KEYWORD: Guideline F

DIGEST: Applicant's Counsel contends that the Judge did not properly apply the mitigating conditions and whole-person concept. In making those arguments, he assets that the Judge did not give proper weight to certain evidence, such as his year of unemployment and his efforts to reduce or resolve his debts. However, a party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 19-03344.a1

DATE: 12/21/2020

DATE: December 21, 2020

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Joseph D. Jordan, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 3, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security 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 October 16, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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, who is in his late 20s, has never been married and has no children. He has earned a bachelor's degree. He was granted a security clearance in 2014. He was unemployed from September 2017 to September 2018 when his former employer lost a contract. In his analysis, the Judge summarized the case as follows:

> Applicant had three delinquent accounts totaling approximately $29,454, claiming that because of a period of unemployment, he did not have sufficient funds to maintain them in a current status. When the SOR was issued in February 2020, all three accounts were still delinquent, and Applicant had only made one voluntary payment to one creditor in October 2018, and a number of involuntary garnishment payments to another. AG ¶¶ 19(a) [*inability to satisfy debts*] and 19(c) [*a history of not meeting financial obligations*] have been established, but there is no evidence that Applicant has been unwilling to satisfy debt regardless of an ability to do so, and AG ¶ 19(b) has not been established. [Decision at 6.]
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> One of the accounts, for $21,944, was charged off in June 2018, and he made only one $3,240 payment to the creditor in October 2018. Following the charge-off, and since that time, he has made no other payments, despite promising to do so, while continuing to use the vehicle for which the loan was opened. Another account for approximately $10,393 was also charged off, but despite securing employment in September 2018, he offered no evidence of any voluntary payments to the creditor. Instead, in May 2019, a Garnishment Summons was issued in the amount of $10,524, and another such summons was issued in January 2020 in the amount of $5,567. Involuntary (garnishment) payments were made, but the documentary evidence of the dates and amounts of those payments were disputed by Applicant. He finally addressed the third delinquent account, the one for $358, but only did so after the Notice of Hearing had been issued. [Decision at 6-7.]

The Judge concluded that AG 20(b), "*the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity thief), and the individual acted responsibly under the circumstances;"* partially applied due to Applicant's unemployment, but none of the other mitigating conditions applied. The Judge noted that Applicant's repeated promises to make payments were not timely fulfilled.

Discussion

In his appeal brief, Applicant's Counsel does not challenge any of the Judge's specific findings of fact. Rather, he contends the Judge failed to adhere to Executive Order 10865 and the Directive. He first argues the Judge did not consider all of the evidence, but he fails to identify any specific piece of evidence that the Judge supposedly did not consider. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-9020 at 2 (App. Bd. Jun. 4, 2001), citing *Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984) for that proposition. A party's bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption.

Applicant's Counsel also argues the Judge erred in concluding Applicant's debts were not infrequent. In support of his argument, he points out that Applicant did not encounter any financial difficulties before his period of unemployment and has not incurred any new delinquent debts since his re-employment. In his analysis, the Judge noted that Applicant failed to resolve one debt in a voluntary and timely manner before his wages were garnished, failed to resolve another debt until the SOR was issued, and has taken little action to resolve the third debt. Based on the Judge's analysis of the facts regarding the three alleged debts, we find no reason to disturb the Judge's key conclusion at issue here, *i.e.*, that AG ¶ 20(a), *"the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, and good judgment*;" did not apply in this case. As stated, for AG ¶ 20(a) to apply fully to an infrequent financial problem, it must also be established that the financial problem does "not cast doubt on the individual's current reliability, trustworthiness, and good judgment[.]"

Applicant's Counsel further contends that the Judge did not properly apply the mitigating conditions and whole-person concept. In making those arguments, he assets that the Judge did not give proper weight to certain evidence, such as his year of unemployment and his efforts to reduce or resolve his debts. However, a party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

Applicant's Counsel relies on decisions of Hearing Office Judges to argue the Judge erred in this case. He cites those decisions to show that Judges decided in favor of applicants in particular fact scenarios. His reliance on those Hearing Office decisions is misplaced. Decisions by Hearing

Office Judges are not legally binding precedent that the Appeal Board must follow. The Board is neither required to justify why it chooses not to follow Hearing Office decisions nor required to reconcile its decisions with such lower decisions. *See, e.g.*, ISCR Case No. 19-00327 at 2 (App. Bd. May 20, 2020). Nor are Hearing Office Judges required to follow—or otherwise justify or reconcile their decisions with—other Hearing Office decisions. *Id*. "Each case must be judged on its own merits[.]" Directive, Encl. 2, App. A ¶ 2(b). In this regard, it merits noting that the scope of our review is narrow. We examine a Judge's challenged conclusions to determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. *See* ISCR Case No. 04-07766 at 2 (App. Bd. Sep. 26, 2006) for the proposition that we may not substitute our judgment for that of the Judge, which is what Applicant's Counsel, in effect, is advocating by citing Hearing Office cases. *See, also*, ISCR Case No. 11-13965 at 3 (App. Bd. Aug. 6, 2013)("We do not have to agree with a Judge's decision to find it sustainable."). Generally, how particular fact scenarios in other cases were decided at the Hearing Office level is not a relevant consideration in our review of a case.

Applicant's Counsel has failed to establish any harmful error below. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the 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 the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael 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