

KEYWORD: Guideline F

DIGEST: A party alleging bias has a heavy burden of persuasion. A judge has no authority to promise a clearance nor is that how the Board understands the cited colloquy. Adverse decision affirmed

CASENO: 14-04664.a1

DATE: 07/24/2015

DATE: July 24, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-04664
)	
)	
Applicant for Security Clearance)	
_____)	

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 October 20, 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 May 11, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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 denied Applicant due process; whether the Judge was biased against Applicant; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant served in the U.S. military, from which he retired in 2007. In addition to his retirement pay, he receives disability pay from the VA. After retiring from the military, Applicant took a job with a Defense contractor. Applicant’s wife has not been able to find suitable employment.

Applicant bought a house for over \$290,000, financing the entire purchase with a mortgage. Shortly thereafter, the real estate market crashed, and Applicant’s house was worth less than the balance of his loan. At the same time, Applicant was experiencing financial difficulties due to his paying for the education of his three children.

Applicant’s SOR alleges the past-due amount on the mortgage loan, plus four other delinquent debts. Two of these four are duplicates of each other. In late 2012, Applicant retained a law firm to assist him in resolving his mortgage problem. On this attorney’s advice, Applicant stopped making payments on the loan while the attorney negotiated a short-sale. This did not succeed, and the home was sold in a foreclosure sale, resulting in a deficiency, although there is no indication that the lender is seeking to recoup this debt.

Applicant also has a credit card debt in excess of \$25,000. He states that he has entered into a payment plan, although he was unable to make some of the payments. When he finally succeeded in contacting the creditor, he was told the debt had been charged off and sold to a collection company, with whom he would have to deal. He produced an agreement to settle the debt for about \$8,800.

Other SOR debts include one owed to a bank. Applicant admits that the account is his, but he denies that the account has a balance. Applicant believes that he may have been a victim of identity theft. He also denied another debt alleged to be owed to a collection company. When asked about these two debts during his clearance interview, he stated that he would pay them if he determined that they were valid. He sent dispute letters to the credit reporting agencies about two weeks after the hearing.

Applicant enjoys a good reputation for loyalty, dedication, trustworthiness, leadership, and reliability. His references recommend that he be granted a clearance.

The Judge's Analysis

As stated above, the Judge concluded that one of the SOR debts was a duplicate of another one. However, he found that Applicant's presentation regarding the \$25,000 credit card debt amounted simply to a promise for future debt resolution, which the Judge concluded was not sufficient to show responsible action or that Applicant had made a good-faith effort to pay his debts. He stated that Applicant's ongoing financial problems "continue to cast doubt on his current reliability, trustworthiness, and good judgment." Decision at 7.

Discussion

Applicant cites to language in the Judge's decision to the effect that Applicant's debts are not in control.¹ Applicant argues that this is merely conjectural and shows that the Judge was biased against him. A party who alleges that a Judge is biased has a "heavy burden of persuasion." *See, e.g.,* ISCR Case No. 14-02207 at 2 (App. Bd. May 27, 2015). We have examined the transcript, the Judge's decision, and the entirety of the record. We find nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. The challenged comment by the Judge was consistent with the record that was before him, given the ongoing nature of Applicant's debts and Applicant's dilatory efforts at disputing and/or resolving them.

Applicant notes that the Judge held the record open for him to submit additional evidence, including evidence that he had disputed some of the debts. He submitted evidence that he had disputed the debts in question by sending letters to the credit reporting agencies. He argues that he did what the Judge required of him, which should have been enough to mitigate the security concerns in his case. We have examined the record, particularly the portions of the transcript that Applicant has cited. The Judge stated to Applicant that the credit reports contained evidence that he owed debts to certain banks, placing on Applicant the burden of providing evidence to the contrary. "[T]hey're enough to show that you owed them money. Once they do that, it's up to you to prove that you don't." Tr. at 63. Although the Judge advised Applicant that he had no legal obligation to do anything, if he requested extra time to provide evidence concerning his claim to have been a victim of identity theft, or that he otherwise did not owe the debts, the Judge would grant it. At the end of the hearing, the Judge held the record open for more than a month. Tr. at 67. Applicant submitted copies of letters he had written to credit reporting companies asserting that he did not owe the debts and demanding that they be removed from his reports. Applicant Exhibit F. He contends that he provided the evidence that the Judge needed and, therefore, should have been granted a clearance.

¹"I am unable to find that Applicant acted responsibly under the circumstances or that he made a good-faith effort to pay his debts. His finances are not yet under control." Decision at 7.

A Judge has no authority to promise an applicant a clearance, especially when he has not received all of the evidence. *See, e.g.*, ISCR Case No. 09-06602 at 2 (App. Bd. Jan. 28, 2011). In this case, however, we do not interpret the Judge’s colloquy with Applicant to constitute such a promise. Rather, noting Applicant’s testimony that he believed certain debts to be the result of identity theft, he gave Applicant extra time in which to provide evidence in support. He said nothing that would likely persuade a reasonable person that he was specifying the quantum of evidence sufficient to meet Applicant’s burden of persuasion. Neither did he say anything that would likely persuade a reasonable person that such evidence as Applicant actually submitted—letters demanding removal of the debts from his reports but with nothing other than his own assertions on the issue of the debts’ legitimacy—would support a favorable decision.

Applicant cites to his favorable evidence, including his service to the U.S. and his having held a clearance for many years without incident or concern. This was evidence that the Judge was required to consider, along with all the other evidence in the record. However, Applicant’s brief is not sufficient to rebut the presumption that the Judge considered all of the evidence. Nor is it sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-00321 at 3 (App. Bd. Jun. 5, 2015).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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