KEYWORD: Guideline F; Guideline E

DIGEST: The evidence of record does not support Applicant's theory that he has mitigated delinquent debts for which the creditors have not filed a proof of claim in his ongoing Chapter 13 bankruptcy proceeding. Adverse decision affirmed

CASENO: 12-06592.a1

DATE: 11/13/2015

DATE: November 13, 2015

In Re:	)	
	)	
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	)	
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 May 2, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On September 30, 2015, after the close of the record, Defense Office of Hearings and Appeals (DOHA)Administrative Judge Nichole L. Noel denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 46 years old. He experienced 23 months of unemployment between 2009 and 2012. He is indebted to eight creditors for approximately $27,000 in delinquent debt. Applicant blames the periods of unemployment and the dissolution of his marriage in 2003 for his financial problems.

In August 2014, Applicant filed for Chapter 13 bankruptcy protection and sought a repayment plan for $76,000 in debt. He has paid over $22,000 into the plan since September 2014, $21,000 of which has been paid to his creditors. Of the eight debts alleged in the SOR, only two of the creditors have filed claims with the bankruptcy trustee. Applicant claims the other six creditors did not pursue claims because he resolved the debts or because the creditors have no record of any delinquent balances attributable to him. He did not submit any evidence showing that he paid any of the SOR debts before filing for bankruptcy protection. Aside from general details about his Chapter 13 bankruptcy petition, Applicant did not provide any information about his current finances.

Applicant was convicted of DUI in 1999. In response to the question on his security clearance application, "Have you EVER been charged with an offense involving alcohol or drugs?" Applicant indicated that he had not. In a 2012 background interview, Applicant stated that he did not report the incident on his clearance application because he did not think it was reported on his arrest record. When answering the falsification allegation in the SOR, Applicant stated that he misunderstood the word "ever" as used in the question.

Applicant admits that, in 2008, his security clearance was revoked after he falsified a 2006 application by failing to disclose numerous delinquent debts and the 1999 DUI conviction.

The Judge reached the following conclusions: Applicant has demonstrated an inability to pay his debts as well as a history of not doing so. He receives partial mitigation for his efforts to reduce his debt through a Chapter 13 bankruptcy payment plan because it shows a willingness to repay his creditors. However this does not fully mitigate the financial concerns raised in the SOR because only two of the eight SOR debts are being repaid in Applicant's Chapter 13 payment plan, as those creditors filed claims with the trustee. Just because six of Applicant's creditors chose not

to file claims with the trustee does not mean that the accounts have been resolved in his favor, as he claims. He did not provide any evidence indicating that he paid any of the six accounts or that the creditors have forgiven the debts. A creditor's decision not actively to collect a debt does not relieve Applicant from repaying debts he knowingly incurred.

Although Applicant experienced some periods of unemployment, he did not establish that his financial problems were entirely beyond his control or that he has acted responsibly in light of them. He has not provided sufficient evidence to support a finding of financial rehabilitation or reform.

The record contains sufficient circumstantial evidence of Applicant's intent to falsify his security clearance application. His explanations are not credible. The language of the question is clear. A reasonable person would understand that disclosure of the 1999 conviction was required. Applicant has a history of attempting to hide derogatory information from the government as shown by the falsification of his 2006 security clearance application.

Applicant argues that the Judge's decision was in error regarding his financial situation. He states that, based on Chapter 13 bankruptcy law, all debts not otherwise exempt from discharge will be discharged whether or not a creditor has filed a proof of claim with the bankruptcy trustee. He asserts that the proof of claim is an optional filing on the part of the creditor and is used only if the creditor has proof of such debt and chooses to receive payment on the debt, which shall nonetheless, be discharged by the bankruptcy court freeing the debtor of said obligation. Although Applicant's argument is not completely clear, he seems to be asserting that the Judge erred when she concluded that six SOR debts have not necessarily been resolved in his favor since no proof of claim was filed in the course of the bankruptcy proceedings.

Applicant has failed to establish harmful error on the part of the Judge. She concluded that the case against Applicant was only partially mitigated. This conclusion was based on her observation that only two of Applicant's SOR debts out of eight were being repaid under the Chapter 13 payment plan. Her doubts about the status of the remaining six debts were appropriate, considering the fact that two of the debts (1.b. and 1.h.) do not appear at all on the list of creditors in the bankruptcy documents and there is no evidence that Applicant has made payment, attempted payment, or has otherwise addressed these debts. The other debts are listed in the bankruptcy documents in the category of "claim not filed." The Judge's basic conclusion that Applicant did not produce sufficient evidence to establish that his other six debts are being paid or are otherwise being resolved is bolstered by the fact that details of Applicant's Chapter 13 bankruptcy plan were not provided by him. Furthermore, since the bankruptcy is still in progress, it is premature to draw conclusions about the eventual status of the debts when such conclusions are based on a presumption of eventual bankruptcy discharge. Of course, given sufficient evidence, a Chapter 13 bankruptcy could be a part of a pattern of mitigation. *See*, *e.g.*, ISCR Case No. 07-06482 (App. Bd. May 21, 2008)("There is no requirement that a plan provide for payment on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time").

Regarding mitigation, Applicant bears the burden of production. Directive ¶ E3.1.15. Given the state of the record, including the lack of specifics regarding the Chapter 13 bankruptcy plan, the Judge's ultimate conclusion that Applicant failed to demonstrate sufficient rehabilitation or reform to overcome the financial considerations concerns is sustainable.[1]

Applicant argues that, when completing his security clearance application, he was in no way trying to be deceitful or misleading in reference to the 1999 DWI offense. He states that he failed to list the offense because he paid restitution and did not think it was on his arrest record since it was over ten years old and never affected his insurance rates. Applicant has failed to establish error on the part of the Judge.

The Board notes that Applicant's assertion on appeal merely repeats his assertion below that he did not think the offense was on his arrest record. This explanation differs from his explanation in his answer to the SOR, where he asserted that he misunderstood the word "ever" as used in the question. The Board also notes that the pertinent question asks if Applicant had ever been charged with an offense relating to alcohol and drugs, and makes no provision for the possibility that a charge might be removed from the books because of age or some other reason. The Judge based her conclusion regarding Applicant's state of mind on the fact that his explanations for his "no" answer varied, and the fact that the language of the question is clear on its face. The Board concludes that there is sufficient circumstantial evidence to support the Judge's conclusion that Applicant intended to falsify his answer.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The Judge's decision is AFFIRMED.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge

[1]Applicant is possibly asserting on appeal that all of his debts not otherwise exempt from discharge will be discharged in his Chapter 13 proceeding, regardless of the status of the debt (proof of claim filed or not, or included in the bankruptcy or not). If this is his meaning, Applicant fails to cite to any applicable statute or case law in support of such a proposition. In any case, it would be inappropriate to rely on an event that has not yet occurred.

Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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