

KEYWORD: Guideline F

DIGEST: If Applicant was in any way confused or unclear as to the Judge’s proposals for leaving the record open, he was duty bound to bring up the issue at the time of hearing, or the post-hearing period granted by the Judge for post-hearing submissions. Applicant was not denied an opportunity to present evidence. Adverse decision affirmed.

CASENO: 12-00406.a1

DATE: 03/31/2014

DATE: March 31, 2014

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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**

Mr. Ronald Matthews, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 18, 2013, 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 December 30, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Claude R. Heiny denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether Applicant was denied an opportunity to present evidence; (2) whether the Judge erred in making certain findings of fact; and (3) whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 57 years old. From 1998 to 2010, Applicant was self-employed. His business went into decline and became totally unprofitable in 2011. His income levels for some years prior to that were extremely low. He purchased a home that went into foreclosure in 2009 in the amount of \$75,000 after he stopped making mortgage payments. He asserts that the lender has not brought an action to collect the deficit. The foreclosure was in the amount of \$75,000. He asserts that the lender has not brought an action to collect the deficit.

Applicant also owes \$14,423 in federal tax liens and \$8,000 of additional debt. He filed his income tax returns but did not have enough money to pay the full tax in 2002, 2003, and 2005. Applicant attempted to negotiate a settlement with the IRS; then in 2013 he hired a tax resolution service. The tax service would not enter into negotiations with the IRS until it was paid. Applicant asserted he made his final payment to the tax resolution service in November 2013. Applicant states that he owes the IRS approximately \$10,000, but provided no documentation from the IRS establishing the amount.

Applicant provided documentation that he paid a total of \$5,081 on his debts. He paid \$1,675 in federal tax and approximately \$1,500 in other SOR debts. He paid approximately \$1,900 in other non-SOR debts. Applicant's monthly net remainder after current expenses is approximately \$500. He has \$350 in his checking account and has no retirement fund.

In October 2011, Applicant stated he was immediately going to contact all of his delinquent creditors and set up payment plans. At the time he stated his financial status was "good." He indicated in mid-year 2013 that he had steady income and sufficient funds to commence paying his debts. At the time of the hearing he had one IRS tax lien that was partially paid, one IRS tax lien in the amount of \$10,391 that was unpaid, and eleven miscellaneous debts that were unpaid in the aggregate amount of \$4,585. On eight of the eleven debts, he has had no recent contact with the creditor.

The Judge concluded: To date, Applicant's efforts to address his delinquent accounts have been minimal. Applicant's handling of his finances, under the circumstances, casts doubt on his current reliability, trustworthiness, or good judgment. Without a meaningful track record of actual resolution of debts, it is unknown whether the debts will, in fact, be resolved in the future. In October 2011, Applicant stated he was going to immediately contact his creditors and establish repayment plans. This he did not do. Applicant has not had recent contact with a majority of his creditors. There is no documentary evidence to support his assertions that he contacted the majority of his creditors about repayment plans. There is no documentation that any repayment plan was reached. Applicant has failed to act aggressively, timely, or responsibly to resolve his delinquent

debts. A promise of future performance, no matter how sincere, is insufficient to demonstrate a track record of meeting financial obligations.

Applicant established that he had paid approximately \$3,000 on five of his debts, but only \$1,250 of this had been paid recently. He has initiated some effort to address his IRS debt, but he provided no documentation showing the tax resolution service was paid, and he has not reached an agreement with the IRS.

While the period of unemployment and reduced earnings were circumstances beyond Applicant's control, he either had no ability or no intention of paying his delinquent accounts. His long-standing failure to repay his creditors, at least in reasonable amounts, or to arrange payment plans, reflects traits which raise unmitigated concerns about his fitness to hold a security clearance.

Although Applicant's brief is not a model of clarity, he appears to raise the issue of whether or not he was provided ample opportunity to submit documentary evidence. He states at one point that he was not certain whether he could or should submit additional information he received after the hearing. He then states that he thought "the testimonies were good enough to clear the debt and SF86 questions and receive a favorable decision for a clearance." Applicant specifically mentions a credit report obtained on November 16, 2013, and states he was not aware he could submit this information. Lastly, Applicant states that he was under the impression that the transcript of the hearing would be mailed to him within 15 days, "so that we could add all information that was verbally testified to." Without specifically stating that he never received the hearing transcript, Applicant indicated that he waited until January 3, 2014, at which time he received notice of the Judge's unfavorable decision.

On three occasions during the hearing, the Judge indicated to the parties that he would keep the record open for ten days in order to receive additional documents to be considered.<sup>1</sup> Applicant was instructed by the Judge to present any additional matters to Department Counsel for his comment. The hearing transcript reveals no evidence of confusion or requests for amplification or explanation of what the Judge was doing on the part of Applicant. If Applicant was in any way confused or unclear as to the Judge's proposals for leaving the record open, he was duty bound to bring up the issue at the time of the hearing, or even during the ten day post-hearing period granted by the Judge for additional submissions. Applicants are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 01-20579 at 3 (App. Bd. Apr. 14, 2004). Also, the administrative file of the case indicates that Applicant received a Prehearing Guidance memorandum which explained the rights of the parties concerning the presentation of evidence. With reference to the current record and case file, there is no way to determine when or if Applicant received his copy of the hearing transcript. However, Applicant does not explain with any clarity why the transcript was necessary to submit additional documentary evidence. He was aware of the ten day deadline imposed by the Judge for additional submissions, and if he felt that receipt of the hearing transcript was a necessary prerequisite to the submission of additional evidence, the prudent step would have been to notify the Judge in a timely manner of the problem.

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<sup>1</sup>Tr. at 12, 13, and 77.

The Board concludes that Applicant was not denied procedural due process rights relating to his right to submit post-hearing evidence.

Applicant argues that the Judge erred in finding that he had a net remainder of monthly income of \$500, with which to pay bills, as opposed to \$100. Applicant states that the difference of \$400 made it look like he could have done more to pay his debts and made him look more irresponsible. The Judge's finding is supported by one piece of Applicant's testimony that, at the time of the hearing, he had \$500 in assets available to pay debts.<sup>2</sup> However, upon further questioning by Department Counsel, the context of Applicant's testimony emerged. Applicant indicated that he hadn't been able to put away \$500 at the end of the month heretofore because he had just recently finished paying the tax resolution service to represent him with the IRS.<sup>3</sup> Applicant's testimony just prior to the statement relied upon by the Judge indicates that earlier in 2013, Applicant had even less money available to pay bills than the net remainder of \$164.25 listed on his personal financial statement (Govt. Ex. 2).<sup>4</sup>

Resolving conflicts in the record evidence is the particular province of the Judge, and he is entitled to broad latitude. Here, however, the Board notes that Applicant himself gave conflicting testimony, and the substantial weight of the evidence, viewed in the context of Applicant's broader testimony and Department Counsel's clarifying questions, indicates that he did not have \$500 net monthly remainder with which to pay down debts.<sup>5</sup> Thus, the Judge's finding was error.

Having found error in the Judge's finding of fact, the Board must now determine the effect of that error. Even if the error had not been made, the Board concludes that the lack of the error would not reasonably be likely to change the outcome of the case. *See* ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006). In his analysis, the Judge makes no reference in any of his conclusions to his finding that Applicant had \$500 per month in disposable income with which to pay bills. Taken as a whole, the gravamen of the Judge's decision, in addition to the basic fact that a large number of Applicant's delinquent debts remain unpaid, is the fact that Applicant failed to maintain contact with his creditors and made no serious efforts to establish repayment plans. Considering the record as a whole, there is substantial evidence to support the Judge's adverse security clearance decision.

Applicant takes issue with the Judge's finding that, in addition to the IRS debts, he owes approximately \$8,000 in overdue debt. He claims that an updated credit report shows that he owes closer to \$2,100. The credit report upon which Applicant relies was never offered for inclusion in the record. Hence, it constitutes new evidence, which the Board cannot consider. Directive, ¶ E3.1.29. Thus, Applicant has failed to establish error on the part of the Judge.

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<sup>2</sup>Tr. at 71.

<sup>3</sup>Tr. at 71, 72.

<sup>4</sup>Tr. at 69-71.

<sup>5</sup>It is possible that Applicant's testimony about having \$500 per month available was prospective in nature. Just prior to the hearing Applicant made his last payment to the debt resolution service, and his testimony about the \$500 figure may represent what he anticipated having at his disposal moving forward.

Applicant makes reference to several other findings of the Judge, and offers commentary and additional explanation without claiming error. There is no presumption of error below, and claims of error must be raised with specificity. *See, e.g.*, ISCR Case No. 04-08312 at 2 (App. Bd. Jul. 14, 2005); ISCR Case No. 99-0519 at 9 (App. Bd. Feb. 23, 2001). Applicant has not established error on the part of the Judge regarding these additional findings of fact.

Applicant asserts that the Judge should have ultimately found in his favor owing to the facts that an unfortunate series of events led to his indebtedness, and he has made payments to creditors to the best of his ability while maintaining a house and while staying current on rent and utilities.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 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. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence.

In this case, the Judge made sustainable findings that Applicant had a lengthy history of not meeting financial obligations. He noted that despite some debt payment, at the time of the hearing Applicant still had a significant amount of overdue indebtedness, including outstanding tax delinquencies, and had not maintained recent contact with his creditors. The Judge concluded that Applicant's promises to pay his delinquent debts were no substitute for a track record of meaningful debt reduction. Applicant has not demonstrated that the Judge erred when he weighed the mitigating evidence against the seriousness of the disqualifying conduct.

Applicant requests that he be granted a probationary or conditional clearance, with the option that he could update the record regarding his debt repayment. Neither DOHA Hearing Office administrative judges nor the Board has the authority to grant conditional clearances. *See* ISCR Case No. 08-07904 at 3 (App. Bd. Mar. 3, 2010).

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). 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 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 decision of the Judge 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: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board