

KEYWORD: Guideline F

DIGEST: There is no presumption of error below. The appealing party has the burden of demonstrating error. Adverse decision affirmed.

CASENO: 12-10062.a1

DATE: 02/26/2015

DATE: February 26, 2015

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In Re: )  
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 ----- ) ISCR Case No. 12-10062  
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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 April 3, 2014, 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 10, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Rita C. O'Brien 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 issue on appeal: whether the Judge made an inaccurate finding of fact based on a misinterpretation of a document submitted by Applicant. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 36 years old. Applicant did not timely file federal income tax returns for 2004 through 2012 or state tax returns for 2005 through 2010. While living and working overseas between 2004 and 2009, coworkers told him that his income was not taxable because he was working outside the United States. Applicant also believed that he was due refunds for the tax years in question, so he did not file returns while outside the country. Applicant had not claimed the appropriate filing status for his income level, which resulted in his owing taxes to the IRS and to his state of residence. In 2011, the IRS filed a tax lien against Applicant for the tax years 2004 through 2007. The lien was for \$42,248, and was ultimately released in May 2013. By the time of his security interview in 2012, Applicant had filed his 2004 and 2008 tax returns as he was planning to file his outstanding delinquent returns one every other week. He planned to pay any penalties he owed, and to have all his back taxes resolved by August 2012. Returns were filed, but as of April 2012, he still owed the IRS \$30,000. In August 2014, Applicant and the IRS agreed on a payment plan of \$450 per month. Applicant has paid his state taxes for tax years 2008, 2009, and 2010. As of September 2014, he owed \$383 in delinquent state taxes for tax year 2011 and \$219 for tax year 2012.

Applicant's net monthly income is \$7,237. This includes income of his wife. His monthly expenditures, which include the \$450 IRS payment and a \$50 per month payment for back state taxes, is \$7,309. This results in a negative monthly cash flow of \$74.

The Judge reached the following conclusions: Applicant's failure to file income tax returns is not recent, however, it is frequent because it involved returns for numerous years. The fact that Applicant did little during a period of six years to investigate the validity of information from coworkers about his tax obligations casts doubt on his reliability and judgment. He has paid back state taxes for four years, and is making payments on his federal and remaining state tax delinquencies. However, his current financial statement shows a negative monthly remainder. Applicant's ability to maintain his payment plans is unclear. Applicant cannot receive full credit for a good-faith effort to meet his tax obligations. He did not file his first delinquent tax return until two years after he returned to the United States and after the IRS filed a tax lien against him. Although he has begun payment plans with the IRS and the state, he did not begin them until 2014. With his cash deficit each month, it is unclear if Applicant will be able to maintain his payment plans. He has not mitigated the security concerns raised by the financial considerations guideline.

Applicant asserts that the Judge was incorrect in finding that he runs a negative balance on his monthly cash flow, and that this incorrect finding was instrumental in the Judge's ultimate conclusion that it was not clearly consistent with the interests of national security to grant him a clearance. At issue is the Judge's evaluation and interpretation of Applicant's Exhibit J, a document showing the monthly household expenses for Applicant and his wife. The document shows a monthly entry for child support expenses in the amount of \$1,693. There is an asterisk placed next to this amount by Applicant and the asterisk relates to a note at the bottom of the expense list that reads, "Child support amount \$1,193 automatically paid." Applicant maintains that the variance in the two figures constitutes a discrepancy resulting from a typographical error wherein he mistakenly listed his monthly child support payments as \$1,693. He states that \$1,193 is the correct amount, and the Judge's finding that he had a negative monthly cash flow of \$74 was based on her reliance on the incorrect \$1,693 figure when making findings. Applicant states that the Judge's decision was based on her erroneous conclusion that, with a negative monthly cash flow, Applicant's prospects for paying off his delinquent tax debts in the future were limited. Applicant has not demonstrated error on the part of the Judge.

There is no presumption of error below, and the appealing party has the burden of demonstrating such error. *See, e.g.*, ISCR Case No. 00-0339 at 2 (App. Bd. Mar. 22, 2001). Applicant has failed to establish that the Judge's reliance on the \$1,693 figure when calculating Applicant's monthly expenses was error. The language contained in the asterisk note is vague, but a reasonable interpretation of the language in the note at the bottom of Applicant's Exhibit J is that \$1,193 of Applicant's expenses for child support were deducted from his pay, or "automatically paid." and the balance was paid through affirmative action by Applicant.<sup>1</sup> There would appear to be no other reason for including the asterisk and the note and relating them to the \$1,693 figure. There is nothing to suggest that the \$1,193 figure was a typographical error. Applicant also claims that a daycare expense figure of \$550 as listed on Exhibit J was in error, and the proper figure should be \$312. The Judge did not commit error if she relied on representations made by Applicant that he now claims were made mistakenly. The assertion that \$312 is the correct day care figure constitutes new evidence, which the Board cannot consider. Directive ¶ E3.29.1.

Even if Applicant could establish that the larger child support figure used by the Judge was error, a review of the Judge's decision convinces the Board that Applicant's negative cash flow was not the principal factor in the Judge's analysis.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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

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<sup>1</sup>In fact, this interpretation is bolstered significantly by Applicant's hearing testimony wherein he stated that he paid \$1,600 a month in child support, \$1,126 of which was automatically deducted from his bank account and was supplemented by an additional payment by him of \$500 per month (Tr. at 87).

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 Ra’anan  
Michael 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