



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
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KEYWORD: Guideline J; F

DIGEST: There is no rule of evidence that compels the Judge to accept an applicant’s statement merely because it is not rebutted by record evidence. Applicant has not established the Judge erred in analyzing the evidence pertaining to the criminal conduct allegation. Adverse decision is affirmed.

CASENO: 20-01361.a1

DATE: 12/21/2021

Date: December 21, 2021

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| In the matter of: |) | |
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| |) | |
| ----- |) | ISCR Case No. 20-01361 |
| |) | |
| 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 September 14, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) and

Guideline J (Criminal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On September 17, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone 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 finding against him on the criminal conduct allegation and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his forties and has three children. About six years ago, he separated from his wife. He claims he is now divorced. He cohabitates with another woman to whom he is engaged to marry and has a child. After serving 20 years on active duty, he retired from the U.S. military in 2017 and, since then, has been working for a defense contractor. He first received a security clearance about 24 years ago.

The SOR alleges that Applicant's house was foreclosed in 2018 and that he has nine other delinquent debts totaling about \$26,400. In responding to the SOR, he admitted the mortgage loan allegation and four of the other debts. The SOR also alleges that Applicant was arrested and charged with felony grand larceny in 2018, later pled guilty to the lesser charge of trespassing, and was sentenced to 90 days in jail (suspended) plus ordered to pay restitution. He admitted being arrested and pleading guilty as alleged but denied knowingly violating the state's grand larceny statute pertaining to firearms.

Upon separating, Applicant and his ex-wife entered into an agreement in which he would pay child support and his ex-wife would retain the marital residence and refinance it so that his name could be removed from the mortgage and deed. For various reasons, the house was not refinanced and his name was not removed from the mortgage. His ex-wife was unable to make the mortgage payments, and the house was foreclosed in 2018 and later sold. In his SOR response, Applicant claimed he did not have any remaining obligation under the mortgage. In his background interview, however, he stated that he and his ex-wife owed about \$43,000 as a balance on the mortgage loan after the sale. Credit reports do not reflect any ongoing indebtedness on the mortgage loan.

Credit reports in the record document Applicant's other alleged debts and show his financial problems began as early as 2008 when he was serving in the military. Even though he claimed he did not receive his military retirement pay for several month after retiring, he began working his civilian job the month following his retirement and did not document his inability to meet his financial obligations. Applicant resolved three of the debts in 2020. He disputed another but did not provide corroborating documentation. He also claimed his support obligation has decreased and he can pay his debts while meeting his current financial obligation but did not

provide documentation showing his income, current state of his personal finances, and other efforts to resolve his debts.

A few months before his arrest, Applicant's girlfriend asked him to pawn one of her handguns to cover unexpected travel expenses. Applicant did so but it turns out that he pawned the wrong handgun. A few months later the girlfriend could not find a handgun that her father gave her and reported it stolen. Upon realizing the mistake, Applicant attempted to retrieve the handgun from the pawnshop and learned he would be charged with grand larceny for theft of a weapon. Applicant turned himself in to authorities and was so charged. On the advice of an attorney, he accepted a plea agreement to trespass, a misdemeanor, and was sentenced as alleged.

The Judge's Analysis

Applicant remained jointly responsible for the mortgage when it was foreclosed. Most of the alleged debts remain unresolved. He did not show his debts arose from circumstances beyond his control because he accrued delinquent debts while in the military and before his separation. He did not document good-faith efforts to resolve his debts or to support his claimed disputes. Overall, he did not meet his burden of production to mitigate the security concerns arising from the alleged debts.

Disqualifying Condition 31(b), *evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted*, applies in this case. Applicant was charged with a felony grand larceny, pled guilty to a misdemeanor, and was sentenced to a suspended confinement and restitution. This conduct is recent. While Applicant claims he did not knowingly commit a firearm theft, the fact that the court still imposed a suspended jail sentence and ordered him to pay restitution to his girlfriend undercuts any suggestion there was no reliable evidence he committed a crime. He did not meet his burden or presenting sufficient evidence to mitigate the security concern arising from his criminal conduct.

Discussion

Applicant's appeal brief contains assertions and a document that was not presented to the Judge for consideration. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

In his appeal brief, Applicant contends that he never broke any laws regarding the handling or sale of firearms, but he did acknowledge, "A misunderstanding resulted in my having a permanent record and some trust issues with my girlfriend." Appeal Brief at 1. To the extent he is claiming that he did not commit the alleged criminal conduct, we do not find that contention persuasive. We note Applicant provided no documentation, such as sworn statements from his girlfriend, criminal defense attorney, or others, to corroborate his claims regarding the alleged conduct. There is no rule of evidence that compels the Judge to accept an applicant's statement merely because it is not rebutted by record evidence. *See, e.g.*, ISCR Case No. 99-0005 at 3 (App.

Bd. Apr. 19, 2000). Applicant has not established the Judge erred in analyzing the evidence pertaining to the criminal conduct allegation.

Applicant contends that it is “irresponsible” to link the alleged criminal conduct to a prior incident in which he was found to have a 45-caliber handgun ammunition clip in his vehicle when entering a military base in 2001. Appeal Brief at 1. In the File of Relevant Material, Department Counsel argued this earlier incident raised questions about whether Applicant was forthcoming regarding the alleged criminal conduct. In the decision, the Judge discounted Department Counsel’s argument by stating:

This [ammunition-clip incident] is something that was known to the Government during the investigation and adjudication of this case, yet not alleged in the SOR. Applicant was not charged with any criminal offense or reprimanded for any administrative violation at that time. Instead, he received only verbal counseling from his military chain of command. This information does not demonstrate “Applicant’s interest in guns and the sale of guns” and it is not sufficient to impeach Applicant’s credibility, even under the whole-person concept. Indeed, the Federal Rules of Evidence generally would exclude this use of 20-years-old information either to impeach credibility or to show a propensity towards the conduct addressed in [the criminal conduct allegation]. [Decision at 7-8.]

Applicant has not shown that the Judge committed any error in his consideration of the ammunition-clip incident.

Applicant’s remaining arguments amount to a disagreement with the Judge’s weighing of the evidence. He draws our attention to various aspects of the record that are favorable to him such as his 25 years of service to the Government while holding a security clearance. He also highlights positive circumstances surrounding his financial problems and criminal conduct. His arguments are not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has 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: 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