

KEYWORD: Guideline F

DIGEST: The Judge’s conclusion that Applicant had not laid a sufficient factual predicate to have the Judge rule on application of the state anti-deficiency statute was reasonable. Adverse decision affirmed.

CASENO: 12-05113.a1

DATE: 12/30/2014

DATE: December 30, 2014

In Re:	)	
	)	
-----	)	ISCR Case No. 12-05113
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Stephen Silvers, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 12, 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 September 17, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Jennifer I. Goldstein 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 erred in some of her findings of fact; whether the Judge failed to consider all of the evidence; 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 married his now ex-wife in the late 1990s. The couple bought a house. After moving in, and without Applicant's knowledge, the spouse received a number of credit cards and charged the maximum amounts on them. As a consequence of this financial problem, Applicant filed for Chapter 7 bankruptcy protection in 2000, discharging about \$70,000 in delinquent debt.

In 2006, Applicant bought a new house, financing the purchase with two mortgages. The first mortgage was at a fixed rate, the second at a flexible rate. Unfortunately, Applicant was able to make his payments for this house for only two years. Applicant stopped making payments in 2008, despite an annual income of \$100,000. He stated that the reason for this delinquency was the high cost of his marital separation. He and his ex-wife were divorced in early 2014. He had requested the court to order a short sale of the house, but it declined to do so because a minor child was living there.

The divorce decree permitted the ex-spouse to reside in the house until it was foreclosed upon; however, as of the close of the record, the lender had yet to seek foreclosure. To save money, Applicant has moved back into the house but is looking for an apartment to rent. The holder of the first mortgage has offered Applicant a loan modification, but he has been unwilling to accept it despite having the financial ability to make the payments. Instead, he has sought a deed-in-lieu of foreclosure. He has not had any contact with the second mortgage holder in almost four years. He believes that his state's anti-deficiency law protects him from liability on deficiency judgments.

Applicant's SOR alleges another debt, a delinquent medical bill for his ex-wife's dental care. This debt has been resolved. He also stated that he had resolved a non-alleged debt for legal fees owed to an attorney who handled his daughter's divorce proceeding. In early 2014, Applicant bought two vehicles, which were for his ex-wife and his daughter. His ex-wife is supposed to give him money for the monthly payments on hers. Applicant has over \$200,000 in retirement savings and an annual salary of \$140,000. He attended no counseling or debt consolidation programs. His uncle, a retired CPA, is advising him on his financial affairs. He advised Applicant not to withdraw funds from his retirement account. Applicant enjoys a good reputation for trustworthiness and dedication to family. He is said to live a modest and abstemious lifestyle. He enjoys a good reputation at work for being hardworking, loyal, and honest.

### **The Judge's Analysis**

The Judge concluded that Applicant's circumstances raised concerns under Guideline F. She resolved the dental bill in his favor. However, she found that Applicant had not mitigated remaining allegations, which addressed his mortgage delinquencies and bankruptcy. She noted his argument that the state's anti-deficiency statute precludes liability for deficiency judgments. However, she stated that it was premature to conclude that the law shields Applicant from liability, insofar as no foreclosure action had been commenced. She stated that his problems were ongoing and the evidence did not provide a reason to conclude that they would not recur.

She noted circumstances outside Applicant's control that affected his finances, such as his divorce and the drop in the housing market. She went on to conclude that Applicant had not demonstrated responsible action in regard to his debts. She noted evidence that he stopped making payments on the house in 2008, despite an annual income of \$100,000, that he has had no contact with the second mortgage holder in several years, and that he has rejected an offer for a loan modification despite an ability to make the payments. She noted that he is seeking a deed-in-lieu of foreclosure. She went on to observe that Applicant, "his ex-wife, and his daughter are all still living in the house for free." Decision at 6. The Judge found that Applicant had not sought formal debt counseling, although he is receiving advice from his uncle, a retired CPA. She concluded that Applicant had not made a good-faith effort to pay his debts, nor has he provided a reason to believe that his financial problems are resolved or are under control.

In the whole-person analysis, the Judge noted evidence that Applicant enjoys a good reputation for honesty, hard work, and dedication to his job. Despite this, she stated that he makes a substantial income, has nearly \$225,000 in retirement savings, and was able to purchase two vehicles for his ex-wife and his daughter. She stated that Applicant has not made any payments since 2008 on the house that he owns and in which he currently resides. She concluded that Applicant has exercised "questionable judgment" and that the evidence left her with doubts about his suitability for a clearance. *Id.* At 8.

## **Discussion**

Applicant has challenged some of the Judge's findings. In particular, he contends that the Judge erred in finding that it was premature to conclude that the anti-deficiency statute would protect him from liability for a default judgement. He also argues that the Judge did not properly evaluate the evidence concerning the offered loan modification, thereby impairing her findings on this matter. We examine a Judge's findings of fact to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. In presenting his argument, Applicant has cited to matters from outside the record, specifically events that post-date the decision. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Concerning the applicability of the anti-deficiency statute in the context of a security clearance or trustworthiness adjudication (as opposed to the mere collectability question), we have previously held that DOHA Judges are capable of ruling on this issue when an applicant has laid an adequate factual predicate and the applicant's conduct and circumstances are otherwise appropriate.

*See, e.g.*, ISCR Case No. 12-04806 at 3-4 (App. Bd. Jul. 3, 2014). In this case, the Judge appears to have concluded that such a predicate had not been laid, in that the events necessary to trigger the anti-deficiency statute had not occurred by the close of the record. This conclusion was reasonable, given the evidence that was before her. Even if she had erred, however, it did not likely affect the outcome of the case. Her analysis devoted significant attention to evidence that Applicant's financial problems arose from conduct that impugned his judgment, irrespective of the extent to which he may come to enjoy the protection of the anti-deficiency statute. Therefore, any error on this issue would have been harmless.

Applicant's argument about the Judge's treatment of the loan modification offer does not cite to an actual error in her findings. Rather, it appears to challenge the manner in which the Judge viewed this evidence and the weight that she extended to it. He cites to evidence from which he argues that a reasonable person would not want to continue making payments on a house in which an ex-wife is living, in that doing so would impose an undue financial burden. Applicant's argument is not sufficient to undermine the Judge's findings of fact on this matter. It is not controverted that Applicant was offered a loan modification from his primary lender, that he had sufficient income and other financial means to make the payments, and that he rejected the offer. Applicant's contention that this was a responsible course of action merely argues for an alternative interpretation of the record evidence, which is not sufficient to undermine the Judge's findings or her weighing of the evidence. *See, e.g.*, ISCR Case No. 12-03790 at 4 (App. Bd. Sep. 12, 2014). We have considered

the entirety of Applicant's argument regarding the sufficiency of the Judge's findings. Her material findings of security concern are supported by substantial record evidence or constitute reasonable conclusions that could be drawn from the evidence. Applicant has not cited to a harmful error in the Judge's findings of fact. *See, e.g.*, ISCR Case No. 14-00151 at 3 (App. Bd. Sep. 12, 2014).

Applicant notes that the Judge gave him time after the hearing to submit additional evidence concerning his effort to resolve his mortgage debts. Applicant submitted such evidence within the time allotted. He further notes that Department Counsel did not object to the admission of this evidence. He argues that by not objecting Department Counsel conceded that Applicant had mitigated all of the security concerns in his case. However, Department Counsel merely conveyed that she had no legal objection to the Judge's consideration of these documents, not that she believed that they were dispositive of the issues that were before the Judge.<sup>1</sup>

Applicant argues that the Judge erred in her mitigation analysis. He cites to his evidence regarding the anti-deficiency law, his reasons not to pursue a loan modification, his marital difficulties, his good character, and other things that he believes show that he has overcome any security concerns in his case. Applicant's argument is not sufficient to rebut the presumption that

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<sup>1</sup>To the extent that Applicant is arguing that his case did not raise security concerns, we note that his delinquent debts were established by his credit reports, his answers to DOHA interrogatories, and his answers to pertinent questions on the security clearance application. The Directive presumes a nexus between proven conduct under any Guideline and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 11-10255 at 4 (App. Bd. Jul. 28, 2014). The Government presented substantial evidence of security concerns.

the Judge considered all of the evidence in the record. Neither is it sufficient to show that the Judge mis-weighed the evidence, viewed as a whole. *See, e.g.*, ISCR Case No. 14-00151 at 3, *supra*. We note the Judge’s findings, and record evidence, of the following: (1) Applicant was discharged in bankruptcy in 2000; (2) Applicant was aware that delinquent debts can affect one’s security clearance (Tr. at 63); (3) Applicant ceased making payments on his house in 2008; (4) Applicant’s ex-wife and daughter have lived in the house ever since, and he currently resides there himself, in essence for free; (5) as of the close of the record Applicant had not resolved his mortgage delinquencies; and (6) he appears to have the financial means to have done so. In light of this, the Judge’s conclusion that Applicant’s financial problems raised concerns about his judgment and reliability, which are integral to a security clearance analysis, is supportable. *See* Directive, Enclosure 2 ¶18 (Failure to meet financial obligations may indicate, *inter alia*, a lack of judgment, raising questions about an applicant’s ability to protect classified information). Applicant’s mitigation case consists, in essence, of promises of future action, rather than of a demonstrated track record of debt resolution. *See, e.g.*, ISCR Case No. 09-02926 at 2 (App. Bd. May 11, 2010).

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 Y. Ra’anan  
Michael Y. 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 Board13.a1

DATE: 12/30/2014