

KEYWORD: Guideline F

DIGEST: The government is not estopped from making an adverse security clearance decision after a favorable adjudication. The Judge did not err by applying the current guidelines to applicants conduct even though occurred prior to the issuance of the guidelines. Adverse decision affirmed.

CASENO: 08-05344.a1

DATE: 02/03/2010

DATE: February 3, 2010

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In Re:	)	
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	)	
Applicant for Security Clearance	)	

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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

Roderic G. Steakley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 2009, DOHA 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 October 30, 2009, after the hearing, Administrative Judge Thomas M. Crean denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge did not consider all the record evidence; whether the Judge mis-weighted the record evidence; whether Applicant was denied due process; and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge found that Applicant is an electrical and systems engineer employed by a Defense contractor. He performs document reviews to determine contractor compliance with Government regulations. A graduate of the Reserve Officer Training Corps, he served seven years in the Air Force and another ten in the Reserves. He has held a security clearance since 1974.

Applicant is indebted to the IRS in the amount of \$42,848, for tax years 1999 to 2003, which is the basis of the sole allegation in the SOR. However, Applicant also had problems with his federal taxes in 1992, 1995, and 1998. His tax liability for 1992, including interest and penalties, was \$12,000, which he paid off with an installment agreement. He also paid off monies owed the IRS from 1995 and 1998.

Applicant’s failure to file timely tax returns from 1999 and 2000 were due to his not being able to obtain records pertinent to his wife’s business. He also owed taxes for tax years 2001 and 2003. In 2008 he entered into a new agreement with the IRS to pay off his tax debt.

When Applicant began working for his current employer, in February 2009, his salary was \$122,500. Although more than he had made at his previous employer, it was partially offset by increased costs of health insurance. Often his expenses each month are more than his income. “Applicant continues to manage the income/expenses shortfall by either reworking his budget to find funds, by obtaining another high interest loan, or by adding to an already existing high interest loan. Applicant acknowledged that financially he is living ‘on the edge.’” Decision at 4.

Applicant enjoys an excellent reputation for trustworthiness, reliability, and the ability to protect classified information. His supervisors and project managers are aware of his problems with the IRS.

In the Analysis portion of the decision, the Judge noted Applicant’s installment agreements, the high opinion which his witnesses expressed of his trustworthiness, and Applicant’s having held a security clearance since 1974 without incident. However, the Judge stated that Applicant’s tax problems were caused by his own inattention rather than by causes outside his control. He also stated that the installment agreements which Applicant entered into were done at the initiative of the

IRS rather than Applicant, which diminished their mitigating force. The Judge concluded that Applicant had not demonstrated that he is currently responsible in the management of his finances. Accordingly, the Judge concluded that Applicant had not met his burden of persuasion as to mitigation.

Applicant contends on appeal that the Judge erred in his analysis. Specifically, he argues that Applicant's having been previously granted a security clearance despite Government awareness of his tax problems precludes an unfavorable decision. "[T]he Government is estopped from considering matters which it has already considered in granting prior security clearances[.]" Applicant Brief at 18. Board precedent, however, is to the contrary. We have long held that prior decisions to grant or retain a clearance do not in and of themselves undermine the legal sufficiency of Judge's subsequent adverse decision. "The [G]overnment is not estopped from making an adverse clearance decision when there were prior favorable adjudications." ISCR Case No. 07-17383 at 2 (App. Bd. Feb. 12, 2009), quoting ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). Furthermore, Applicant's prior good security record is not a bar to an unfavorable adjudication. As we have previously held, the Government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. ISCR Case No. 08-00435 at 3 (App. Bd. Jan. 22, 2009), citing *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied* 397 U.S. 1039 (1970).<sup>1</sup>

Applicant observes that the security concerns in his case were based upon events occurring prior to the implementation of the current Adjudicative Guidelines. Therefore, he argues that it was improper for the Judge to have decided the case against him based on those Guidelines. We construe this argument as a contention that Applicant was denied the due process afforded by the Directive. However, a Judge is bound by the provisions of the Directive. *See, e.g.*, ISCR Case No. 05-00939 at 4 (App. Bd. Oct. 3, 2007). Furthermore, the Board's authority is limited to reviewing a case for compliance with the Directive. We do not have authority to entertain challenges to the wisdom, legality or constitutionality of provisions of the Directive or of policy decisions of the Department of Defense. *See* ISCR Case No. 03-23190 at 3 (App. Bd. Jul. 12, 2007); ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001). The current Guidelines apply to adjudications in which the SOR was issued on or after September 1, 2006, as was the case here. *Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, Directive, Enclosure 2, at 16-17. Therefore, the application of the current Guidelines in Applicant's case is in accordance with guidance from DoD, included in the Directive. The Judge did not err in applying these Guidelines.<sup>2</sup>

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<sup>1</sup>See Department Counsel Brief at 5: "Review and denial of this Applicant's clearance status is particularly appropriate because it takes into account facts and circumstances—the exacerbation of the Government's security concerns as a result of Applicant's ongoing failure to address his Federal tax obligations—that were neither present nor as significant at the time of previous adjudications."

<sup>2</sup>See also ISCR Case No. 03-09412 at 3-4 (App. Bd. Oct. 26, 2004) for discussion of inapplicability of *Ex Post Facto* Clause of the U.S. Constitution to DOHA adjudications.

Applicant contends that the Judge erred in his weighing of the evidence, citing to the opinions of the character witnesses called in Applicant's behalf and to evidence that he is making payments consistent with his installment agreement with the IRS. He argues that the Judge ignored the favorable testimony of these witnesses, which, he contends, demonstrates that Applicant should have a clearance.<sup>3</sup> A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). Applicant's presentation on appeal has not rebutted that presumption. The Judge explicitly considered the matters cited by Applicant, but he provided a plausible explanation as to why he nevertheless concluded that Applicant had failed to mitigate the security concerns in his case. Applicant has failed to demonstrate that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law, in light of the Judge's unchallenged findings concerning the extent of Applicant's debt, its ongoing nature, and Applicant's continued mismanagement of his finances. *See* ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009); ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007) (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 or reached conclusions in a manner that is arbitrary, capricious, or contrary to law).

Applicant also argues that the Judge erred by considering "matters which are clearly outside the scope of the reasons stated in the SOR in reaching his conclusions." Applicant Brief at 18. Applicant has provided no support for this contention. A review of the decision, in light of the record as a whole, demonstrates that the Judge based his decision upon Applicant's admissions in his response to the SOR and upon the record evidence bearing on Applicant's debt to the IRS, his response to that debt, and his financial stability. The Judge also considered evidence that Applicant had prior difficulties with the IRS. Such evidence is relevant in evaluating the whole-person factors prescribed in the Directive, especially the nature, extent, and seriousness of Applicant's conduct; the circumstances surrounding the conduct, including Applicant's knowledge; the frequency and recency of the conduct; and the presence or absence of rehabilitation or other behavioral changes.<sup>4</sup> There is nothing in the Judge's decision to demonstrate or suggest that he gave improper weight to these matters.

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<sup>3</sup>Applicant notes that the Department Counsel called no witnesses in support of the Government's case which, he argues, renders Applicant's evidence conclusive. "The strength of the Government's own employee, [Witness C], who could only be deemed to have the Government's best interests in mind, must be determined to be conclusive in establishing [Applicant's] current reliability, trustworthiness and good judgment with respect to the protection and handling of classified information." Applicant Brief at 17. To the extent that this argument includes a contention that the Government failed to meet its burden of production, we note that this burden arises only with regard to controverted allegations. Directive ¶ E3.1.14. In this case, Applicant admitted the one allegation contained in the SOR. Consequently, this allegation was not controverted. Nevertheless, the Government presented documentary evidence, including credit reports and a written statement by Applicant addressing his IRS problems. Therefore, the burden of persuasion rested on Applicant to demonstrate mitigation under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>4</sup>Directive ¶ E2.2(1 -3), (5).

After reviewing the record, the Board concludes 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.’” *Egan, supra*, n. 2.

### **Order**

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board