DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 18, 2023

In the matter of:	)	
-----	)	ISCR Case No. 20-02349
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 10, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 28, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on three SOR allegations and against her on the remaining five allegations. These latter allegations asserted that Applicant had five delinquent debts totaling about $30,100. In her SOR Response for three of those debts, Applicant stated, "I agree that, this account was closed and removed. Statue [sic] of limitations met on this account. Account opened in previous marriage." For the other two allegations, she submitted nearly identical responses, stating the accounts were "satisfied closed" and, for one of these allegations, she omitted the sentence about the opening of the account during a previous marriage. SOR Response at 2-4. In his findings of fact, the Judge indicated that Applicant "apparently agreed that the accounts were accurate. However, in her view, all accounts, whether satisfied or not, were

removed by identity fraud, dispute, or by the statute of limitations." Decision at 3. In his analysis, the Judge concluded that Applicant experienced conditions beyond her control that contributed to her financial problems, but that she failed to establish that she acted responsibly under the circumstances, noting she had taken inconsistent positions throughout the security investigation regarding her responsibility for several of the delinquent debts. The Judge also noted Applicant provided no documentation of actions taken to address the five remaining debts at issue and concluded there was no clear evidence that her financial problems are being resolved or are under control.

We construe Applicant's brief as challenging the Judge's evidentiary rulings and his weighing of the evidence. For reasons stated below, we affirm the Judge's decision.

Evidentiary Rulings

At the hearing, Applicant objected to the admission into evidence of various documents. These objections included her security clearance application, a credit report, and a Westlaw record of an eviction filing in a state court. These documents are official records or evidence complied or created in the regular course of business and are admissible under Directive ¶ E3.1.20 without authenticating witnesses. Examples of Appeal Board decisions addressing the admissibility of such official records include: ISCR Case No. 19-00673 at 3 (App. Bd. Oct. 19, 2020) (security clearance applications); ISCR Case No. 18-00552 at 3 (App. Bd. Jan 18, 2019) (credit reports); and ISCR Case No. 14-00019 at 6 (App. Bd. Sep. 18, 2014) (state court records). In general, Applicant's objections to the above-identified documents relate to the weight to be given them rather than to their admissibility. We find no error in the Judge's rulings admitting those documents into evidence.

During the hearing, Applicant also objected to a summary of Applicant's personal subject interview (PSI) (Government Exhibit (GE) 2) that the Judge admitted into evidence. This evidentiary ruling merits further discussion. Under Directive ¶ E3.1.20, a DoD personal background report of investigation (ROI) may be received into evidence with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence. GE 2, being part of an ROI, is subject to this authentication requirement. At the hearing, the Government called no witness to authenticate GE 2.

Applicant objected to GE 2 because it was obtained before she obtained legal services to help her with the debts, and she did not know specifics about the debts when she was interviewed. During the exchange at the hearing regarding this document, Applicant also indicated she was unaware of what "discrepant" meant in the PSI. After explaining that term, the Judge asked, "Is there any reason why you believe this exhibit should be not be received in evidence?" Applicant responded by saying, "No, I don't. Besides the fact that I didn't know that those accounts were

there at the time, I don't have anything else." Tr. at 23. The Judge then admitted GE 2 into evidence. In the decision, the Judge noted, "After receiving explanations about certain words with the exhibit, Applicant withdrew her objection, though she indicated she was unaware of the delinquent accounts at the time of the April 2019 interview." Decision at 2. We do not interpret Applicant's response to the Judge's question as withdrawing her objection to GE 2.

At the hearing, Applicant was not informed about the authentication requirement of ¶ E3.1.20. She was not asked if GE 2 was an accurate report of what she said during the interview, asked if she was adopting GE 2 as her statements, or otherwise questioned about the accuracy or authenticity of that document. Nor is there any basis in the record to conclude she waived the authentication requirement in ¶ E3.1.20 in regards to GE 2. *See, e.g.*, ISCR Case No. 20-01097 at 4, n.2 (App. Bd. Jun. 15, 2022) for the proposition that a party may manifest adoption of a statement in a number of ways, including through words or conduct. However, we find no evidence of Applicant adopting GE 2 in this case. In the absence of any form of authentication or waiver, GE 2 was not admissible under the Directive. *See, e.g.*, ISCR Case No. 19-01649 at 2-3 (App. Bd. Jan. 6, 2021) (error for Judge to consider unauthenticated portion of ROI). Even though the Judge erred in admitting GE 2 into evidence, this error was harmless because it did not likely affect the outcome of the decision. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020). Other admissible evidence in the record was sufficient to support the Judge's unfavorable clearance decision.

Another aspect of the Judge's evidentiary rulings regarding GE 2 merits clarification. In addressing this exhibit, the Judge stated, "In security clearance investigations, an applicant has no right to an attorney because the process is not criminal in nature." Decision at 2. In her appeal brief, Applicant takes issue with that statement. To the extent that the Judge is stating that security clearance applicants do not have the same right to counsel as indigent criminal defendants, we agree. However, the Judge's statement, as written, is overbroad. Applicants may consult with counsel at their own expense during security clearance investigations and have a right to be represented by counsel during ensuing adjudications. *See* Executive Order 10865 § 3(5) and Directive ¶¶ 4.3.4 and E3.1.8. *See also* Executive Order 12968 § 5.2(a)(3). That said, we note Applicant's statements about seeking attorneys to represent her pertained to a debt resolution program. Applicant made no claim that she sought the assistance of counsel directly in her security clearance adjudication and was denied such representation. Based on our review of the record, there is no reason to conclude that Applicant's right to counsel under the Directive was infringed.

Findings of Fact and Weighing of the Evidence

Applicant contends the Judge erred in the findings of fact. In doing so, she argues that debts were removed from her credit report, that payments were made to satisfy debts, and that she was a victim of a credit bureau breach or of some form of fraud. These contentions, however, do

not constitute a challenge to any of the Judge's specific findings of fact but instead amount to a disagreement with the Judge's weighing of the evidence. Applicant's arguments also highlight her efforts to dispute or resolve the alleged debts. She further contends that the SOR allegations are "incorrect" (Appeal Brief at 2) and asserts that the Judge did not consider all of the evidence.

In his analysis, the Judge noted that Applicant's reliance on the statute of limitations does not constitute a good-faith effort to resolve financial delinquencies (citing ISCR Case No. 15-01208 at 3 (App. Bd. Aug. 26, 2016) as support); that she provided no documentation of actions taken to address the five alleged debts at issue; and that her explanations regarding the debts were not consistent. In this regard, the Appeal Board has previously stated that it is reasonable for a Judge to expect an applicant to present documents corroborating actions taken to resolve debts. *See, e.g.*, ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 15, 2020). Furthermore, there is more than one plausible explanation for the absence of debts from a credit report—such as the removal of debts due to the passage of time—and the absence of unsatisfied debts from an applicant's credit report does not extenuate or mitigate an overall history of financial difficulties or constitute evidence of financial reform or rehabilitation. *See, e.g.*, ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017). In short, none of Applicant's arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 21-01169 at 5 (App. Bd. May 13, 2022).

Conclusion

Applicant failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board