

KEYWORD: Guideline F

DIGEST: Applicant has not rebutted the presumption that the Judge was impartial. Adverse decision affirmed.

CASENO: 14-06440.a1

DATE: 01/08/2016

DATE: January 8, 2016

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In Re: )  
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 ----- ) ISCR Case No. 14-06440  
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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 20, 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 October 21, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 was biased against Applicant; whether Applicant was denied due process 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 military from 1977 to 1997. He has two children, the younger of whom is in college. He is providing his college-age child with support. Prior to 2013, Applicant’s wife was unemployed. She now works, earning about \$30,000 a year. Applicant bought a home in 1998. He obtained a second mortgage the next year in order to finance the addition of a pool. In 2006, he and his wife purchased another house, this one for Applicant’s wife’s sister. The sister put down \$40,000 and was to make the monthly mortgage payments. In 2007, Applicant took out an equity loan to pay off some credit cards and finance the purchase of a boat.

In 2009, Applicant began experiencing financial difficulties due to family problems. His parents-in-law passed away, leaving their home to Applicant’s wife and sister. The house had not been paid for, so Applicant attempted to make the mortgage payments until they could sell it. Unfortunately, they had trouble selling it, because the house was appraised for less than the balance of the loan. Applicant paid some legal fees for his son, as well as medical expenses that were not covered by insurance. In addition, Applicant made trips to another city to help move his mother into an assisted living facility. Due to these events, Applicant’s credit card debt increased.

Applicant took a job in another state. He attempted to sell his residence, but this attempt also failed because the value of the house was less than the mortgage. The new job did not work out, so Applicant returned to his original domicile. A subsequent IRS audit determined that he owed another \$12,000 in taxes, and Applicant entered into an installment agreement to pay this debt. Applicant’s sister-in-law lost her job and became unable to pay the mortgage on the house that Applicant had purchased for her. They attempted to return the house to the bank but were not successful.

Applicant sought a loan modification for his primary mortgage debt. The creditor did not agree, however, and filed suit against Applicant. The creditor obtained a judgment in foreclosure against Applicant in the amount of a little over \$278,000. Applicant contended that this house is now awaiting a short sale that will resolve the first mortgage loan. There is a second mortgage on the house, but Applicant contends that it will be resolved through a “deficiency clause.” Decision at 4.

Applicant hired an attorney to advise him on his financial situation. Initially suggesting bankruptcy, the attorney subsequently recommended a strategic default. He has not paid on the loan since 2011 and has continued to live in the house. He also engaged in a strategic default on the loan for the house that he purchased for his sister-in-law. She continued to live there until 2014, and his son lives there now. His son does not pay the mortgage or rent.

Applicant stated that he decided to pursue the strategic defaults because he could not pay his creditors. He chose to stop paying on the houses on the advice of his attorney. Applicant has about \$500 in expendable monthly income. He has paid off his debt to the IRS, and he has received credit counseling from his attorney. He self-reported to his security officer that his house was being foreclosed.

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

The Judge resolved some of the SOR debts in Applicant's favor. For the mortgage debts on his house and the house he purchased for his sister-in-law, however, the Judge reached the opposite conclusion. She stated that some of the reasons for Applicant's financial problems were beyond his control but not all of them, such as his purchase of the home for his in-law and his taking a job in another state. She noted that Applicant forced the lender to take him to court, with the result that Applicant has a judgment against him. She concluded that Applicant had not acted responsibly in regard to his debts, nor is there evidence that his financial situation is under control. She also concluded that a strategic default, which forces the creditor to resort to litigation or accept a lesser amount, does not constitute a good-faith effort to pay debts.

In the whole-person analysis, the Judge cited to Applicant's military service and circumstances outside his control that affected his financial situation. She stated, however, that Applicant's means of resolving his debts, while lawful and shrewd as a business strategy, raise questions about his judgment, reliability, and trustworthiness. Moreover, he still has a significant amount of delinquent debt that has not been resolved.

### **Discussion**

Applicant contends that the Judge exhibited bias against him, citing to her reference to his living "rent free" in his house that is the subject of the short-sale. He also cites to the Judge's conclusions about the amount of his outstanding debts and about his plan to resolve them through short sales. A Judge is presumed to be impartial, and a party who contends otherwise has a "heavy burden" on appeal. *See, e.g.*, ISCR Case No. 14-03108 at 3 (App. Bd. May 20, 2015).

We have reviewed the record evidence, paying particular attention to the transcript of the hearing. We find nothing therein that would persuade a reasonable person that the Judge lacked the requisite impartiality. The phrase "rent free," which occurs twice in the transcript but is not found in the Decision itself (Tr. at 75 and 101), is a fair characterization of Applicant's circumstances, insofar as he has been living in his house without making rent or mortgage payments since 2011.

Other comments by the Judge appear to be reasonable conclusions drawn from the evidence that was before her. Applicant has not rebutted the presumption that the Judge was impartial.

Applicant argues that he did not know until the hearing what particular aspects of his circumstances raised concerns under Guideline F. He states that only when Department Counsel directed his attention to Directive, Enclosure 2 ¶ 19(a) (“inability or unwillingness to satisfy debts”) did he understand the concern.<sup>1</sup> To the extent that he is arguing that he did not receive due process, an applicant is entitled to receive an SOR that places him on reasonable notice of the allegations being made against him. However, an SOR is an administrative pleading that does not have to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 04-08806 at 3 (App. Bd. May 8, 2007). Neither does it have to specify which particular disqualifying conditions might be pertinent.

In this case, the SOR alleged Applicant’s delinquent debts with sufficient specificity that a reasonable person would understand the nature and extent of the Guideline F security concerns at issue. Moreover, at the beginning of the hearing, Applicant raised this matter with the Judge, who explained to him in some detail the concerns that can arise from delinquent debts and the procedures that would be followed in the hearing. Tr. at 15-18. At the end of this explanation, Applicant stated that he was ready to proceed and neither did nor said anything further that would have caused the Judge to believe that he did not understand the nature of the proceeding. We find no reason to conclude that Applicant was denied the due process afforded by the Directive.

Applicant challenges the Judge’s treatment of the mitigating conditions. He argues that his strategic defaults were done upon the advice of counsel and constitute a legal and reasonable way to resolve his mortgage debts. The Judge stated that Applicant’s efforts were lawful. Decision at 10. However, the lawfulness of a course of action does not necessarily resolve questions about an applicant’s reliability with regard to classified information. For example, mere reliance upon a legally available option such as bankruptcy or the statute of limitations is not enough to show a good-faith effort to resolve debts. *See* ISCR Case No. 12-01664 at 3 (App. Bd. Jan. 17, 2014).

By the same token, Applicant’s decision to default upon a contractual obligation, even if done upon the advice of counsel, might nevertheless have adverse effects on him. One such effect might be an impairment of his ability to obtain credit. *See, e.g.*, Government Exhibit 4, Credit Report. Another would be that such conduct raises questions as to his willingness or ability to abide by other obligations, such as those governing the protection of classified information. This is especially true in light of the Judge’s findings and conclusions about the extent to which Applicant’s financial problems were the result of his own conduct and not solely due to circumstances outside his control. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015) for the proposition that even if an applicant has in some way or another resolved his debts, a Judge may consider the circumstances underlying them or their resolution.

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<sup>1</sup>Applicant does not appear to question the applicability of this disqualifying condition. His appeal argument is that he presented sufficient evidence to mitigate the concern arising from his financial problems.

Applicant’s argument is, in essence, a disagreement with the Judge’s weighing of the evidence. His argument, however, is not 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. 14-05251 at 3-4 (App. Bd. Oct. 5, 2015). Given the totality of Applicant’s circumstances, the Judge’s conclusion that he had not mitigated the concerns arising from his financial delinquencies is supportable.

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: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

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