

KEYWORD: Guideline F

DIGEST: The Judge did not fail properly to apply the adjudicative criteria set forth in the Directive. A Judge has no authority to engage in investigative activity. The whole-person analysis complies with the requirements of the Directive. Adverse decision affirmed.

CASE NO: 11-07346

DATE: 02/13/2013

DATE: February 13, 2013

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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**

Richard L. Morris, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 3, 2012, DoD 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 24, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 erred in his application of the mitigating conditions and whether the Judge’s whole-person analysis was in error.

The Judge made the following pertinent findings of fact: Applicant works for a Defense contractor. He holds a bachelor's degree and expects to receive a master's degree.

In the mid-1990s, he established his own company, which initially did well. However, his contracts began to dwindle, and he developed financial problems. He shut down the company and took a job with a significant salary but no benefits. His wife, however, had a job that provided medical coverage for the family. In the early 2000s, Applicant's employer relocated to another state. Applicant had to relocate in order to keep his job. This entailed a substantial pay cut.

Subsequently, Applicant's wife became unable to work due to an on-the-job injury, which meant that she lost medical insurance for herself and the family. Because of this, Applicant was not able to pay his family's medical bills. Beginning in the mid-2000s, Applicant endured periods of unemployment. However, he has been working full-time since 2010, and his current salary is \$87,000.

The SOR alleged 71 delinquent debts, totaling \$82,000. The debts are for medical bills, consumer debts, car repossessions, etc. These debts accumulated from the mid-2000s to the present. Five of these debts were actually duplicates of others, six were disputed and removed from Applicant's credit report, and four were paid. Applicant claims to have established payment plans for 31 of the SOR debts. He presented little corroborating evidence of contacts with creditors prior to March/April 2012, and most of the payment agreements evidenced in the record were to begin after the date of the hearing. Moreover, 41 SOR debts are unresolved.

Applicant contends that he did not have the means to pay his debts more aggressively because he is the family's sole provider. He has experienced financial stress due to having to maintain two households after his relocation. In addition, he has supported his mother and paid for her care. Applicant and his wife follow a budget, but he has not participated in financial counseling. He contends that he has a good plan to pay off his debts. Applicant's SCA disclosed six foreign vacations in the 2000s.

In the Analysis, the Judge concluded that Applicant's financial condition raised security concerns under Guideline F. However, he also concluded that Applicant had failed to demonstrate mitigation. Although he acknowledged that Applicant's debts were affected by circumstances outside his control, the Judge stated that Applicant had not demonstrated responsible conduct in relation to those debts.<sup>1</sup> He stated that Applicant's debts were ongoing,<sup>2</sup> that Applicant had begun

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<sup>1</sup>Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]"

<sup>2</sup>Directive, Enclosure 2 ¶ 20(a): "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

to address his financial situation only recently,<sup>3</sup> and that he had not received financial counseling.<sup>4</sup> The Judge also cited to evidence of Applicant's several foreign vacations in the context of his evaluation of Applicant's financial judgment. He determined that it is too soon to conclude that Applicant had demonstrated mitigation.

Applicant contends that the Judge failed properly to apply the Adjudicative Guidelines. He states that, at a certain point in the hearing, the Judge substituted his own subjective criteria for those promulgated in the Directive. In support of this argument he cites to a portion of the transcript, that reflects the Judge's questioning of Applicant: "So what has prevented you from addressing those debts a little bit more aggressively?" This question was prompted by Applicant's admission that he and his wife had not addressed their debts "as aggressively . . . as we should have." Tr. at 102. He argues that the Judge's question implied a requirement for Applicant to be debt-free, which was not consistent with the Directive. We do not find Applicant's argument to be persuasive. In the cited colloquy the Judge is merely seeking clarification of Applicant's own evidence rather than intimating the criteria that he will apply in evaluating Applicant's case. We find no reason to conclude that the Judge improperly substituted his own opinions for the criteria mandated by the Directive.

Applicant argues that the Judge erred in his application of the mitigating conditions. The Judge focused in large measure on evidence that Applicant's plans for debt resolution would not begin until after the close of the record. As such, Applicant had not demonstrated a track record of debt repayment so much as promised future action in regard to his finances. *See, e.g.*, ISCR Case No. 10-07881 at 2 (App. Bd. Oct. 5, 2012) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner). In addition, the Judge's findings about (1) Applicant's having spent funds on foreign travel rather than debt repayment and (2) the extent of Applicant's unresolved debt support a conclusion that Applicant has not demonstrated responsible behavior in regard to his debts. We find no reason to disturb the Judge's application of the mitigating conditions.

Applicant contends that the Judge did not properly apply the whole-person factors in his evaluation of the case. Among other things, he asserts that "the Judge failed to make any inquiry to the Applicant's honesty, reliability, integrity, contacts with the community, loyalty to our country, and his trustworthiness, and therefore failed to consider it." To the extent that Applicant is arguing that the Judge should have conducted further investigation of the case, a Judge has no such authority. For the Judge to have done so would have been inconsistent with his responsibility to serve as an impartial fact-finder. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). To the extent that he is arguing that the Judge should have asked questions at the hearing concerning

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<sup>3</sup>The Judge stated that the recency of Applicant's payment efforts called into question their viability. Accordingly, he concluded that he could not extend full application to Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to replay overdue creditors or otherwise resolve debts[.]"

<sup>4</sup>Directive, Enclosure 2 ¶ 20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

Applicant's character, it is an applicant's responsibility to present evidence in mitigation. See Directive ¶ E3.1.15. In fact, Applicant submitted character evidence, which included opinions from those who know him concerning his trustworthiness, job performance, and other positive qualities. The record before us provides no reason to believe that the Judge failed to consider Applicant's character references or any other evidence. See, e.g., ISCR Case No. 11-00455 at 2 (App. Bd. Nov. 20, 2012) (A Judge is presumed to have considered all of the evidence in the record). Considering the record as a whole, the Judge's whole-person analysis complies with the requirements of the Directive, Enclosure 2 ¶ 2(a), in that he considered the totality of Applicant's conduct in reaching his decision. See, e.g., ISCR Case No. 10-03598 at 3 (App. Bd. Oct. 10, 2012).

The record supports a conclusion 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.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). See also Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

### Order

The Decision is **AFFIRMED**.

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

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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

