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

Date: June 15, 2022

In the matter of:	)	
	)	
------	)	ISCR Case No. 21-00050
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 7, 2021, 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 hearing. On March 29, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Eric H. Borgstrom denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged two financial concerns—a Chapter 7 bankruptcy in 2001 and another in 2019. At hearing, the Government amended the SOR to allege a federal tax issue. The Judge found against Applicant on the original two allegations and for Applicant on the additional allegation. The favorable finding is not in issue. Applicant raises the following issue on appeal —whether the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in her late fifties and has been employed as an administrative assistant for a DoD contractor since 1998. Divorced from her first husband, she married her current husband in 2000. She has two adult children and three adult stepchildren.

In April 2001, Applicant and her husband filed a petition for Chapter 7 bankruptcy, and eligible debts were discharged in October 2001. Applicant testified that about $17,000 in unsecured debt from their earlier marriages was discharged.

Applicant's husband is in his late sixties. Upon his retirement in 2007, he took a lump-sum payout in the amount of about $400,000, which he placed in an investment account. Prior to retirement, he also had a part-time realtor practice and planned to transition to a full-time realtor in retirement. He used withdrawals from his retirement account to pay initial costs as a full-time realtor and to start a small furniture retail business, which triggered tax liabilities and penalties. With the national financial crisis of 2008, his retirement account was reduced to about $200,000, his real estate business plummeted, and his small retail business quickly closed. From then through September 2013, Applicant's husband took additional withdrawals from his retirement account to cover monthly expenses. In 2013, the couple elected to downsize. They sold their larger home and used the last $60,000 from his retirement account to purchase a smaller home.

After purchase of their new home, the couple incurred a $237,000 construction loan to complete renovations. In addition, they charged approximately $11,000 on credit cards for items not covered by the loan. In about 2014, Applicant's husband began receiving approximately $1,900/month in Social Security benefits. In 2015, he closed his real estate practice. From about 2016 to 2019, he drove a school bus, with an annual income of about $20,000, to supplement his Social Security income.

In January 2019, the couple was only making minimum payments on their credit-card bills. After consulting the bankruptcy attorney whom they previously used, the couple filed a petition for Chapter 7 bankruptcy. The joint unsecured debts included approximately $71,600 in credit cards and personal loans; $16,300 for delinquent taxes; and $85,600 in student loans. Their eligible debts were discharged in June 2019.

Applicant attributed the 2019 bankruptcy to the downturn in the housing market, losses in the husband's retirement account, and their mistake in taking early withdrawals from that account to pay bills. When questioned why she did not elect a Chapter 13 bankruptcy repayment plan or a debt-consolidation plan, Applicant testified that she favored a fresh start and was concerned about generating the income necessary to make payments under either of those options.

Beginning in 2008, the couple owed significant federal income taxes due to early withdrawals from Husband's retirement account. Applicant testified that, for TY2008 through TY2012, they owed and paid approximately $42,700, using further withdrawals from her husband's retirement account to pay those liabilities. Applicant also testified that she took two $10,000 loans from her own retirement account to pay for her daughters' weddings in 2008 and 2011.

In TY2013, the couple owed $19,600 in federal taxes in excess of their withholding, largely because of withdrawals from her husband's retirement account. In November 2014, they established a payment plan with the IRS and made monthly payments from January 2015 until filing for Chapter 7 bankruptcy in March 2019. For TY2014. the couple owed approximately $6,950 in excess of withholding. No payments were allocated to the TY2014 delinquency prior to the bankruptcy discharge. Upon the bankruptcy discharge, approximately $7,400 in federal taxes, penalties, and interest were written off for TY2013 and 2014. Currently, Applicant and her husband have no delinquent federal taxes.

After the June 2019 bankruptcy discharge, Applicant reduced some of their monthly expenses and increased her retirement withholding. A September 2021 credit report reflects no new delinquent accounts. Applicant testified that they recently refinanced their residence, received $16,000 in a cash payout, and have approximately $19,000 in their checking account. In January 2021, Applicant received a promotion and raise.

The Judge's Analysis

The real estate market collapse and the significant loss in her husband's retirement account were conditions largely beyond Applicant's control. However, Applicant's financial problems resulted from her husband's repeated early withdrawals from his retirement account, done with her knowledge and approval. Applicant chose to pay approximately $20,000 towards her daughters' weddings in 2008 and 2011 rather than use the funds to pay her delinquent taxes and other debts. Although the couple downsized their residence in 2014, they obtained a large construction loan and incurred credit-card expenses to complete a significant renovation. Applicant testified that they did not implement any cost-cutting measures until after their 2019 bankruptcy discharge. They elected to file a Chapter 7 bankruptcy petition, and there is no documentary evidence that they initiated any other debt resolution efforts to repay creditors or settle debts.

> While Applicant and [her husband] experienced some circumstances beyond their control, they repeatedly acted in a manner that worsened their tax problems and financial problems, and twice elected a "fresh start" through bankruptcy discharge instead of repaying their creditors. Taken in its entirety – including the recurring and worsening tax problems, the two bankruptcies, the $80,000 in discharged debt and taxes, the several years of tax payments, and the current financial situation – doubts remain about Applicant's adherence to the fulfilment of her financial obligations under contractual terms.
>
> . . .
>
> Although she has not incurred any financial delinquencies since her June 2019 bankruptcy discharge, it is too soon to conclude that financial problems are unlikely to recur given the years of such problems. [Decision at 9–10.]

Discussion

First, Applicant asserts that the Administrative Judge "was factually incorrect in multiple findings," but cites to only one—that the Judge erroneously found that there was no evidence that Applicant ever inquired into whether she could afford either a Chapter 13 or debt-consolidation repayment plan. Appeal Brief at 11. Our review of the record confirms that Applicant was asked during the hearing whether she had considered a debt consolidation repayment plan or a Chapter 13 repayment plan. Although she initially equivocated in her response, she ultimately testified that she had sought advice on both options. The Judge extended an opportunity for Applicant to submit documentation of any efforts, but she failed to do so. Tr. at 61–62, 100, 121–122. In his analysis, the Judge more specifically concludes that "[t]here is no *documentary* evidence that they initiated any other debt-resolution efforts to repay their creditors or settle their debts." Decision at 9 (emphasis added). That conclusion is supported by the record. Any error in the Judge's finding that there was no evidence of such efforts is harmless, as it did not likely have an impact on the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020).

Second, Applicant highlights that bankruptcy is "a legally authorized means for resolving delinquent debt" and that she has now been financially stable for almost three years. Appeal Brief at 11–12, 14. It is well established that, although an applicant has a legal right to file for bankruptcy, the Government may still consider the applicant's underlying financial circumstances for what they reveal about judgment and reliability. *See, e.g.*, ISCR Case No. 16-02246 at 2–3 (App. Bd. Dec. 8, 2017). Additionally, even though bankruptcy is a legal option, the Judge may consider what efforts, if any, Applicant took to resolve the debts short of bankruptcy. *Id.*

The remainder of Applicant's brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant's arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). Although we give due consideration to the Hearing Office cases that Applicant's counsel has cited, they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *See, e.g.*, ISCR Case No. 17-02488 at 4 (App. Bd. Aug. 30, 2018).

Applicant failed to establish that the Judge committed any harmful error or that she 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