

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge made sustainable findings that Applicant had a lengthy and serious history of not meeting financial obligations including the purchase of a \$997,000 house and a \$40,000 piano.. Adverse decision affirmed

CASENO: 12-01185.a1

DATE: 03/18/2013

DATE: March 18, 2013

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In Re: )  
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----- ) ISCR Case No. 12-01185  
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Applicant for Security Clearance )  
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**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, 2012, 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 a hearing. On January 7, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Applicant raises the following issue 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. Applicant started a limited liability company (LLC) to do defense contracts in about 2004. Applicant used business loans and lines of credit for the company. In 2006, Applicant bought a house for \$997,000 in a city where the real estate market was booming. He financed \$900,000 with two loans from the same bank. When the real estate market crashed, several creditors closed or lowered the lines of credit Applicant used for LLC. The company was awarded a government contract in 2008. The contract gave the government the right to do business with LLC, but did not guarantee a set amount of work. LLC did not receive enough work to remain viable. Applicant used his personal credit to pay company expenses.

Applicant was hired by another company in 2009. Applicant still had his company. His employer felt it would be a conflict of interest for Applicant to work for both. Applicant was hired on the condition that he commit to cease working at his own business. Applicant gradually closed the physical plant of his company, but he did not terminate it as a business entity. In May 2010, the U.S. Small Business Administration (SBA) informed Applicant of possible defense contracting work for his business. Applicant did not withhold this information from his employer, and he invited his employer to attend a meeting on the potential contract. The meeting never took place. In June 2010, Applicant's employer terminated him for violation of his agreement to give up his work with his own company. Applicant was unemployed from June 2010 until August 2010. He worked for another company from August 2010 until he was hired by his current employer in February 2011. Applicant's company is still in existence. He owes the state \$10,000 for fees to the state for LLC.

The SOR alleges six delinquent debts with balances totaling about \$194,000 and a past-due second mortgage. Many of these were business debts. Applicant is making payments on a number of them, but has not negotiated a settlement with the creditor for any of them. One debt for \$40,000 was for the purchase of a grand piano Applicant stated was an investment. The piano was sold for \$20,000, and the balance on the debt was \$31,996.

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<sup>1</sup>The Judge made a favorable formal finding under Guideline E. This finding is not at issue on appeal.

Applicant resolved his delinquent mortgage loans through a short sale of his house. Applicant has not received any formal financial counseling. He has paid, or entered into agreements to pay, other debts not alleged in the SOR. He is working overseas and earns a good salary. He stated that he plans to settle his delinquent debts.

The Judge reached the following conclusions: Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. He spent beyond his means, as verified by the purchase of a \$997,000 house and a \$40,000 piano when his income could not justify purchases of those amounts. The failure of Applicant's business qualifies as a condition that was outside his control. Applicant may have hoped that his business would generate enough income to justify his high-cost purchases, but he was unable to grow or sustain the business. He has made some strides in paying and settling his debts, but he still owes well in excess of \$150,000.

Applicant has not acted responsibly under the circumstances, and he has not made a good-faith effort to pay his debts. His finances are not yet under control. His financial issues are recent and ongoing. A determination cannot be made that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. Financial concerns remain despite the presence of some mitigation.

Applicant asserts that he agrees with the majority of the Judge's assertions that he has made many mistakes in this matter. He admits to poor judgment, and indicates this was partially based on poor advice from legal counsel. He does fully accept the consequences of his actions. However, Applicant does not feel that his reliability and trustworthiness are in question. He points to the fact that he informed his workplace security personnel when he started the strategic default process. He believes his efforts to stay forthcoming to his superiors regarding his financial situation is evidence of his integrity and provides a reason why his security clearance should not be revoked.

Applicant asserts that the concerns over his finances have been mitigated by the passage of time and that circumstances existed that were beyond his control. He asserts that the focus was so much on his error of purchasing the house and the piano that he could not fully present the extenuating circumstances surrounding the failure of his business. Applicant also states that when he told the Judge that he had not received financial counseling, this was in error.

Applicant's submission on appeal contains matters that are not part of the record below. The Board cannot consider new evidence on appeal. *See* Directive, ¶ E3.1.29.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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). Applicant's assertion that he was unable to fully present extenuating circumstances in his case because of the focus on other matters is not entirely clear. To the extent that he is asserting that he was denied the opportunity at his hearing to fully present his case, such an assertion fails to

overcome the presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). After a review of the hearing transcript, the Board concludes that Applicant was not hindered in his ability to present his case fully.

In this case, the Judge made sustainable findings that Applicant had a lengthy and serious history of not meeting financial obligations and had made numerous choices regarding his finances that reflected questionable judgment. Central to the Judge's analysis was his conclusion that Applicant took on financial commitments with the purchase of a \$997,000 house and a \$40,000 piano that he could not support given his income level and a struggling business. The Judge also concluded that there is insufficient evidence to support a conclusion that Applicant's financial difficulties are behind him. These conclusions are supported by the record. The Judge adequately discussed why, given these factors, the disqualifying conduct established under Guideline F was not mitigated.

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 Judge's decision is AFFIRMED.

Signed: Michael Y. Ra'an  
Michael Y. Ra'an  
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