



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
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 ARLINGTON, VIRGINIA 22203
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Date: March 31, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 20-01656
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jeffrey D. Billett, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 27, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On November 24, 2021, after consideration of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30 and raised the following issues: whether the Judge failed to consider all the evidence; whether she failed to properly consider or apply the mitigating factors; and whether she was biased against Applicant. Consistent with the following, we affirm.

The Judge’s Findings of Fact: The Judge’s findings of fact are summarized below:

Applicant is single and in his mid-forties, with a minor son. He has a master’s degree and a real estate license and owns two businesses—a consulting company and a real estate company. Applicant has held a security clearance since 2008 and has been with his current employer since

July 2018. The SOR alleges that Applicant has delinquent debt totaling approximately \$98,000 across seven accounts: four consumer accounts, two medical accounts, and a child support arrearage. Additionally, the SOR alleges that Applicant failed to file his 2017 federal tax return.

In responding to the SOR, Applicant admitted all allegations, with the exception of the two medical accounts. He attributes the delinquencies to a period of unemployment from March to December 2017. During that same time period, he suffered unexpected losses in his real estate business. Applicant also cited legal expenses related to his child custody dispute, as well as travel costs to visit his son in another state. He claims that he began addressing his debts shortly after he regained employment in December 2017 and that he has now resolved all alleged debts other than his child support arrearage.

Regarding his period of unemployment in 2017, Applicant disputes Department Counsel's representation in the FORM that he left his position voluntarily in March 2017. Instead, he states that he was working remotely and that, when the contract ended, this arrangement was no longer possible. He declined the option of moving out-of-state and left without a severance package.

Applicant was not without income and financial resources, as he had real estate interests as early as 2013 and owned 16 properties. He stated that he suffered losses and that he invested \$100,000 in an apartment complex and suffered theft of property by the management company, but provided no proof. Applicant admits that initially he focused on paying the mortgages and other expenses on his rental properties. Applicant had consistent work as a contract employee and has been employed full time since December 2017.

In his answer to the FORM, Applicant stated that he began paying delinquent debts as early as January 2019, including a \$37,581 payment to have his mortgage reinstated and a payment of \$1,236 on another account. He did not address his child support arrearage.

The SOR alleged child-support arrearage in the amount of \$43,235. Applicant admitted the allegation, but claimed that he was unable to provide child support from September 2017 to April 2019 due to financial losses and insufficient income. He provided proof that he paid from February 2006 until September 2019, usually in the amount of \$1,000, but sometimes much less. The child custody issue is contentious, and Applicant provided a court order from 2019 that granted him custody and allowed him to stop child support. In 2020, his arrearage was confirmed by court order to be approximately \$44,200. He projects that it will be reduced to \$32,000 and that he will pay \$700/month to address. Applicant has represented that his attorney advised him to stop child support payments.

The SOR alleged four consumer accounts with delinquent debt totaling approximately \$48,700. These debts included a deficiency balance on a surrendered car and debts for credit cards used for real estate repairs. Applicant settled and paid all four accounts between September and November 2020.

Applicant denied the two medical accounts alleged. As to SOR ¶ 1.e., he contacted the creditor to validate the debt, and it was subsequently removed from his credit report. As to SOR

¶ 1.g., Applicant denied the debt of \$109, which has no identifying information for the original creditor. He has been unable to discover information about this alleged debt.

Applicant admitted that he failed to file his Federal income tax return for tax year 2017, but produced evidence that he filed in February 2020, “long after his security clearance process began.” Decision at 5.

Applicant completed a personal financial statement, in which he reports a net monthly income of approximately \$22,000 and real estate income of approximately \$6,800, from which he pays other mortgages. His monthly net remainder is \$10,899, and he lists his total assets as \$2.1 million. Applicant presented letters of recommendation from friends and colleagues that attest to his diligence, ethics, and integrity.

“Applicant settled the SOR debts, with the exception of the child-support arrears, in 2020, after the SOR was issued. The delinquent accounts were from 2018 and 2019. He changed some responses after the FORM was issued in February 2021.” *Id.*

The Judge’s Analysis and Whole-Person Concept: The Judge’s analysis is quoted, in pertinent part, below:

Applicant’s financial issues began in 2017 when a contract ended and he was unemployed for nine months. He initially stated in his SF-86 that he received a severance package, but denied that in his response to the FORM. He presented inconsistent answers as to the ending of his job in 2017. This casts doubts on his trustworthiness and whether he acted responsibly in addressing his delinquent debts. . . . Applicant’s child support arrearages remain unresolved and he is relying on a court order that has not yet been signed. He chose to pay other delinquent accounts or settle others. He also stated that his attorney advised him not to pay despite a court order. . . . The record does not support good-faith efforts to repay creditors. He waited and decided to settle. This is a legitimate way to pay, but he waited until after the security clearance process began to begin resolving his delinquent debts. His child support is unresolved even though Applicant can clearly afford to pay the arrearages.

. . .

Applicant failed to meet his burden to mitigate the financial concerns set out in the SOR, despite the fact that he has settled four of the delinquent accounts and settled \$44,276 of his delinquent debt. As of the close of the record, he owed child-support arrearages of over \$44,000 and was not making payments towards the arrears.

. . .

After weighing the disqualifying and mitigating conditions under Guideline F, I conclude that Applicant has not carried his burden. . . . He has not addressed his child support arrearages. This creates great doubt on his judgment as he had a court order confirming his arrearages. [Decision at 7–8.]

Discussion

Applicant argues that the Judge failed to include and consider all the evidence and failed to properly apply the mitigating factors, both in regards to his outstanding child support arrears and in regards to his satisfaction of the other alleged debts. To the extent that Applicant is challenging the Judge’s findings of fact, the test on appeal is whether the Judge’s findings are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record. Directive E3.1.32.1. To the extent that he is challenging her conclusions, the Board must consider whether they are (1) arbitrary or capricious; or (2) contrary to law. Directive, E3.1.32.3.

As a preliminary matter, the Board notes that there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. A party’s mere assertion to the contrary is not sufficient to raise a serious question as to whether an Administrative Judge considered the record evidence. *See, e.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020). “Rather, a party must base such a claim of error on something in the record that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence.” ISCR Case No. 02-23979 at 4, n.4 (App. Bd. Aug. 25, 2004).

Turning first to the issue of the child support arrearage, Applicant argues that the Judge failed to consider complex and contentious circumstances, to include: that Applicant had paid child support consistently for many years; that the court authorized him to abate payments in 2016; that the court in 2017 ordered payment of the abated months just as Applicant faced unemployment and significant losses in his real estate business; that Applicant has had custody of his child since 2019; that the child’s mother has failed to make court-ordered support payments; that the custody and child-support arrearage issues are still in litigation; and that his attorney has advised him not to make any payments on the arrearage until the matter has been fully litigated.

Our review of the Judge’s decision, however, reveals that she did include and consider these matters, but determined them to be outweighed by Applicant’s failure to make any payments after regaining employment. The record evidence confirms those facts that the Judge relied upon: that Applicant regained employment in December 2017, that his income increased significantly in the years since, that he re-paid other debts, but that he failed to make child support payments while the child remained in the mother’s care and has failed to make any payments on the arrearage since 2019, when he regained custody. As the Judge noted, Applicant’s own evidence established that a family court entered a judgment against him in September 2020 for \$44,261 in arrears. Although Applicant has repeatedly stated that his attorney advised him not to pay on that arrearage, he has submitted no evidence to document this assertion. Having admitted that he was \$43,235 in arrears on child support payments, Applicant had the burden to present evidence that mitigated this concern, but failed to do so. Directive ¶ E3.1.15.

Turning to the other debts alleged, the evidence confirms that Applicant settled and satisfied all other major SOR debts in the fall of 2020, around the time that the SOR was issued. Applicant disputes the Judge’s characterization of his payments as being prompted by the security clearance process, noting that he began repayment of other, non-alleged, debts in January 2019. The record evidence indicates that Applicant encountered significant financial difficulties in 2017, that it took him some time to regain his financial footing and to re-pay delinquent debt, and that the alleged debts—which he admitted—were among the last to be settled and paid. Simply because the debts were satisfied prior to adjudication of the FORM does not mean that the Judge was obligated to make favorable findings regarding those debts. Instead, the Judge was required to examine all the circumstances surrounding the debts and their eventual satisfaction: in this case, relevant factors included the timing of settlements, Applicant’s robust salary for the past several years, and the fact that one debt had already been reduced to judgment. *See, e.g.*, ISCR Case No. 03-04704 at 4 (App. Bd. Sep. 21, 2005).

We determine that there is relevant evidence of record to support the Judge’s findings of fact regarding the child support arrearage and delinquent debts, in light of all the contradictory evidence in the record. Directive E3.1.32.1. Turning to the issue of whether the Judge properly applied the mitigating factors, Applicant’s brief in essence argues that the Judge misweighed the evidence. 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 incorrectly or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-03344 at 3. Applicant has not rebutted the presumption that the Judge considered all the evidence in the record, nor has he established that her decisions were arbitrary and capricious.

Applicant also challenges the Judge’s findings with regard to his failure to file a federal tax return for 2017. Applicant belatedly filed it in February 2020, seven months prior to the SOR, and received a refund. Applicant correctly highlights that the Judge failed to cite or address Mitigating Condition ¶ 20(g), (“the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements”). Directive, Encl. 2, App. A ¶ 20(g). Applicant asserts this omission to be harmful error, as it is “indicative of a Decision that did not comprehensively and fairly evaluate his case.” Appeal Brief at 12. However, reading the decision in light of the record, we conclude that this error was harmless, as it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 10-01021 at 3 (App. Bd. Nov. 18, 2011). As evident in the analysis sections excerpted above, the Judge focused primarily on Applicant’s failure to make any payments on his child support arrearage of \$44,000 and focused to a lesser degree on his delinquent debts that were only recently settled and paid. The Judge’s adverse decision rests squarely on those security concerns. Our review of the record and decision convinces us that the Judge’s apparent failure to consider and apply Mitigating Condition 20(g) to the sole allegation of a failure-to-file did not likely affect her decision.

Finally, Applicant alleges that the Judge was biased. Applicant does not cite any particular examples of bias, but instead takes issue with the general tone of the Judge’s decision, her failure to acknowledge evidence favorable to him, and her statements regarding inconsistencies in his submissions. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. The standard is not

whether a party personally believes a Judge was biased, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the Judge's fairness and impartiality. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). Applicant has failed to cite specific instances that reflect bias, and our review of the record and decision reveals none. Applicant has failed to carry the heavy burden of persuasion.

Applicant failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board