

KEYWORD: Guideline F

DIGEST: A party's disagreement with the Judge's weighing of the evince , or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. Adverse decision affirmed.

CASENO: 12-03790.a1

DATE: 09/12/2014

DATE: September 12, 2014

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In Re: )	
)	
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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**

Thomas Albin, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 1, 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 June 16, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 the Board should conduct a plenary review of the case; (2) whether the Judge erred by allowing Department Counsel to make certain representations during closing argument; 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 59 years old. The SOR alleges delinquencies on three student loans. The SOR alleges that the amounts on the loans total more than \$89,000. Anticipating a financial windfall based on his ancestry and an expected increase in profits from his wife's business, Applicant borrowed more than \$100,000 in his name for his children's college educations. In addition, he co-signed about \$12,600 in student loan debt for a daughter, and about \$66,000 in student loan debt for a son. The anticipated additional income did not materialize.

Applicant's children did not make the payments when their loans came due, and the creditors eventually pursued Applicant because of his contractual liability. By 2013, two of Applicant's son's loans were in default. A third student loan belonging to the son was in collection by 2011. In 2014, Applicant withdrew about \$30,000 from his 401(k) account to settle one outstanding student loan. A second student loan was cancelled and the lender issued a 1099-C to Applicant for tax year 2013. Applicant agreed to pay \$4,200 to settle this debt, and the debt is likely to be settled by summer of 2014. Applicant's son has accepted responsibility for the third student loan debt. An application to consolidate payments for this loan was accepted in May, 2014.

For the most part, Applicant's payments on the loans he took out in his name for his children's education have been on time. However, he has been paying only the interest on a loan that has a principal balance of \$69,000. Applicant and his wife have been delinquent on their home mortgage since December 2013. Applicant and his wife have relied for some time on Applicant's overtime to meet their expenses and debt payments. The overtime was sufficient to cover a \$1,600 shortfall in the household budget until December 2013, when Applicant's wife was involved in a car accident and lost her income. In October 2014, Applicant will no longer be constrained by withdrawal limits from his 401(k), which has a balance of around \$70,000. His finances will likely improve in April 2015 when he starts to receive retirement pay from the National Guard. Applicant and his wife have yet to pay a \$1,000 consumer credit debt which needs to be resolved for their mortgage lender to consider refinancing their mortgage. Applicant is presently living with the burden of \$97,000 in parent loan debt.

The Judge reached the following conclusions: Applicant knew when he signed the educational loans for his children that he would be liable if they failed to make the payments. He raised concerns about his financial judgment by taking on student loan obligations well beyond what

he and his spouse could reasonably afford on their household income. Without proof of a legitimate claim to the inheritance, or of a more favorable business climate for his spouse's business, it cannot be concluded that Applicant acted fully responsibly when he took on the loan obligations. Applicant knew as of the end of 2011 that his daughter and son were behind in their student loan payments. When contacted by the creditors about the debts, he declined to pay them because they were his children's primary responsibility. When it became clear that the loans were adversely affecting his clearance eligibility, he took steps to retire one of the debts. As of May, 2014, the other two student loan debts have not been settled, although repayment arrangements are in place for those loans, and Applicant's son has taken responsibility for paying the larger loans. However, it would be premature to consider the Government's security concerns mitigated with regard to these loans in the absence of a track record of debt payments. While the current mortgage delinquency appears to be an unfortunate consequence of his spouse's car accident, it reflects the tenuous nature of Applicant's financial situation. He is still carrying \$97,000 in parent loan debt, and is repaying two loans from his 401(k). While Applicant's finances are likely to improve in 2015, the security clearance eligibility of an applicant must be based on present circumstances and not on future events. Should his son fail to make payments on the group of loans under the debt consolidation, Applicant has not shown that he will be able to resolve the debt in the near future.

Applicant asserts that the Board is able to conduct a plenary review of this case. He states that the limited scope of review generally employed by an appellate body is based upon the notion that the Judge is in the best position to assess the credibility of the parties. He then asserts that the Judge never indicated that Applicant's credibility and the credibility of his spouse were at issue during the hearing, and therefore the Board is as capable as the Judge of evaluating the evidence. The Board declines to engage in *de novo* review. The scope of the Board's review is set forth in the language of the Directive, which states, "The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. . . ." Directive, ¶ E3.1.32. Even if the Board accepts Applicant's assertion that witness credibility is not at issue in the case, the Board will not ignore the Judge's decision. Rather, the Board will review the Judge's decision in accordance with its appellate authority, as set forth in the Directive and well established principles of appellate review. *See* ISCR Case No. 02-20576 at 3 (App. Bd. May 4, 2004). Accordingly, the Board will consider Applicant's appeal only to ascertain whether it raises issues of factual or legal error by the Judge.

At the hearing, each party made a closing argument. At the conclusion of Applicant's closing, the Judge allowed Department Counsel to make a rebuttal argument. At that time Department Counsel referenced charitable contributions made by Applicant that appeared as deductions on tax returns that were in evidence. Department Counsel's argument essentially questioned the propriety of Applicant's contributions in light of his troubled financial profile. No mention was made of the charitable contributions in prior closing arguments. In a post-hearing submission, Applicant responded to Department Counsel's rebuttal. Applicant now argues that Department Counsel engaged in improper rebuttal argument at the hearing by raising an issue for the first time. He asserts that his inability to respond to Department Counsel's rebuttal "on the spot" created a situation wherein he could not effectively counter Department Counsel's argument with

a written statement. Applicant states that it was error for the Judge to allow the argument during the oral rebuttal.

Even assuming that Department Counsel's references to Applicant's charitable contributions were improper rebuttal, Applicant has failed to establish harmful error. First, Applicant did not avail himself of the opportunity to object to the argument at the hearing. Secondly, Applicant did take advantage of the opportunity to address Department Counsel's argument in writing, and that writing was made part of the record. Regarding Applicant's concern about the reduced effect his written response might have had upon the Judge, the Board notes that closing argument is not evidence. *See* ISCR Case No. 01-21939 at 3 (App. Bd. Feb. 26, 2003). Also, fact finders in DOHA proceedings are Judges with professional education and experience. In this setting there is less concern about the potential prejudicial effect of irregularities involving arguments than there would be in a setting before a lay jury. *See* ISCR Case No. 12-04540 at 3(App. Bd. Mar. 19, 2014). Finally, a review of the Judge's decision indicates that Applicant's charitable giving in the midst of overall financial difficulties was not a significant factor in her analysis of the case.<sup>1</sup>

Applicant argues that the Judge's whole-person analysis is flawed. He asserts that the totality of circumstances of the case should trump the partial or complete application of any of the mitigating factors and, in the present matter, the totality of circumstances dictates that Applicant should have retained his clearance. He emphasizes his motivations in helping out his son, the Judge's observation that Applicant's son was the primary obligor on the loans and should have taken responsibility for them, the fact that one of the loans has been totally satisfied and repayment agreements are in place for the remaining indebtedness, and the fact that he will shortly have additional sources of income at his disposal. Applicant has failed to establish error on the part of the Judge.

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

The gravamen of the Judge's analysis in this case is the fact that Applicant is in a tenuous position financially, having assumed student loan obligations either directly through his own loans or co-signing on his children's loans in amounts that exceeded his ability to repay, given his income level. One student loan remains delinquent at a time when Applicant is only making interest

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<sup>1</sup>The Judge mentions Applicant's tithing in one sentence in the findings of fact. There is no mention of it at all in the analysis portion of the Decision.

payments on another large loan that he incurred directly. The Judge's concern that Applicant will be unable to meet his obligations should his son default on the outstanding indebtedness is reasonably supported by the record evidence. Likewise, the Judge's conclusion that Applicant had not mitigated the Government's concerns because of the lack of a meaningful record of payments on the outstanding debt (by either his son or himself) is sustainable.

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 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