

KEYWORD: Guideline F

DIGEST: The Judge concluded the “debts in issue are fully documented[.]” Applicant’s argument fails to take into consideration other record evidence proving the alleged student loans, particularly the four credit reports admitted into evidence as well as Applicant’s disclosures in his security clearance application and background interview of having delinquent student loans his testimony about signing a student loan application, and his testimony about the Government’s collection efforts for those loans. Of note, credit reports are generally sufficient to establish the Government’s prima facie case of Guideline F security concerns. From our review of the record evidence, the Judge’s material findings regarding the student loans are based on substantial evidence, i.e., “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. Once the student loans were proven, the burden shifted to Applicant to mitigate the security concerns arising from them. Directive ¶ E3.1.15. Adverse decision affirmed.

CASE NO: 19-00325.a2

DATE: 04/28/2021

DATE: April 28, 2021

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In Re:)	
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-----)	ISCR Case No. 19-00325
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Frederick D. Greco, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 2, 2019, 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 July 10, 2019, Department Counsel amended the SOR by adding a Guideline E (Personal Conduct) allegation. On October 16, 2020, after the hearing, Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On January 6, 2021, we remanded the case to the Judge to correct identified errors and to issue a new decision in accordance with Directive ¶ E3.1.35. On February 3, 2021, the Judge issued a Remand Decision in which he again found in favor of Applicant on the sole Guideline E allegation and on two of the five alleged debts. The Judge found against Applicant on three alleged delinquent student loans. Applicant appealed the Judge’s Remand Decision.

The Judge’s favorable findings in the Remand Decision were not raised as an issue in this appeal. Applicant raised the following issues on appeal: whether the Judge’s findings and conclusions were supported by record evidence and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Pertinent Findings of Fact

Applicant, who is in his 70s, has been working for his current employer, a defense contractor, since 2016. He is a widower. In the 1960s, he served on active duty in the military and earned a Bronze Star and Purple Heart.

The SOR alleged that Applicant had three delinquent student loans totaling about \$117,000. Applicant denied these SOR allegations with explanations. He guaranteed the student loans for his child’s education. The student loans are reflected in credit reports that were admitted into evidence.

Applicant experienced periods of unemployment between 2011 and 2016. After the student loans came due, his wife made payments on those loans for about two years until she passed away in late 2013. Following her passing, the student loans went into default because Applicant did not assume responsibility for making the payments. He could not confirm whether his child made any payments on those loans or whether the loans were ever placed in forbearance.

Applicant asserted that the three student loans were consolidated into one loan but provided no documentary evidence corroborating that assertion. From early 2016 to early 2020, the Department of the Treasury placed two of the student loans totaling about \$78,100 into a collection status, began withholding about \$300 to \$340 of Applicant’s monthly social security benefits, and applied those payments to the student loans. Over that period, the social security withholdings totaled in excess of \$9,000 and were applied only to fees and interest. The principle balance of those

loans remain basically unchanged. In early 2020, the withholdings stopped, likely due to coronavirus pandemic, and likely may resume as the pandemic fades.

Applicant's annual salary is about \$40,000. He receives annual social security benefits of about \$25,000 and annual pension payments of about \$9,500. He has a home mortgage. He maintains an average monthly checking account balance of about \$1,600 and an average monthly savings account balance of about \$600. Given these circumstances, he should have been able to make some voluntary payments towards the student loans but did not do so.

The Judge's Pertinent Analysis

Applicant's periods of unemployment and the passing of his wife in 2013 merit some credit under Mitigating Condition 20(b), *i.e.*, 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 theft), and the individual acted responsibly under the circumstances. However, he has failed to satisfy the second prong of that mitigating condition. "[H]e has failed to take any documented voluntary steps to address his accumulated delinquent student loan debts and provide persuasive proof of his voluntary addressing his delinquent debts in issue." Remand Decision at 10. Debt reduction through involuntary action, such as a garnishment or attachment, does not reflect an individual is making a good-faith effort to repay overdue creditors.

"Applicant's past and present failures to address and resolve his accumulated student debt delinquencies reflect adversely on his ability to maintain his finances in a sufficiently stable manner to meet the minimum requirements for holding a security clearance. At this time it is too soon to make safe predictions that Applicant will be able to voluntarily, or even involuntarily, resolve his accrued student debts within the foreseeable future." Remand Decision at 11.

Discussion

Proof of the Student Loans

Applicant contends the Government did not prove that he owed the alleged student loans. In making this argument, he challenges the Judge's interpretation of his denials of those loans. This challenge relates back to the reason why the Judge's initial decision was remanded. In his first decision, the Judge concluded, "Applicant's admitted debt delinquencies negate the need for any independent proof." Judge's Initial Decision at 8. The Board ruled that conclusion was in error because Applicant's SOR response denied the student loan allegations with explanations and the Government remained obligated to prove those controverted debts. *See* Directive ¶ E3.1.15.

In the Remand Decision, the Judge addressed Applicant's denial of the student loans by concluding:

Qualified denials (whether made under oath or not) to pleading allegations in an SOR can be considered as admitted facts that can be weighed along with other evidence developed during the hearing and in post-hearing proceedings. Pleadings in ISCR proceedings and in federal and state courts in general serve a very important purpose of narrowing the issues open to evidentiary proof. Because Applicant's denials of SOR ¶¶ 1.a-1.b and 1.d in his SOR response incorporate his attached explanations of the alleged delinquent student loans, his denials cannot be considered unqualified denials eligible for acceptance and consideration under the exculpatory no doctrine recognized in certain situations by DOHA's Appeal Board. *See* ISCR Case No. 94-1137, at 4 (March 27, 1996) and *compare* with DISCR Case No. 89-0589 at 4 (App. Bd. May 31, 1990)¹ Applicant's debts in issue are fully documented and create some judgment issues. *See* ISCR Case No. 03-01059 at 3 (App. Bd. Sept. 24, 2004). [Remand Decision at 9.]

In his current brief, Applicant challenges the Judge's conclusion regarding "qualified denials" and notes the Government offered no additional evidence on remand to prove the controverted student loans. He argues the Judge's reliance on the "explanations" accompanying his denial of the student loans still did not prove those debts. We do not find this argument persuasive.²

In the paragraph quoted above, the Judge concluded the "debts in issue are fully documented[.]" Applicant's argument fails to take into consideration other record evidence proving the alleged student loans, particularly the four credit reports admitted into evidence (Government Exhibits (GE) 3-5 and Applicant's Exhibit (AE) M) as well as Applicant's disclosures in his security clearance application and background interview of having delinquent student loans (GE 1 and 2), his testimony about signing a student loan application (Tr. at 66 and 69-70), and his testimony about the Government's collection efforts for those loans (Tr. at 71-86, 89-90, 96, and 119-126 and Applicant's Exhibits (AE) B-L and N-Q).³ Of note, credit reports are generally sufficient to establish the Government's *prima facie* case of Guideline F security concerns. *See, e.g.*, ISCR Case No. 18-00552 at 3 (App. Bd. Jan. 18, 2019). From our review of the record evidence, the Judge's material findings regarding the student loans are based on substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary

¹ In the past, some Federal circuit courts recognized the "exculpatory no doctrine" as a possible defense to a charge of making a false statement under 18 U.S.C. § 1001. In the cases cited by the Judge, the Appeal Board concluded that doctrine was no defense to an applicant's falsification of a security clearance application. In *Brogan v. United States*, 522 U.S. 398, 408 (1998), the U.S. Supreme Court rejected the application of the "exculpatory no doctrine" in prosecutions under 18 U.S.C. §1001. We do not see how that doctrine or the cited Appeal Board cases have any application in interpreting Applicant's denial of the student loans.

² We agree with Chief Department Counsel's reply brief argument that Applicant has apparently misinterpreted the Appeal Board's reason for remanding the Judge's initial decision to mean the Government had failed to meet its burden of proof below. Reply Brief at 8.

³ Applicant basically testified that he was responsible for one consolidated loan that combined the three alleged student loans (Tr. at 121-122) but he did not agree with amounts of the alleged loans.

evidence in the same record.” Directive ¶ E3.1.32.1. Once the student loans were proven, the burden shifted to Applicant to mitigate the security concerns arising from them. Directive ¶ E3.1.15.

We recognize that an applicant’s explanation accompanying a denial of an SOR allegation may, depending on its nature and content, constitute an admission of facts at issue. In this case, the Judge stated that “Applicant denied all of the Guideline F allegations covering his debts with explanations.” Decision at 3, emphasis added. That statement is incorrect. Applicant annotated the SOR by noting “I deny with explanation” for two of the alleged student loans and simply annotated “I deny” for the third. SOR Response. His denials are subject to various interpretations. Other than noting that Applicant acknowledged the Government was withholding his Social Security benefits to repay the loans, the Judge did not identify specific facts that Applicant’s SOR explanations may have established. Even though the Judge may have erred in his interpretation of the “qualified denials,” it was a harmless error because it likely had no impact on the outcome of the case given the other evidence noted in the previous paragraph proving the three student loans. *See, e.g.*, ISCR Case No.17-01181 at 4 (App. Bd. Apr. 30, 2018).

Amount of the Alleged Student Loans

Applicant argues the Judge did not explain why the student loans totaled about \$117,000 when AE P listed two of the debts showing a balance of about \$78,670. Based on the facts in this case, there was no need for the Judge to explain the difference between those two amounts. The Judge found that two of the student loans totaling about \$78,100 were consolidated and were subject to a Department of Treasury collection action that involved the withholding of Applicant’s social security benefits. This collection action did not address the third established student loan that was alleged to be about \$39,100. Furthermore, contrary to Applicant’s contentions, neither Department Counsel nor the Judge were required to explain how the amounts owed on the student loans were calculated or why the loans increased by a certain amount over a specific period. The amount of a debt listed in a credit report may change over time due to voluntary or involuntary debtor payments, the accumulation of interest, the imposition of fees or penalties, and similar actions. In DOHA proceedings, the Government is entitled to rely on information contained in credit reports and is under no obligation to corroborate or verify the accuracy of that information before presenting it, although that information remains subject to an applicant’s opportunity to present evidence in rebuttal, mitigation, or explanation. *See, e.g.*, ISCR Case No. 07-08925 at 3 (App. Bd. Sep. 15, 2008).

Weighing of the Evidence

Applicant’s remaining arguments amount to a disagreement with the Judge’s weighing of the evidence. He first asserts that his failure to make payments on the student loans did not justify the Judge in finding “bad faith” in the following finding: “Still unclear is why he could not help [. . . his child] with payment on the loans that he was individually responsible for while he was gainfully employed.” Appeal Brief at 4, quoting from Remand Decision at 4. In challenging that finding, he argues there is no evidence of “bad faith.” This argument lacks merit. The Judge made no finding of bad-faith. Similarly, Applicant challenges the Judge’s related conclusion that the Government’s

action of withholding Applicant's social security benefits were not sufficient to establish a good-faith effort to repay the loans. This challenge establishes no error. As we have previously stated, the satisfaction of a debt through involuntary collection efforts, such as a garnishment or attachment, is not the same as, or similar to, a good-faith initiation of repayment by the debtor. *See, e.g.*, ISCR Case No. 16-03122 at 3 (App. Bd. Aug. 17, 2018). A conclusion that an applicant failed to prove that he or she is adhering to a "good-faith" effort to repay a debt does not equate to a conclusion that he or she was acting in "bad-faith," which implies some form of impropriety.

In his arguments, Applicant also highlights that his deceased wife had managed the family's finances and that he relied on her and his child to make the payments on the student loans. When his wife passed away, Applicant was overwhelmed and did not focus on making the payments. He argues that, given these circumstances, his failure to make the student loan payments was understandable. He also points out the Government pursued collection efforts for those loans for years without him raising any objections or creating any problems, and he has expressed a willingness to refinance his home to pay the loans. None of Applicant's arguments are 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. 18-02592 at 5 (App. Bd. Jan. 6, 2021).

Conditional Clearance Request

In his brief, Applicant requests that, if the collection process is to continue, he be given an opportunity to make payments or that he be permitted to refinance his home or sell it to pay off the debts. He conditions this request on the Government determining the full amount of the debt and explaining how it was calculated. DOHA is not a debt collection agency and has no authority or responsibility to perform the debt verification action that Applicant is requesting. To the extent he is requesting the Appeal Board grant him a conditional security clearance under Directive, Encl. 2, App. C, his request is denied. He has failed to show that he has taken sufficient voluntary actions to resolve the student loans to warrant the granting of a conditional security clearance.

Conclusion

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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