

KEYWORD: Guideline F

DIGEST: Despite some evidence of mitigation, the Judge emphasized that Applicant's imprudent spending and overall poor handling of his finances was the larger contributor to his pattern of debt delinquency. This conclusion is supported by the record evidence. Adverse decision affirmed.

CASE NO: 11-07194.a1

DATE: 02/07/2013

DATE: February 7, 2013

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 Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 22, 2012, 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 November 28, 2012, after the hearing, Administrative Judge John Grattan Metz, Jr. 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: (1) whether the Judge discriminated against Applicant in view of others similarly situated and because of the variability of his employment; (2) whether the Judge erroneously defined bankruptcy as “financial irresponsibility;” (3) whether the Judge erroneously failed to conclude that Applicant’s financial difficulties were not recent; (4) whether the Judge erroneously failed to take into account the fact that Applicant will lose his job as the result of an unfavorable decision; (5) whether the Judge erroneously concluded that Applicant’s April 2008 job dismissal was within his power to prevent; and (6) whether the Judge erroneously failed to take into consideration Applicant’s service to, and love of, country. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: Applicant is 50 years old. He married in 1994 and divorced in 2007. He and his ex-wife have no children together. Applicant has an extensive history of financial problems, marked by two Chapter 7 bankruptcy discharges, one in May 1996, from which he was discharged from about \$20,000 in debt, and a second in January 2009, from which he was discharged from about \$480,000 in dischargeable debt. Applicant attributed the second bankruptcy to his March 2007 divorce and a period of unemployment that began in April 2008.

Applicant experienced periods of underemployment and unemployment from May 1995 to March 1998. In March 1998, he began an extended period of full-time employment. By 2000, he was making a six-figure salary, earning over \$300,000 in 2000-2001. Between 2002 and 2004 he earned a total of nearly two million dollars. Applicant and his wife enjoyed their good fortune, buying a house and numerous luxury items. Applicant put \$40,000 into a retirement fund. Applicant’s salary declined in 2006 and 2007 after he took an executive position with a start-up company. Meanwhile, his marriage had begun to deteriorate. In December 2005, Applicant moved out of the marital home and bought an historic home into which he put \$200,000 in renovations. This left him with about \$3,000 a month in mortgage payments. He also had expenses pursuant to the divorce settlement. Sometime in 2006, Applicant took \$40,000 out of his retirement fund.

Applicant was hired as a program manager in 2007 at an annual salary of \$150,000. However, he was fired from this job in March 2008, because the company owner wanted Applicant to work from the office five days a week, whereas Applicant wanted to work from home two days a week. Consequently, Applicant only earned about \$93,000 in 2007-2008. He remained unemployed until December 2008, precipitating his September 2008 bankruptcy filing.

In February 2009, the Internal Revenue Service (IRS) filed a \$19,308 tax lien on Applicant for unpaid 2006 taxes. In September 2009, his state tax division filed a \$4,623 tax lien for unpaid 2006 state taxes. After the efforts of a tax resolution company failed, Applicant established a repayment plan with the IRS in December 2011. He was supposed to start \$300 monthly payments that month. However, he was laid off because his interim clearance had been revoked due to his financial problems. Applicant was re-hired by his company in March 2012 to work on unclassified

contracts, and he re-contacted both the IRS and the state tax division about reestablishing repayment plans. He claims to be paying the IRS \$300 monthly and the state \$200 monthly. However, he has not documented the terms of the agreements, or any of the claimed monthly payments. Applicant's IRS tax liability has risen to over \$21,000, including interest and penalties. The current amount of the state tax liability is unknown.

Since Applicant left his CEO job in 2007, his employment has been more than usually subject to the vagaries of employment in federal contracting. He is not a regular full-time employee, but remains employed only as long as his company has unclassified contracts that he can work on. Applicant has experienced all these circumstances since 2007.

The Judge reached the following conclusions: The Government established a case for disqualification under Guideline F, and Applicant did not mitigate the security concerns. Applicant's tax liability for state and federal taxes exceeds \$26,000. Moreover, Applicant has a January 2009 bankruptcy discharge that seems as much the result of his financial irresponsibility as his divorce. Between tax years 2000 and 2006, Applicant earned over 2.6 million dollars. But his spending over that period was, if not profligate, at least imprudent. He appears to have saved little beyond the \$40,000 he put in a retirement account but later prematurely withdrew. His financial difficulties are recent, not infrequent, and because of the variability of his employment, the circumstances under which the problems occurred are likely to recur. Applicant's divorce is a circumstance beyond his control, but having little in financial reserves is not. Also, his April 2008 dismissal—the immediate precipitant of his 2009 bankruptcy—was completely within his power to prevent by the simple expedient of coming to work when the owner wanted him to. Consequently, he cannot be considered to have acted responsibly in addressing his debts because the debts and resulting bankruptcy were due to his own conduct. Applicant's failure to document any follow-through on the tax debts after his re-employment in March 2012 undercuts his claim to rehabilitation.

Applicant's employment fluctuates. There are too many unknowns to conclude that his financial problems are headed for resolution. The lack of demonstrated progress fails to show a clear path for resolving his delinquent debts. Without such a path, it cannot be concluded that financial problems are unlikely to recur.

Applicant's appeal brief is accompanied by numerous documents, including statistical data on the number of federal employees who owe back taxes and documents displaying Applicant's efforts to secure employment. Applicant also made factual representations in his brief that were not included in the record below. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

Applicant claims the Judge discriminated against him, based on the fact that there are numerous federal contractor personnel on record owing back taxes to the IRS who currently hold security clearances. This argument fails on several levels, primarily because of the prohibition on the Board considering new evidence and the fact that Applicant's assertions do not constitute proof. Also, given that security clearance adjudications are individualized determinations, the status of others, even those who may appear to be similarly situated, are irrelevant to these proceedings. *See* Directive, Enclosure 2 ¶ 2(b).

Applicant argues that his case is mitigated in part by the fact that his financial difficulties stem from his divorce seven years ago, and the fact that the divorce is not recent. A review of the Judge's decision indicates that the Judge gave partial mitigation credit to the fact that Applicant's divorce was a matter outside his control. However, the Judge also emphasized that Applicant's imprudent spending and overall poor handling of his finances was the larger contributor to his pattern of debt delinquency. The Judge's conclusions are supported by the record evidence.

Applicant states that the Judge erroneously gave no consideration to the fact that he will lose his job as a result of the Judge's adverse decision. The adverse impact of an unfavorable decision is not relevant in evaluating clearance eligibility. *See, e.g.*, ISCR Case No. 10-03757 at 2 (App. Bd. Sep. 13, 2011).

Applicant disputes the Judge's findings of fact regarding the disagreement between him and his boss over time spent at the office that led to his termination from employment in April 2008. After a review of the record, the Board concludes that Applicant's assignment of error is without merit, and the evidence supports the Judge's findings on the matter.

Applicant argues that the Judge failed to take into account his love for his country and the service he has provided throughout his career. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Here, Applicant fails to overcome that presumption. The Judge specifically acknowledges Applicant's favorable character evidence, his military service, and employment history in the body of his decision.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for his 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 Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board