

KEYWORD: Guideline F

DIGEST: We are not persuaded by Applicant's arguments, concluding that they do not accurately characterize the transcript. At the beginning of the hearing, the Judge asked Applicant if she had "given some thought to hiring an attorney," and she replied, "I did, sir, But I cannot afford it, sir." This response demonstrates that Applicant was aware of her right to representation, which is set forth in the Directive, a copy of which she received along with the SOR. The Judge then questioned Applicant in some detail on her educational and work background, concluding from her answers that she was qualified to represent herself. Applicant argues on appeal that the Judge's conclusion was based, in part, on discussions that occurred off the record and, therefore, are not available to us for our appellate review. We have examined the transcript and discovered no indication that off-the-record discussions on this matter took place. We find nothing that supports a conclusion that Applicant did not understand her right to representation. Adverse decision affirmed.

CASENO: 18-00679.a1

DATE: 10/17/2019

DATE: October 17, 2019

In Re: _____)
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Applicant for Public Trust Position)

ADP Case No. 18-00679

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Daniel Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On March 20, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 12, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process, whether the Judge was biased against her, and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant has fourteen delinquent debts, totaling about \$39,700. These debts are for such things as credit cards, charge accounts, medical expenses, and automobile loans. Applicant attributed her problems to expenses incurred due to the death of her father-in-law; a move due to her husband's military service; her son's illness; her husband's health problems as well as her own; and her own unemployment while tending to her son. In addition to these things, Applicant took out a loan to pay for tickets to a theme park.

Applicant testified that she worked with a debt repair firm but provided no documentation that this firm actually resolved any of her debts, none of which Applicant has paid. About two weeks before the hearing, she contacted two debt relief organizations. She made a payment to one of them a day before the hearing. She plans to address her debts with her anticipated income tax refund and a disability award that her husband expects. Applicant's co-workers and close friends find her to be trustworthy and diligent.

The Judge concluded that Applicant's problems were affected by circumstances beyond her control, as outlined above. However, he further concluded that she had not demonstrated responsible action in regard to her debts, citing to questionable expenditures for loans and purchases that could have been directed toward resolving her financial difficulties. The Judge noted a paucity of evidence concerning the debt relief firm that Applicant hired, and he commented as well on her "last minute maneuvers" in contacting other credit repair services, evidence that he found merited little weight.

Decision at 7. He stated that, given the totality of the evidence, it is foreseeable that Applicant's financial problems will continue indefinitely.

Discussion

Applicant contends that she was denied due process. For example, she argues the Judge did not properly ascertain whether her decision to represent herself was knowing and intelligent. She also states that she did not understand the nature of the proceeding, leaving her unsure about the standard that would be applied to her case. Throughout her brief, Applicant describes the Judge's conduct of the hearing as confusing, meandering from topic to topic in such a way as to invite misunderstanding and preclude effective self-representation.

We are not persuaded by Applicant's arguments, concluding that they do not accurately characterize the transcript. At the beginning of the hearing, the Judge asked Applicant if she had "given some thought to hiring an attorney," and she replied, "I did, sir. But I cannot afford it, sir." Tr. at 5. This response demonstrates that Applicant was aware of her right to representation, which is set forth in the Directive, a copy of which she received along with the SOR. The Judge then questioned Applicant in some detail on her educational and work background, concluding from her answers that she was qualified to represent herself. Tr. at 5-11. Applicant argues on appeal that the Judge's conclusion was based, in part, on discussions that occurred off the record and, therefore, are not available to us for our appellate review. We have examined the transcript and discovered no indication that off-the-record discussions on this matter took place. We find nothing that supports a conclusion that Applicant did not understand her right to representation. Neither do we find anything that shows that her decision to appear *pro se* was other than knowing and intelligent. *See, e.g.*, ISCR Case No. 17-01320 at 3 (App. Bd. Jul. 31, 2018).

Applicant contends that she did not understand the nature of the proceedings, specifically, whether her hearing was to determine access to public trust information or classified information. She argues that, due to this confusion, she was not adequately apprised of the standard that would apply in her case.

It is true that, at one point in the hearing, the Judge asked Applicant if she understood the purpose of the public trust hearing, and Applicant replied that it was in regard to her security clearance. The Judge and Department Counsel consulted with one another and confirmed to Applicant that the hearing was, indeed, in regard to a position of trust, as clearly stated in the SOR. Tr. at 10. The Judge did not further explain the difference between a security clearance and a position of trust. However, even if this was an error, it was harmless. Security Executive Agent Directive (SEAD) 4, effective June 8, 2017, contained in Enclosure 2 of the Directive, establishes common adjudicative criteria for persons seeking access to classified information or eligibility to hold a sensitive position. Therefore, an applicant seeking, for example, a position of trust with a DoD contractor will find his or her case evaluated under the same standard and using the same guidelines and procedures as apply to security clearance cases. *See ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018). See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), cert. denied.

In light of this, we conclude that Applicant's apparent impression that she was seeking a security

clearance was not due to the guidance she received from DOHA or to the Judge's conduct of the hearing. In any event, this confusion in and of itself likely exerted no meaningful effect on Applicant's ability to prepare for the hearing.

Turning to the question of Applicant's actual understanding of the procedures utilized in her hearing, we note that the Judge advised her that if she had any questions to ask him and that if she required a break to gather her thoughts, etc., to let him know. Tr. at 11. He described the nature of the hearing and its various parts, for example opening statement, the nature of Department Counsel's exhibits, and the closing argument. Tr. at 12-13. These explanations were sufficiently clear to apprise a reasonable person as to what to expect during the course of the proceeding. At the beginning of her case in chief, Applicant stated that she had not brought exhibits to the hearing. Tr. at 20. The Judge subsequently took documents that Applicant had attached to her SOR response, designated them Applicant Exhibits, and admitted them into evidence as part of Applicant's presentation. Decision at 2. In addition, he gave Applicant two weeks after the hearing to submit additional documentation, which she did. Tr. at 49; Decision at 2.

Applicant contends that it was erroneous for the Judge to permit Department Counsel to cross examine her at the beginning of her case in chief, characterizing this as "the strangest aspect of the entire proceeding." Appeal Brief at 6. In point of fact, the Judge asked Applicant if she wished to address the SOR allegations by testifying on her own or by submitting to questioning by Department Counsel, and she chose the latter alternative. Tr. at 20-21. We find no error in this procedure, which is not unusual in DOHA hearings. Applicant contends that Department Counsel took unfair advantage of her during cross examination, posing questions that contained "loaded language," further confusing Applicant and preventing her from meeting her burden of persuasion. It is true that a DOHA hearing is adversarial, and a Department Counsel's job is to present the Government's evidence. Directive ¶ E3.1.14. In this hearing, however, the Government's case had already been established by Applicant's admissions to the SOR. See Directive ¶ E3.1.15. Department Counsel's questions, which were generally open-ended rather than leading, explored the background of Applicant's financial difficulties, addressed each debt in some detail, and gave Applicant an opportunity to explain what she had done to resolve the debts and otherwise develop the record. Moreover, after Department Counsel finished, the Judge asked further questions in clarification of the evidence. Tr. at 40 *et seq.* We find no reason to conclude that the Judge permitted Department Counsel to take unfair advantage of Applicant or preclude her from presenting her case effectively. After examining the record as a whole, we conclude that Applicant was not denied the due process afforded by the Directive. See, e.g., ISCR Case No. 15-04472 at 3 (App. Bd. Feb. 9, 2017). Having chosen to appear *pro se*, Applicant cannot fairly complain about the quality of her self-representation. See, e.g., ISCR Case No. 11-08118 at 2-3 (App. Bd. Aug. 12, 2013).

Applicant contends that the Judge exhibited "biased conduct" at the hearing, resulting in a decision that was arbitrary and capricious. We find nothing in the record that would persuade a reasonable person that the Judge was lacking in the requisite impartiality. Applicant has not rebutted the presumption that the Judge was unbiased. See, e.g., ADP Case No. 07-00966 at 3 (App. Bd. Aug. 24, 2009). Applicant argues that the Judge erred by permitting a witness to observe the hearing

without asking her if she wanted the hearing to be open. At one point, the Judge noted the presence of another person, whom Department Counsel advised was a new Department Counsel who wished to observe the proceedings for purposes of training. She told the Judge that she had previously received permission from Applicant for this person to be present in the hearing room. The Judge asked, “Is that okay with you, [Applicant]?” and Applicant replied “It’s okay, sir.” Tr. at 18-19. Accordingly, the Judge did receive Applicant’s permission for the presence of the new employee in the hearing room. In any event, while he did not specifically ask her if she wanted an open hearing, a hearing is presumed open unless the applicant requests otherwise, which in this case did not happen. *See Directive ¶ E3.1.12.* The presence of this employee did not impair any right that Applicant enjoyed under the Directive.

Applicant’s attorney reports difficulties in accessing the DOHA website and the current Directive. The Board does not have control over the operation of the website. We do report complaints when appropriate. On this occasion we found the DOHA site generally functional with the current Directive accessible at <https://ogc.osd.mil/doha/DIRECTIVE%202017.pdf>. Furthermore, as noted earlier, the Directive was received by Applicant with the SOR.

We resolve the remaining allegations of error adversely to Applicant. We note Applicant’s argument that the ultimate decision was based upon an incomplete record and, therefore, was arbitrary and capricious. However, Applicant does not identify any evidence that the Judge’s purported errors prevented her from submitting. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a rational connection between the facts found and the choice made.”” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse decision is sustainable on this record.

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board