

KEYWORD: Guideline B; Guideline C; Guideline F

DIGEST: Applicant’s argument that by communicating with his creditor as the Judge envisioned he could have reaffirmed his debts is moot, in that he never did undertake that course of action. Any error by the Judge was harmless in that it did not affect the outcome. Adverse decision affirmed.

CASE NO: 15-03786.a1

DATE: 04/21/2017

DATE: April 21, 2017

_____)
In Re:)
)
-----) ADP Case No. 15-03786
)
)
Applicant for Public Trust Position)
_____)

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 trustworthiness designation. On December 9, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 30, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a trustworthiness designation. Applicant appealed

pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge denied him due process and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines B and C are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: Applicant purchased rental property in 2007, with a view of reselling it at a profit. However, he experienced a negative cash flow from his agreement with the renter. He attempted to short sell the property, but it went into foreclosure. The sale resulted in a deficiency, which Applicant estimated at about \$144,000. He stated that an attorney told him to ignore this debt because eventually the lender would write it off. The SOR alleges two debts—\$41,000 and \$147,000—owed to the same mortgage company.

Applicant received financial counseling and consulted with a bankruptcy attorney. He has reduced a \$44,000 credit card debt to zero and is current on all his bills. His credit score is 743, which is considered excellent. Applicant has about \$120,000 in a 401(k) account.

Applicant requested additional time to ascertain the status of his debt. The Judge gave him 60 days to contact the creditor and determine the status of the debts alleged in the SOR. Following the hearing, Applicant stated that the statute of limitations for deficiency judgments had run. He cited to a law that established three years as the limitations period for suits to enforce deficiency judgments.

The Judge found that Applicant did not explain how he knew that the creditor had not sought or obtained a deficiency judgment, nor did he aver that he had even contacted the creditor. He provided no copies of correspondence with the creditor or documentary evidence to show that a debt had been forgiven. Applicant did not disclose whether he had searched property records for evidence of a deficiency judgment.

Applicant enjoys a good reputation for his ethical standards as well as his reliability and trustworthiness. A colleague recommends that he receive a trustworthiness designation.

The Judge's Analysis

The Judge cleared Applicant of all but the Guideline F allegations, for which he concluded that none of the mitigating conditions fully applied. The Judge noted that Applicant's property went into foreclosure in 2010 and that since then Applicant had increased the value of his 401(k) plan by \$100,000. The Judge noted that the creditor may well not have sought enforcement of the deficiency during the limitations period. The Judge noted evidence of Applicant's excellent credit rating. However, he cited to Appeal Board precedent to the effect that reliance on the non-collectibility of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive. *See, e.g.*, ISCR Case No. 10-03656 at 3 (App. Bd. Jan. 19, 2011). He also cited to cases holding that

a debt's having dropped off a credit report in and of itself provides no meaningful evidence of debt resolution or of financial rehabilitation. *See, e.g.*, ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017). Having so noted, the Judge went on to state that Applicant had provided insufficient evidence about his financial delinquencies to establish mitigation. He concluded that there is not enough evidence in the record to support a conclusion that Applicant's problems are truly behind him and will not recur.

In the whole-person analysis, the Judge cited to evidence that Applicant had not contacted the mortgage lender for several years and, although given two months in which to present evidence of the status of the SOR debts, did not even get in touch with the creditor. Applicant did not provide sufficient evidence to clarify the status of the debts or to show that they were resolved.

Discussion

Applicant contends that the Judge treated him unfairly. Although not persuasive, Applicant's contention merits discussion. He notes that the Judge gave him extra time in which to present evidence about the status of his debts, but that the Judge concluded that the evidence he submitted was of insufficient mitigating value. Applicant states that the debts in question do not appear on his most recent credit report, which he argues is proof that the creditor did not pursue the deficiency within the limitations period and that it is no longer collectable. He contends that the Judge's recommendation to contact his creditor constituted pressure to reopen a debt barred by the statute of limitations, which he analogized to entrapment.¹

At the hearing the Judge provided guidance to Applicant as to what kind of evidence might be helpful.

[L]et's say you call them up and they say it's beyond the statute of limitations, it's not a collectable debt, we're not interested in being paid. If you can get a letter from them or some documentation to confirm that, then the debt is resolved. Tr. at 41.

As the Judge found, Applicant provided no reason to believe that he had contacted the creditor at all. Rather, he merely cited to state law concerning the statute of limitations along with an uncorroborated assertion that the creditor had not sought enforcement within the time provided by law. Applicant's argument that by communicating with his creditor as the Judge envisioned he could have reaffirmed his debts is moot, in that he never did undertake that course of action.² Any error by the Judge was harmless in that it did not affect the outcome. *See, e.g.*, ISCR Case No. 15-

¹Applicant also contends that the Judge denied him certain rights under the U.S. Constitution. However, the authority of Hearing Office Judges as well as of Administrative Judge members of the Appeal Board is limited to applying the provisions of the Directive. A DOHA proceeding is not a proper venue to address claims that an applicant's Constitutional rights have been violated. *See, e.g.*, ISCR Case No. 08-05344 at 3 (App. Bd. Feb. 3, 2010).

²Applicant's argument has some merit. We note the Judge's comment that if Applicant could get a statement to the effect that the debt in question is time-barred his Guideline F concerns would be mitigated. A Judge has no authority to promise an applicant a clearance or to advise an applicant on the quantum of evidence that would mitigate the concerns in his or her case. *See, e.g.*, ISCR Case No. 14-02806 at 3, n.1 (App. Bd. Sep. 9, 2015). In addition, actions in a clearance adjudication may have significant ramifications in other aspects of an applicant's life.

00535 at 3 (App. Bd. Mar. 13, 2017). Applicant was not denied the due process afforded by the Directive. Otherwise, Applicant's argument is a disagreement with the Judge's weighing of the evidence, in particular the credit report, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 12-09387 at 2 (App. Bd. Apr. 26, 2016).

We have considered Applicant's challenge to the Judge's application of the mitigating conditions and the whole-person factors. We note his reliance upon his credit score, which the Judge explicitly addressed in his Decision. He also reiterates his contention that the statute of limitations applied to his debts. As stated above, we find no error in the Judge's analysis on this matter. Moreover, even if enforcement of these debts were barred by the statute of limitations, the Judge could still consider the circumstances underlying them, or a paucity of evidence explaining what Applicant may have done to resolve them. *See, e.g.*, ISCR Case No. 09-08550 at 4 (App. Bd. Feb. 25, 2011).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination "may be granted only when 'clearly consistent with the interests of the national security.'" *See, e.g.*, ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

I agree with my colleagues in their resolution of this case. The Judge's advice that Applicant's security concerns would be mitigated by evidence that the statute of limitations had run was ill-considered, as noted in footnote 2. However, given the record as a whole, the error is harmless. In addition, neither the record nor Applicant's brief provide information about what sort

of communications with creditors might revive time-barred debts, although, as the Appeal Decision notes, the issue is moot.

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board