DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

KEYWORD: Guideline F

DIGEST: Aspects of the Judge's challenged comment are not sustainable. In general, the Judge's comment runs contrary to well-established evidentiary principles. Credit reports, as business records, have a degree of trustworthiness that generally underlies each hearsay rule exception. The Judge's comment ignores the degree of trustworthiness that credit reports have as business records. Furthermore, Federal court precedent does not support his concern about "other unidentifiable sources" being involved in creating business records. Additionally, the Judge's comment is based on faulty premises, *i.e.*, generalizations that have no factual basis in the record evidence. An example of such a generalization is the Judge's statement about the substantial risk of accepting information in credit reports without verifying the contents of entries by obtaining original source documentation. Nowhere in the decision does the Judge point to any specific record evidence to show that particular information in the credit reports is inaccurate or otherwise unreliable. Furthermore, the Judge's contention that original source documentation should be obtained to verify entries in credit reports runs contrary to Appeal Board precedent. It is well settled in DOHA proceedings that parties are entitled to rely on the information contained in credit reports and are under no obligation to verify the accuracy of that information before presenting it. Favorable Decision is Reversed.

CASE NO: 19-02993.a2

DATE: 11/23/2021

Date: November 23, 2021

In the matter of:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel
Nicholas T. Temple, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 24, 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 February 3, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On April 28, 2021, we remanded the case to the Judge to ensure the record contained all of the post-hearing documents that were submitted. On June 28, 2021, the Judge issued a Remand Decision in which he again granted Applicant eligibility for a security clearance. Department Counsel timely appealed the Judge's Remand Decision.

Department Counsel raised the following issues in their latest appeal: whether the Judge lacked impartiality, whether the Judge erred in his findings of fact, and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact and Analysis

Applicant is in his forties and is married with children. He has a master's degree and served honorably in the military. He has been working in his current position since 2018. He was granted a security clearance over 25 years ago.

The SOR alleged that Applicant had 20 delinquent accounts totaling about $84,000. In responding to the SOR, Applicant admitted all of the SOR allegations with comments. "[S]ome of his admissions were ill-advised and erroneous." Decision at 3. His financial difficulties started about seven years ago when he was injured in the line of duty. His injury required surgery, and he was out of work for about a year. He incurred a similar injury about a year later. During his recovery periods, he took two vacation trips to the Caribbean. He was initially denied workers' compensation. His income was reduced until he could return to work full time. He hired an attorney to contest the workers' compensation decision and received a settlement of about $50,000, minus about $15,000 in attorney's fees. He also attributed his financial problems to his ex-wife leaving him with nothing but debts.

More than three years before the SOR was issued, Applicant hired a law firm to assist him in resolving his delinquent debts. He was advised to stop making payments on debts to facilitate settlements and entered into a debt resolution program under which he was to make monthly payments of about $850. A good portion of each payment goes toward fees and monthly program services costs. Seventeen debts were listed in the program. "Because of the way the listed accounts appear in Applicant's debt-resolution program (partial creditor names; some partial account numbers; some full account numbers; and some missing account numbers), it is difficult to align the SOR-alleged accounts with those in the debt-resolution program, especially since the credit report on which the SOR-listed allegations are based, also does not fully identify essential account information." Decision at 5. He relied completely on the financial guidance of the law firm. Misleading statements from the law firm caused him to make inaccurate statements regarding his accounts. In mid-2020, Applicant also engaged the services of a credit repair organization but failed to provide any report of its activities.

Applicant resolved four of the alleged debts, is in the process of resolving eight of them, and has not resolved eight others. It is unclear whether he has other non-alleged debts. Some of the documents Applicant submitted could not be aligned to alleged debts but it is possible, if not probable, they apply to those debts. Applicant's monthly income is about $9,100, his monthly expenses are about $4,800, and his monthly debt payments are about $3,200, which leaves him about $1,100 for discretionary purposes. He has not received formal financial counseling but received financial guidance from the law firm and credit repair organization.

Mitigating Conditions 20(a), 20(b), and 20(d) apply and 20(c) partially applies. He has paid off several accounts, including unalleged debts, and others are in the queue. "Applicant's current financial track record is good. He started focusing on his delinquent accounts years before the SOR was issued. Overall, the evidence no longer leaves me with any questions and doubts as to Applicant's eligibility and suitability for a security clearance." Decision at 16.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the

decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

Credit Reports

Department Counsel take issue with the Judge's comment regarding credit reports. This comment reads in pertinent part:

> With respect to one of the main evidentiary documents in the record – the September 2019 credit report (GE 2) – the Appeal Board has explained that it is "well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. *See, e.g.*, ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006)." (Emphasis added) It noted that the burden then shifts to the applicant to establish either that he is not responsible for the debt or that matters in mitigation apply. (ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010)) However, there is a substantial risk when one accepts, at face value, the contents of some credit reports without obtaining original source documentation to verify entries. Credit bureaus collect information from a variety of sources, including public records and "other sources," and it is these other unidentified sources that are the cause of concern. Likewise, when accounts are transferred, reassigned, sold, or merely churned, an individual's credit history can look worse than it really is.
>
> In this particular instance, the September 2019 credit report referred to numerous creditors for several delinquent accounts. Because of abbreviated names and acronyms, multiple and partial account numbers for the same account listed several times under different creditors, debt purchasers, or collection agents, many of those entries are garbled or redundant, and have inflated the financial concerns. One can conclude that the information in that particular credit report – actually a summary or secondary evidence pertaining to an account – might be less accurate, trustworthy, or reliable than the other evidence of record. It certainly does not furnish the information, much less evidence, necessary to make an informed decision. This difficulty has arisen and created unnecessary confusion for Applicant, Department Counsel, and this Administrative Judge in aligning alleged accounts with documents submitted in mitigation by Applicant. Interestingly, Chief Department Counsel and Department Counsel argue that "because the debt resolution does not list account numbers, it is impossible to determine which accounts are in that program" – an argument that could also apply to the fact-deficient GE 2. [Decision at 13-14.]

Aspects of the Judge's challenged comment are not sustainable. In general, the Judge's comment runs contrary to well-established evidentiary principles. Credit reports, as business records, have a degree of trustworthiness that generally underlies each hearsay rule exception. *See* McCormick on Evidence § 286 (8th ed. 2020) and Rothstein, Federal Rules of Evidence, Rule 803. Exceptions to Rule Against Hearsay—Regardless of Whether the Declarant is Available as a

Witness—Rationale of Business Records Exception (3rd ed. 2021)("The theory underlying the traditional business records exception was that trustworthiness was somewhat ensured by the regularity of the process, by its repetitive nature, by the fact that profits, jobs, or other benefits rode on its accuracy, by the usual absence of direct litigation motivation, and by the presumed job expertise of the maker and integrity of the maintenance and storage function. The fact that all participants in making and storage of the document were acting under a business duty to be honest and careful provides a measure of reliability."). *See also United States v. Childs*, 5 F.3d 1328, 1333-1334 (9th Cir. 1993)(noting several Federal circuit courts have held that exhibits are admissible as business records even if other sources are involved in creating those records). The Judge's comment ignores the degree of trustworthiness that credit reports have as business records. Furthermore, Federal court precedent does not support his concern about "other unidentifiable sources" being involved in creating business records.

Additionally, the Judge's comment is based on faulty premises, *i.e.*, generalizations that have no factual basis in the record evidence. An example of such a generalization is the Judge's statement about the substantial risk of accepting information in credit reports without verifying the contents of entries by obtaining original source documentation. Nowhere in the decision does the Judge point to any specific record evidence to show that particular information in the credit reports is inaccurate or otherwise unreliable. Furthermore, the Judge's contention that original source documentation should be obtained to verify entries in credit reports runs contrary to Appeal Board precedent. It is well settled in DOHA proceedings that parties are entitled to rely on the information contained in credit reports and are under no obligation to verify the accuracy of that information before presenting it. *See, e.g.*, ISCR Case No. 07-08925 at 3 (App. Bd. Sep. 15, 2008).

A Judge, as the trier of fact, must weigh the evidence. In doing so, a Judge does not have unfettered discretion and must not weigh the evidence in a manner that is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. As noted above, a Judge's conclusions are arbitrary and capricious, for example, if they fail to articulate a satisfactory explanation, including a rational connection between the facts found and the choice made; they reflect a clear error of judgment; they offer an explanation that runs contrary to the record evidence; or they are so implausible that they cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4. A Judge's conclusions are arbitrary and capricious when they are based on unfounded findings or assertions, *i.e.*, those not based on substantial evidence in the record. In this case, it was arbitrary and capricious for the Judge to conclude that credit reports are "less accurate, trustworthy, or reliable than" some unspecified or hypothetical "other evidence of record." Nowhere in the decision does the Judge identify that "other evidence of record." As we have previously stated, a Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and the Board can discern what the Judge is finding and concluding. *See, e.g.*, ISCR Case No. 99-0018 at 2 (App. Bd. Dec. 6, 1999). In the challenged comment, the Judge's generalized conclusion about "other evidence of record"—that fails to identify or discuss any specific record evidence showing why a specific credit report or its entries are unreliable—is not sustainable as written. If there was evidence that showed information in the credit reports was inaccurate or unreliable, the Judge should have identified those specific deficiencies in the record evidence. By not identifying those specific deficiencies, the Judge's contention about the unspecified "other evidence of record" is unfounded and amounts to speculation.

From our review of the credit reports in the record, we see no basis for the Judge's concerns. The Judge erred in finding the September 2019 credit report (GE 2) contained only partial account numbers for the debts alleged in the SOR. To the contrary, GE 2 contains full account number for those debts. We also note the SOR debts are trackable in the other credit reports in the record. All in all, credit reports, absent evidence to the contrary, are considered reliable as a business record and can be used to establish delinquent debts alleged in an SOR. *See, e.g.*, ISCR Case No. 03-20327 at 3.

Impartiality

Department Counsel cite a number of the Judge's previous decisions in which he used the same or similar version of the above-challenged comment and contend the Judge has a "distrust" and "personal disdain" of credit reports. Appeal Brief at 13. To the extent that Department Counsel are arguing that the Judge lacked impartiality, we do not find that argument persuasive. Impartiality is not demonstrated merely because the Judge has committed error. Proof of error, standing alone, does not demonstrate the Judge was biased or lacked impartiality. *See, e.g.*, ISCR Case No. 04-09239 at 7 (App. Bd. Dec. 20, 2006).

Findings of Fact

A key issue in Department Counsel's brief is whether the Judge erred in finding certain debts alleged in the SOR were enrolled in Applicant's debt resolution program (DRP). We examine a Judge's challenged findings to see if they are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See, e.g.*, ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018).

From our reading of the decision, the Judge found that ten of the debts alleged in the SOR were enrolled in the DRP. Department Counsel, on the other hand, contend that none of the alleged debts "can be unambiguously keyed" to those enrolled in Applicant's DRP. Appeal Brief at 10. We agree with Department Counsel that some of the Judge's findings in question are not sustainable.

An example of this issue is the Judge's findings involving three SOR debts from the same creditor, a bank. A credit report (GE 5) reflects Applicant had three delinquent credit card debts from the bank in the amounts of $10,102, $740, and $634. In his SOR Answer submitted in March 2020, Applicant provided DRP documents that reflect one debt from the bank was enrolled in the program. The DRP documents also indicate that the debt was settled, but they fail to provide an account number or other identifying information for the debt. Applicant claimed all three debts were being handled by the DRP but submitted no corroborating documentation. AE L.

In the decision, the Judge discussed the largest debt in a separate paragraph and discussed the two smaller debts together in another paragraph. He noted the lack of information about the specific status of each debt. He found the largest SOR debt was enrolled in the DRP and was in

the process of being resolved. For the two other debts, he stated one of them was enrolled in the DRP but could not determine which one. He then found at least one of them was enrolled and was in the process of being resolved. Presumably, he concluded the other debt was not enrolled and was not being resolved, but he made no finding of that nature.

We are puzzled by the Judge's findings. First, we do not understand how the Judge could find two of the bank's debts were enrolled in the DRP when only one is listed. Second, although one of the bank's debts was most likely enrolled in the DRP, which one cannot be determined based on the evidence presented. A finding that one or more of the specific debts were enrolled amounts to mere speculation. A finding cannot be based solely on speculation. Having admitted the bank debts, Applicant had the burden of producing evidence to show which debts were resolved or mitigated. Directive ¶ E3.1.15. Under these circumstances, the Judge erred in finding particular SOR debts from the bank were enrolled in the DRP. Third, Department Counsel offered into evidence a credit report that was pulled on the date of the hearing in December 2020. The information in this credit report was at least ten months more current than the DRP information. This credit report reflects that the balances of the three bank debts remained the same as alleged, which contradicts with DRP entry indicating one of the debts was settled. In his findings, the Judge erred in failing to address this contradictory information in the credit report.

Based on our review, the record contains insufficient evidence to support the Judge's findings that three other SOR debts (SOR ¶¶ 1.b, 1.d, and 1.q) were enrolled in the DRP. Considering also the two purportedly enrolled bank debts discussed above, the Judge erred in finding five debts totaling over $32,000 were enrolled in the DRP. Furthermore, the Judge found that eight other debts totaling over $9,000 were not enrolled in the DRP and were not resolved. For another debt (SOR ¶ 1.r) the Judge found Applicant was in the process of resolving it even though he submitted no documentary evidence supporting that claim. In summary, there are 14 SOR debts totaling over $41,000 for which Applicant failed to offer sufficient documentary evidence to establish he is taking action to resolve them.

Mitigation Evidence

Department Counsel also contends the Judge erred in his analysis of various mitigating conditions. For example, they argue the Judge failed to consider important aspects of the case in concluding Applicant acted responsibly under the circumstances. Besides the two Caribbean vacations for which the Judge made findings, Department Counsel point out that Applicant borrowed $61,000 to purchase a vehicle in early 2020. Tr. at 101. They also note Applicant was making minimum monthly payments on about $30,000 in credit card debt. Tr. at 94-95. Additionally, the credit report pulled on the date of the hearing also shows Applicant has another vehicle loan with a balance of $24,000. GE 4 at 6. The Judge did not address this evidence in his decision. We agree with Department Counsel that these were important aspects of the case that the Judge should have addressed in his mitigation analysis.

Conclusion

The Judge erred in finding some of the substantial SOR debts were enrolled in Applicant's DRP. He failed to consider important aspects of the case. In general, his decision runs contrary to the record evidence. The record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision of the Judge is **REVERSED**.

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