

Date: June 15, 2023

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Applicant for Security Clearance)
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ISCR Case No. 20-02971

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Daniel Conway, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 4, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline F (Financial Considerations), Guideline H (Drug Involvement and Substance Misuse), and Guideline J (Criminal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 9, 2023, Defense Office of Hearings and Appeals Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged, under Guideline F, six delinquent debts totaling approximately \$74,000, and, under Guidelines H and J, two criminal charges to which Applicant pleaded guilty: possession of a controlled substance (Oxycodone) in 2016, and felony importation of cocaine in 2017. The Judge found in favor of Applicant on four small debts and the Guideline H allegations, and against Applicant on two large debts totaling about \$72,700, and on the criminal conduct. On appeal, Applicant asserts new evidence in the form of recent partial payments on the two large debts in question, and a letter signed by Applicant’s former attorney and a United States Magistrate Judge who were involved with Applicant’s criminal charges, explaining the Veterans Treatment Court and arguing Applicant’s worthiness for a security clearance. In addition, Applicant asserts factual

errors in the Judge's decision and argues the Judge improperly weighed the evidence and failed to consider relevant evidence in mitigation. For the reasons set forth below, we affirm.

Judge's Findings and Analysis

Applicant is in his 30s and employed by a Federal contractor. He previously served honorably in the military. In July 2016, he was charged with possession of a controlled substance (Oxycodone). In October 2017, he was charged with felony importation of cocaine. In the first case, Applicant was cited for possession of Oxycodone when he returned from Mexico to the United States after filling a U.S. prescription for the drug in Mexico. He told a government investigator that he went to the appropriate court and was told by the clerk that no action had been taken on his citation, and he would be contacted at a later date. He also said he assumed the sheriff's office chose not to pursue the charge since no record could be found. He did not follow up on the citation. In testimony, he said he went to Mexico for dental work, and returned with the Oxycodone. He presented an older bottle to a border agent, not a newly filled prescription, and was cited for misdemeanor possession of a controlled substance. He then said he went to the wrong courthouse to address the citation and the hearing was rescheduled. He claimed in testimony that after the hearing was rescheduled, he was given a new date to appear, but he failed to do so because he was incarcerated.

In October 2017, Applicant claimed to a government investigator that he went to Mexico to obtain vaccines for his dogs, had left his rental car unattended for three hours, and returned to the United States. His vehicle was searched at the border and 16 kilos of cocaine were found inside the spare tire. Applicant was arrested and charged with felony importation of cocaine. He denied the drugs belonged to him and denied knowledge of it being in his vehicle. Applicant entered a guilty plea to felony importation of cocaine. He told a government investigator that he pled guilty to fast track his case and to allow him to qualify for Veterans Court. He said he would have been convicted of the charge had he gone to trial. He participated in a 90-day residential Community Resource and Self-Help Program (CRASH) after his incarceration, a prerequisite to participating in Veterans Court.

Applicant violated a CRASH program restriction and was returned to federal prison from October 2018 to April 2019. In April 2019, he filed a motion to withdraw his guilty plea so he could participate in Veterans Court. As part of his agreement to allow him to withdraw his plea and participate in Veterans Court, he had to plead guilty to the importation of cocaine charge. He also learned that he had an outstanding charge for possession of a controlled substance from 2016 and a warrant for his failure to appear in court. Applicant said the state agreed to resolve the possession citation while he was a participant in the Veterans Court. However, the charge was adjudicated through a diversion program in a different court. Applicant completed the program, and the misdemeanor charge was dismissed in January 2021. The Veterans Court required that Applicant plead guilty to the charge and complete various requirements, and in three years, he could request to have the charge expunged. Applicant completed all of the requirements of the program in July 2020.

The SOR alleged that Applicant had six delinquent debts totaling about \$74,000. Applicant testified that his debts were incurred during his marriage and that he lost track of the smaller ones

due to life events. The two larger debts for which the Judge found against Applicant became delinquent in 2017. In his security clearance application (SCA), he attributed the smaller of the two debts (SOR ¶ 1.b for about \$14,920) to a divorce and the end of a contract that he had been working on, and that he planned to contact the creditor to resolve them once he was back to work. In his November 2019 interview, he said he underestimated the amount of his credit-card debt and attributed it to loss of a contract and because he was unemployed while incarcerated in October 2017 for his drug charge. He also explained that the larger of the two debts (SOR ¶ 1.a for about \$57,790) resulted from a loan to purchase a travel trailer for which he was unable to pay for the same reasons. He told the investigator that he contacted the creditor and planned to make payments because he started a new job and would pay once he knew he would keep the job. He said the four remaining debts (for which the Judge found for Applicant) were paid after he received the SOR.

When Applicant answered the SOR in February 2021, he said he was working on repaying the two debts in question (SOR ¶¶ 1.a and 1.b). He delayed resolving the debts because of a costly child custody dispute. At the hearing, he provided letters dated February 14, 2023, from the creditor confirming settlement offers of \$26,006 for the debt alleged in SOR ¶ 1.a, and \$6,696 for the debt alleged in SOR ¶ 1.b. The creditor agreed to accept monthly payments of \$650 and \$270, respectively, for 40 months until June 2026. Applicant provided copies of payments made in February and March 2023.

The Judge found that Applicant began accumulating delinquent debt in 2017. He paid the small debts in 2021, after he received the SOR. However, despite promises to address the two large debts, he failed to act on them until “days before his hearing.” Decision at 9. The Judge said that Applicant’s unemployment was primarily due to his incarceration after being charged with a serious drug offense, a matter that was not beyond his control, while the other reasons attributed to his delinquent debts were beyond his control. The Judge found that mitigating condition AG ¶ 20(a) does not apply because some of the debts are ongoing and unpaid, and that Applicant did not act responsibly under the circumstances. The Judge found that AG ¶ 20(b) has minimal application, and that there was no evidence of financial counseling as contemplated by AG ¶ 20(c), but that AG ¶ 20(d) applied to the four small delinquent debts that were paid. The Judge found in favor of Applicant on the four small debts, but against him on the two larger debts alleged in SOR ¶¶ 1.a and 1.b.

The Judge found in favor of Applicant on the Guideline H allegations, but against him on the cross-alleged criminal conduct described as two drug charges in SOR ¶¶ 2.a and 2.b. The Judge found that the misdemeanor offense of possession of a controlled substance (Oxycodone) was adjudicated through a diversion program and was dismissed. She also found that the felony charge for importation of cocaine was adjudicated in Veterans Court and dismissed with prejudice after Applicant completed the Court’s requirements. The Judge held that Applicant’s past criminal conduct was serious and did not occur under unique circumstances. She held that both criminal charges were dismissed through the benefit of the Veterans Court program, not because they did not occur. Applicant pleaded guilty to both charges and the Judge found that his serious criminal conduct casts doubt on his reliability, trustworthiness, and good judgment, despite the mitigation applied for completing the Veterans Court program and current employment. Decision at 10.

The Judge held under the whole-person analysis, that Applicant had not met his burden of persuasion, including failing to take meaningful action on his two largest debts until days before his hearing despite being aware of the security concerns; he had not established a meaningful financial track record to conclude he will faithfully comply with resolving the two large debts; and completion of the Veterans Court program did not overcome the seriousness of the offenses alleged under Guideline J.

Discussion

On appeal, Applicant argues that the Judge erred by finding that “Applicant failed to take action on [large debts] until days before his hearing.” Appeal Brief at 3. He argues that “[p]ayments began more than several days prior to hearing,” specifically, “good faith was initiated in January 2023 with first payment made on 1 February 2023.” *Id.* He also argues that the Judge “abused her discretion by failing to apply mitigating conditions that the circumstances are unlikely to recur and happened some time ago.” *Id.*

The Judge noted in her findings of fact that Applicant negotiated settlements of the two large debts and made required payments in February and March 2023. The record shows that these payments were made one month before the hearing, and on the day of the hearing. Applicant Exhibit E, F. An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. *See, e.g.*, ISCR Case No. 17-00569 at 4 (App. Bd. Sep. 18, 2018). A debt that became delinquent several years ago is still considered recent because “an applicant’s ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions.” *See, e.g.*, ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017).

The Appeal Board has noted that in evaluating Guideline F cases, the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. *See, e.g.*, ISCR Case No. 07-06482 at 2 (App. Bd. May 21, 2008). *See also* AG ¶ 2(a) (“All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a national security eligibility determination.”).

The Judge also found that relevant mitigating conditions under Guidelines F and J were not sufficient to meet Applicant’s burden of persuasion under Directive ¶ E3.1.15. Applicant’s disagreement with the Judge’s weighing of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 22-01631 at 2 (App. Bd. Feb. 16, 2023).

Finally, on appeal, Applicant provided new evidence of good faith efforts to repay debts, and a letter from his former counsel and a Federal Magistrate Judge explaining the Veterans Court program, asserting facts, and opining on Applicant's security worthiness. Of note, the Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. The Judge's whole-person analysis regarding the entirety of Applicant's security-significant conduct complies with the requirements of Directive ¶ 6.3, in that the Judge considered the totality of the evidence in reaching her decision. *See, e.g.*, ISCR Case No. 15-06532 at 3.

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* AG ¶ 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: James F. Duffy

James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board