

KEYWORD: Guideline F

DIGEST: Applicant argues that the Judge’s analysis was flawed when he concluded Applicant forced his creditors through the bankruptcy process to accept far less than what they are owed. The Judge may properly consider that, even if the current Chapter 13 bankruptcy plan is successfully carried out, Applicant will have avoided paying the creditors much of his debt. Adverse decision affirmed.

CASE NO: 15-00682.a1

DATE: 07/13/2016

DATE: July 13, 2016

In Re:	)	)	
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	)	)	
Applicant for Security Clearance	)	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 17, 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 May 23, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Matthew E. Malone denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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 is a 54-year-old employee of a defense contractor. He began working for his current employer in 2010. He served in the military from 1985 to 2005 and retired in pay grade E-6. He had hoped to serve longer in the military, but was unable to do so because of the service's high-year tenure policy.

When he married in 1994, Applicant did not have any financial problems and was able to pay his debts on time. His wife came to the marriage with significant personal debt from her previous marriage. In 1995, he filed Chapter 13 bankruptcy and started making monthly payments under an approved wage earner's plan. When the monthly payments increased to accommodate petition modifications, he was unable to keep up with the payments. His bankruptcy was converted to a Chapter 7 proceeding, and he received a discharge of his debts in 1997.

In 2004, Applicant filed a second Chapter 13 bankruptcy petition because he fell behind on his truck payments and his wife, who had medical problems over the years, was unable to qualify for disability benefits. After retiring from the military, he was unable find work to meet his financial obligations. His pending bankruptcy was converted to a Chapter 7 proceeding, and he received a discharge of his debts in 2005.

From 2005 to 2010, Applicant experienced periods of unemployment and part-time employment. In 2009, he fell behind on his mortgage payments and other obligations when he was laid off from a full-time job. He filed a third Chapter 13 bankruptcy in 2009. This bankruptcy is still ongoing; however, it was dismissed three times for failure to make payments and those dismissals were later vacated. In 2015, the latest dismissal was vacated, and Applicant is making monthly payments of \$450 under a wage earner's plan that addresses all but one of the 24 debts listed in the SOR.

The one debt not addressed in the current Chapter 13 bankruptcy is Applicant's mortgage. This mortgage was removed from the original 2009 petition after Applicant was unsuccessful in obtaining a mortgage modification that was a condition for him to be granted a modification to the bankruptcy petition. The home has since gone into foreclosure. Besides decisions relating to his attempts to salvage his mortgage, Applicant attributes the bankruptcy dismissals and re-filings to changes in, and alleged malfeasance by, his bankruptcy lawyers. Another reason for the bankruptcy revision was the perfection of a lien by a homeowner's association for unpaid dues that he paid in installments outside the bankruptcy proceeding in 2015.

Another factor that complicated Applicant's bankruptcy was unpaid taxes arising from miscalculation of his Federal tax returns after he retired from the military. Taxes were not being

withheld from his retired pay resulting in a tax bill he was unable to pay. He also miscalculated the tax reporting requirements of his wife's disability income and incurred another tax bill. His past-due tax obligations are included in his Chapter 13 payments.

Applicant has been making the monthly payments under the current version of his Chapter 13 bankruptcy, through which his debts will be satisfied in September 2017. He characterized his current finances as sound. He has not accrued new delinquent debts since he began working for his current employer. He has about \$1,500 in monthly discretionary income after meeting all of his monthly financial obligations, including the bankruptcy payment. Other than financial counseling associated with his bankruptcy filings, he has not obtained professional financial assistance.

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

In his analysis, the Judge addressed four mitigating conditions and explained why three did not apply and one was eligible for limited application.<sup>1</sup> He found that Applicant experienced unforeseen events that impacted his financial health. In concluding that Applicant did not act responsibly under the circumstances, he briefly reviewed Applicant's bankruptcy history and stated that, although Applicant is now engaged in a manageable repayment plan, his past performance does not inspire confidence that he will actually complete this plan without interruption. The Judge noted Applicant did not submit information to corroborate his claim that his current finances are sound and his debts are under control. He concluded Applicant has not made good-faith efforts over the years to repay his debts, but forced creditors to comply with bankruptcy procedures to accept far less than what they are owed. In making a whole-person assessment, the Judge stated he evaluated the record, including Applicant's military service.

### **Discussion**

Applicant argues that the Judge's analysis was flawed when he concluded Applicant forced his creditors through the bankruptcy process to accept far less than what they are owed. Specifically, he stated this is poor analysis because there is no regulation that indicates an applicant must settle for the full amount of the debt owed. This argument, however, lacks merit.<sup>2</sup> Ongoing bankruptcy proceedings do not insulate Applicant's financial problems from scrutiny. "The degree to which a Chapter 13 bankruptcy plan makes an applicant's creditors whole is a factor that a Judge is entitled to consider when evaluating whether an applicant is acting reasonably to rectify his financial difficulties." *See, e.g.,* ISCR Case No. 09-03764 at 3 (App. Bd. Apr. 1, 2010). Accordingly, the Judge may properly consider that, even if the current Chapter 13 plan is successfully carried out, Applicant will have avoided paying the creditors much of his debt.

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<sup>1</sup> The mitigation condition that the Judge found had limited application was 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[.]"

<sup>2</sup> Applicant uses the word "bias" once in his brief. Reading the brief as a whole, we conclude he did not articulate an argument that the Judge was biased.

Applicant further contends that the Judge did not consider all of the relevant evidence and mitigating factors. In support of that claim, Applicant cites to his financial stability before his marriage, his unemployment, and his current payments under a Chapter 13 bankruptcy plan through which his debts will be resolved in September 2017. The Judge, however, made findings about those matters. Applicant failed to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-05959 at 2 (App. Bd. Apr. 6, 2016). Applicant also failed to identify any specific mitigating condition that the Judge did not appropriately consider. Additionally, his disagreement with the Judge’s weighing of the evidence was 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. 14-03747 at 3 (App. Bd. Nov. 13, 2015). We give due consideration to the Hearing Office case that Applicant has cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge’s decision. *Id.* In reaching his decision, the Judge considered the totality of the evidence in compliance with the whole-person analysis requirements. *See* Directive, Enclosure 2 ¶ 2 and ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

The Judge examined the relevant evidence 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: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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