

DIGEST: The Appeal Board cannot consider new evidence. Adverse information from a credit report can normally meet the Government’s burden of production. There is a nexus between admitted or proved conduct under the Guidelines and an applicant’s eligibility for a clearance. A Judge is presumed to have considered all of the evidence in the record. Disagreement with a Judge’s weighing of the evidence is not enough to show that the Judge erred. Adverse decision affirmed.

CASE NO: 15-02093.a1

DATE: 11/17/2016

DATE: November 17, 2016

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| ----- |) | ISCR Case No. 15-02093 |
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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

Kristen E. Ittig, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 26, 2015, 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 July 21, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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’s findings of fact were unsupported by substantial evidence and whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He has been working for his current employer since 2004 and has held a security clearance since 1983. Since 2007, he has also been employed as an adjunct professor at a state university.

Applicant was married in 1983, separated in 2004, and divorced in 2011. Upon their separation, he moved into an apartment. He and his wife used credit cards to live on so that she could stay in the house with their three children and attend college. He also paid about \$3,500 monthly in alimony and child support. “At one time they had at least 20 credit cards open. As his wife would ‘max out’ an older credit card, they would open a new one, and on and again with unending credit.” Decision at 2. They incurred a massive amount of debt. He tried to pay the credit cards as best he could. He worked overtime and obtained a second job to help pay the bills.

When Applicant and his ex-wife divorced, she wanted to stay in the home and put the children through college. To assist her in qualifying to buy the home, Applicant took on the consumer credit card debt from the marriage. He then hired a debt management company to help him pay that debt. He paid \$3,000 to the debt management company to start the process and \$1,000 monthly. He soon realized the company was not doing anything to help him and his debt went into collection. Creditors were calling him, and most of the debts were charged-off.

The SOR alleged seven delinquent debts totaling about \$100,000. The debts alleged in SOR ¶¶ 1.a and 1.f are the same debt. This debt was placed for collection for about \$55,000 and charged-off for about \$49,600. Applicant claims he set up an arrangement to have the creditor automatically paid \$400 from his checking account each month, but those payments stopped at some point. He recently reinstated the payments and will continue them until the debt is paid. He believes he currently owes the creditor about \$24,300. He provided proof that he paid four of the other debts and claims he paid the remaining debt. He also paid a non-alleged debt of about \$13,000.

Applicant testified that he currently has three credit cards with zero balances. His credit rating recently improved. He is making monthly alimony payments of about \$2,700 and has about \$300 in discretionary funds at the end of the month. He has about \$75,000 in a 401(k) account. “Applicant recognizes his mistakes in the past and has no intention of engaging in these wild financial practices in the future.” Decision at 4. His work performance appraisals for 2013, 2014, and 2015 reflect he either “achieved excellence” or “exceeded expectations” in each rating category.

Id.

The Judge’s Analysis

The Judge found against Applicant on both of the duplicate debts and in favor of him on the remaining debts. In determining that disqualifying conditions 19(a) and 19(c) applied,¹ the Judge concluded that Applicant's delinquent debts were incurred by reckless spending. While his divorce contributed to his financial indebtedness, he made poor decisions and chose to handle the situation in a manner that aggravated his financial problems. After their separation, he and his ex-wife used credit cards to maintain a lifestyle to which they were accustomed even through they were trying to maintain two households. When they maxed out one credit card, they would open another. While he worked overtime and took on a second job, he did not live within his means. His history of reckless spending, without sufficient mitigation, shows irresponsibility, a pattern of unreliability, and poor judgment. The Judge noted there was a nexus between the nature and scope of Applicant's conduct and his eligibility for a security clearance.

Applicant recently focused on resolving his debts. He provided proof that he resolved some of his delinquent debts, but remains indebted to at least one creditor for about \$24,000.² "[T]he point here is that the Applicant has not shown that he is reasonable, responsible or uses good judgment. There is nothing in the record to show that Applicant can live within his means. Without more, the Applicant has failed to establish that he is financially responsible." Decision at 6.

Discussion

In his appeal brief, Applicant submitted a state court decision showing the attorney who operated the debt management company was disbarred and also provided an undated credit report in the brief. The state court decision and undated credit report were not previously included in the record. Those documents constitute new evidence that the Appeal Board can neither receive nor consider. Directive ¶ E3.1.29.

Applicant contends that the Judge erred in finding against him on both of the duplicate debts.³ The Appeal Board has noted that, if a debt is alleged twice in the SOR, an applicant should receive a favorable formal finding on at least one of those debts. *See, e.g.*, ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). The Judge's error, however, was harmless because it did not likely have an impact on the overall disposition of the case. *See, e.g.*, ISCR Case No. 14-02619 at 2 (App. Bd.

¹ Directive, Enclosure 2 ¶¶ 19(a) "inability or unwillingness to satisfy debts;" and 19(c) "a history of not meeting financial obligations[.]"

² In his post-hearing submission, Applicant provided a document dated March 9, 2016 (five days after the hearing), from the creditor listed in SOR ¶¶ 1.a/1.f that reflected he owed a balance of about \$49,600. The letter also indicated the creditor agreed to accept monthly payments of \$400 until the balance was paid in full. Applicant's Exhibit D. However, in Applicant's Answer to the SOR, he reported that he had paid \$405 a month on the debt from 2008 to 2013, thus reducing it by \$24,300.

³ In the brief, Applicant stated that the Judge orally struck the debt in SOR ¶ 1.a. Appeal Brief at 8. Our review of the transcript does not confirm that the Judge struck that debt. At the hearing, however, Department Counsel made the statement that, "if we strike [SOR ¶ 1.a]," then the debts in SOR ¶¶ 1.b - 1.g are separate consumer debts. Tr. at 42.

Apr. 7, 2016). In this regard, we note the Judge specifically found that the debts in SOR ¶¶ 1.a and 1.f were the same debt and considered those allegations as one debt in her analysis.⁴

Applicant argues that Department Counsel did not meet his burden of establishing disqualifying conditions 19(a) and 19(c) or a nexus between those conditions and Applicant's security clearance eligibility. These arguments lack merit. In his Answer to the SOR, Applicant admitted all but one of the alleged delinquent debts. Department Counsel also offered into evidence credit reports that proved the existence of those debts. It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's responsibility under Directive ¶ E3.1.14 for presenting evidence of controverted facts. *See, e.g.*, ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010). Additionally, the Directive presumes there is a nexus or rational connection between proven conduct under any of its guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 12-00084 at 3 (App. Bd. May 22, 2014). Nevertheless, it merits noting that the Judge specifically found a nexus existed in this case and explained how the nature and scope of Applicant's conduct negatively impacted his security clearance eligibility.

Applicant argues the Judge failed to give him credit for his "stated willingness" to borrow against his 401(k) account to pay the remaining unresolved debt (Appeal Brief at 9); the Judge failed to give him credit for the payment plan on that debt; and the Judge did not meaningfully apply the whole-person concept or the factors listed in Directive, Enclosure 2 ¶ 2(e) for making a clearance decision on an individual who is currently eligible for access to classified information. First, Applicant testified, "I could take a loan on my 401-K and pay it off in one lump sum, or whatever works. Or I could do a monthly thing." Tr. at 66. His testimony falls well short of a declared intention or even a "stated willingness" to borrow from his 401(k) account to pay the debt, but is more akin to a recognition of a possible way to resolve the debt, which is of little mitigative value. Second, the Judge made findings of fact that Applicant had a repayment plan for the remaining unresolved debt and discussed that plan in her mitigation analysis. She also indicated that she considered the "whole-person concept" in rendering her decision. A Judge is not required to discuss each and every piece of record evidence, and the presence of some mitigating evidence does not 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. 12-11660 at 3 (App. Bd. Jul. 9, 2014). Applicant's arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor are they 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. 14-01284 at 3 (App. Bd. Apr. 6, 2015).

⁴ In calculating the total amount of the debts alleged in the SOR, the Judge excluded the amount of the debt in SOR ¶ 1.a. She discussed this calculation at the hearing. Tr. at 42.

Applicant also argues that the Judge erred in her analysis of mitigating condition 20(b).⁵ He maintains that he acted responsibly in consolidating his debt, but also acknowledges that his conduct contributed to the delinquent debts and contends the Judge erred by “affording that [contributory] conduct dispositive significance.” Appeal Brief at 13. He further argues the Judge erred by completely ignoring the other mitigating conditions. However, he does not specifically challenge the Judge’s finding that he engaged in reckless spending that demonstrated irresponsibility, a pattern of unreliability, and poor judgment, but does acknowledge his approach to the marital debts was “unconventional.” Appeal Brief at 10. The Judge stated that none of the mitigating conditions were applicable in this case. Decision at 7. In her analysis, she concluded that mitigating condition 20(b) was not controlling and that Applicant has not acted responsibly under the circumstances, noting he continued to spend money he did not have and abused the credit card system in the process. Applicant’s arguments, in essence, are a disagreement with the Judge’s weighing of the evidence or an argument for a different interpretation of the evidence, which 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016). Although not discussed in her analysis, the Judge obviously gave Applicant credit under mitigating condition 20(d)⁶ for resolving the debts in SOR ¶¶ 1.b-1.e and 1.g, because she found in favor of him on those allegations.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Applicant has not identified any harmful error likely to change the outcome of the case. 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

⁵ 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[.]”

⁶ Directive, Enclosure 2 ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I believe the case should be remanded to the Judge to resolve a significant inconsistency. The adverse decision relies on one remaining debt (SOR allegation 1.a). The Judge, by implication, accepted Applicant's assertion that he had paid that debt down by making monthly payments from 2008 until 2013 (five years that predate the issuance of the SOR). The monthly payments were \$405 a month. Nonetheless, she found against him because "Applicant has not acted responsibly under the circumstances." (Decision at 7)

I believe that there is a contradiction between her finding that accepted the Applicant's assertion and her conclusion that he has not acted responsibly. I think that a new decision is in order.

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