

KEYWORD: Guideline F; Guideline E

DIGEST: Based on our review of the record, we conclude that GE 7 supports the Judge’s conclusion that Applicant pled guilty at the nonjudicial punishment proceeding to five offenses, including forgery, fraud, and making a false statement. To the extent that Applicant is contending that the Judge made no mention of the letters of recommendation he submitted at the hearing, this contention is not accurate. The Judge made findings regarding Applicant’s character reference letters. See Decision at 4. Applicant has failed to show the Judge erred in making any findings of fact or in reaching any conclusions regarding the nonjudicial punishment allegation. Adverse decision is affirmed.

CASE NO: 19-01234.a1

DATE: 06/24/2020

DATE: June 24, 2020

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In Re:)	
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-----)	ISCR Case No. 19-01234
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brittany D. Honeycutt, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 10, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On March 31, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 erred in her findings of fact and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings on four Guideline F allegations and one Guideline E allegation were not raised as an issue on appeal. Consistent with the following, we affirm.

The Judge found against Applicant on three delinquent debts totaling about \$20,800. The largest of those debts (over \$19,500) was incurred when Applicant prematurely terminated an apartment lease. The smaller debts involved accounts from a telecommunication company (approximately \$770) and a cable company (approximately \$450). The Judge also found against Applicant on an allegation asserting he received nonjudicial punishment in 2006 for fraud, forgery, making a false statement, impersonation, and unauthorized wearing of a military uniform.

In his appeal brief, Applicant challenges the Judge’s unfavorable finding on the nonjudicial punishment allegation and denies having engaged in any fraudulent activity. He asserts:

[The Judge] also improperly applied the mitigating factors to [Applicant’s] personal conduct allegation, whereas [Applicant] stated at his hearing that he told his Battalion Commander, that he was guilty of wrongfully driving a vehicle in Korea and that he wrongfully wore a rank earlier than he should. At the non-judicial Article 15 hearing, [Applicant] was advised to plead guilty to obtain a better sentence. [Applicant] lacked life experiences during the time of his misconduct fourteen (14) years ago, and [Applicant] did not fully appreciate the adjudication process. [Applicant] provided supporting letters of recommendation at the hearing, and he has shown no recidivism within the last fourteen (14) years, which [the Judge] made no mention of in her decision. Therefore, the Administrative Judge failed to consider all aspects of [Applicant’s] Whole Person Concept and other mitigating factors, making the decision in this case erroneous. [Appeal Brief at 6, omitting a footnote.]

In her Analysis, the Judge addressed the nonjudicial punishment allegation by stating:

. . . . Applicant’s misconduct in 2006 while serving on active duty triggers consideration of mitigating conditions under AG [Adjudicative Guideline] ¶ 17. AG ¶ 17(c) applies because of the passage of almost 14 years since the misconduct. AG ¶ 17(c) provides:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Yet, despite the passage of so much time, Applicant has not shown that he fully accepts responsibility for that behavior. He denies any fraudulent activity, even though the Commander's report of disciplinary action (GE 7) indicates he pled "guilty" to all five of the offenses, including forgery, fraud, and making a false statement. Instead of showing the reform that could have triggered AG ¶ 17(d) ("the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, [or] other inappropriate behavior, and such behavior is unlikely to recur"), Applicant would have the Government believe that it involved only driving a private vehicle, which he needed for warfighter training, and that his unauthorized wearing of sergeant rank was only "partially wrong" because his LES [Leave and Earnings Statement] reflected his rank as E-5. His current lack of full candor about his misconduct in 2006 causes lingering doubt about his personal conduct. For the reasons noted, the personal conduct concerns are not fully mitigated. [Decision at 17.]

Based on our review of the record, we conclude that GE 7 supports the Judge's conclusion that Applicant pled guilty at the nonjudicial punishment proceeding to five offenses, including forgery, fraud, and making a false statement. To the extent that Applicant is contending that the Judge made no mention of the letters of recommendation he submitted at the hearing, this contention is not accurate. The Judge made findings regarding Applicant's character reference letters. *See* Decision at 4. Applicant has failed to show the Judge erred in making any findings of fact or in reaching any conclusions regarding the nonjudicial punishment allegation.

Regarding the cable company debt for about \$450, Applicant asserts that a \$400 payoff confirmation in Exhibit E shows that he paid this debt to the successor company of the alleged creditor. We are unable to locate in Exhibit E the \$400 payoff confirmation that Applicant is referencing. Applicant testified that he disputed this debt and received documentation that the account was closed. A document from a collection agency in Exhibit E reflects "your account [from a different cable company] has been closed by this office and returned to your creditor" and "Should you wish to confirm the deletion, we recommend checking back with the bureaus in approximately thirty (30) days." At the hearing, a discussion between the Judge and the parties ensued about whether the documents in Exhibit E addressed the alleged cable company debt or an unalleged debt. Tr. at 67-74. This discussion ended with the Judge saying she would "make findings based on the evidence I have in the record." *Id.* at 74. In her decision, the Judge concluded that Applicant provided no proof the alleged cable company debt was resolved, noting that he failed to show the debt referenced in Exhibit E is the alleged debt. Applicant has failed to show the Judge erred in reaching that conclusion.

Applicant also contends the Judge did not consider or properly weigh all the relevant evidence. For example, he argues the Judge did not give appropriate weight to various circumstances beyond his control—such as his loss of employment, divorce, and advice from a divorce attorney to not make payments on any debts until a marital settlement agreement was reached—and she did not properly consider his efforts in working with debt collection companies to reach settlement agreements. He further asserts that he has accepted responsibility for his actions that resulted in him receiving nonjudicial punishment and, the absence of any further wrongdoing, shows he has learned from his past mistakes. These arguments, however, are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-01717 at 4 (App. Bd. Jul. 3, 2017). We give due consideration to the Hearing Office cases that Applicant has cited, but they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge’s decision. *Id.* We further conclude the Judge considered the totality of the evidence, in compliance with the whole-person analysis requirements. *See* Directive, Encl. 2 App. A ¶ 2(a) and (d).

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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information 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