

KEYWORD: Guideline F

DIGEST: A Judge should consider not only the extent to which an applicant may have resolved his or her debts but also the underlying circumstances for what they reveal about the applicant’s judgement and reliability. In addition to the combined total amount of Applicant’s mortgage debt, the Judge relied on a paucity of record evidence of financial reform by Applicant and on Applicant’s failure to explain why he continued to amass delinquent debt despite having stopped making mortgage payments. Adverse decision affirmed.

CASENO: 15-03916.a1

DATE: 07/18/2017

DATE: July 18, 2017

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**

Kelly B. McClanahan, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 16, 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 March 23, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 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 works as a contractor for a Federal agency, a job he has held for over 10 years. He has held a security clearance since 2009. Applicant has been married since 2014, and the couple recently purchased a house. Because of Applicant's poor credit history, the mortgage is in his wife's name alone.

Applicant developed financial problems in 2008. He had bought a home a year earlier with his then-fiancee, financing the purchase with first and second mortgages. Applicant subsequently called the wedding off, and his fiancee moved out of the house. She did not contribute to the mortgage payments and eventually filed for bankruptcy, relieving her of responsibility for both mortgages.

Applicant sought to modify the first mortgage loan, but the lender refused. Applicant attempted to sell the property but was not successful. He stopped making payments in late 2007 or early 2008, and the lender foreclosed on the property several years later.

Applicant presented evidence that the first mortgage was sold to the lender's subsidiary. He attempted to contact the lender on the second mortgage to settle the debt. He provided no documentation to show that either the first or second mortgage loans were canceled, forgiven, or otherwise resolved.

In addition to the above, Applicant's SOR alleges a debt arising from an automobile loan. After the hearing, Applicant contacted the creditor and agreed to settle this debt with two payments of a little over \$400. He provided no proof that he made these payments. Although the Judge resolved two credit card debts in Applicant's favor, he noted that Applicant had earlier contended that these accounts were due to fraud but at the hearing acknowledged that they were legitimate.

Applicant's yearly salary is about \$75,000, and his wife earns about \$55,000. Applicant has about \$250 in disposable income each month for debt payment. He also has saved about \$700 to be used for that purpose.

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

The Judge stated that Applicant's problems were the result of financial mismanagement and of some circumstances that were outside his control. He noted evidence that Applicant has made some effort to pay his debts over the years, concluding that he had resolved the two credit card debts and that he had a reasonable basis to dispute another. However, regarding the two mortgage debts and the car loan, the Judge entered adverse findings. He stated, for example, that Applicant did not demonstrate how it was that he continued to incur delinquent debt even after he stopped making

payments on his mortgages. He also stated that the total amount of mortgage debt established by the evidence entail significant security concerns. He concluded that Applicant did not present sufficient evidence of financial reform to mitigate concerns that similar problems may arise in the future.

In the whole-person analysis, the Judge noted that Applicant has held a clearance for several years without incident or concern. He also noted evidence of Applicant's excellent work performance. However, he reiterated that Applicant's remaining unresolved debt was large and that he had not presented sufficient evidence of financial reform. Describing the case as "a close call," the Judge ultimately concluded that Applicant had not met his burden of persuasion as to mitigation.

### **Discussion**

Applicant raises a number of issues to the effect that he was denied due process. He argues, for example, that he was not permitted to submit a document from the lender to the effect that he no longer owes anything on the first mortgage. Some of the assertions in Applicant's Appeal Brief and Department Counsel's Reply Brief constitute new evidence. Although we generally cannot consider new evidence on appeal, we will do so in regard to threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No.14-00812 at 2 (App. Bd. Jul. 8, 2015).

We note that, after Applicant's attorney stated that he had no further evidence with him on the day of the hearing, the Judge held the record open for three weeks following the hearing for Applicant to present additional evidence. Tr. at 83. Applicant presented several documents, which the Judge admitted as Applicant Exhibits (AE) G through X. After receiving the adverse decision, Applicant filed a motion for reconsideration, which the Judge denied. Later, several months after the record closed, Applicant received an additional document addressing the first mortgage discussed above. Applicant moved the Appeal Board to remand the case to the Judge for consideration of this document, which we denied.

On appeal, Applicant argues that this new evidence is sufficiently dispositive of the case that we should have granted the motion for remand. Alternatively, Applicant argues that the Judge should have considered as substantive evidence the index that Applicant's attorney provided when submitting Applicant's post-hearing documents and which he contends would have supported a finding that the first mortgage has been resolved.

Our examination of the record convinces us that Applicant was not denied a reasonable opportunity to present evidence in his behalf. As stated above, the Judge held the record open after the hearing, a procedure that is discretionary with him and not required by the Directive. There is nothing in the record or in our decisions interpreting it that would give an applicant an open-ended right to supplement the record indefinitely. As Department Counsel argues, the doctrine of administrative finality requires that at some definable point a record be closed for adjudication. Reply Brief at 7. In the case before us, the Judge established a closure date that reasonably balanced Applicant's interest in submitting evidence in mitigation with DOHA's duty to issue a final decision in the case. *See, e.g.*, ISCR Case No. 08-07803 at 2, n.2 (App. Bd. Sep. 21, 2009) regarding the

necessity of finality in DOHA adjudications.<sup>1</sup>

Concerning the index, there is nothing in the Directive that would require a Judge to consider as evidence the statements of an attorney representing one of the parties at the hearing. The Directive does not establish such a duty, and it is a long-standing matter of DOHA procedure that arguments of counsel have no evidentiary force. *See, e.g.*, ISCR Case No. 14-02290 at 3 (App. Bd. Jan. 30, 2017). We find no reason to conclude that the Judge abused his discretion by making the index an appellate exhibit rather than a substantive one.

Moreover, the motion for remand that Applicant has addressed in the course of making his argument on appeal merely asked us to remand the case for the purpose of taking in additional evidence, which we have no authority to do. The Directive authorizes us to remand a case only for the purpose of correcting an identified error. Directive ¶ E3.1.33.2. *See* ISCR Case No. 15-02957 at 3-4 (App. Bd. Feb. 17, 2017). After considering Applicant's arguments on appeal, we find no reason to conclude that he was denied the due process afforded by the Directive.<sup>2</sup>

Applicant also contends that the Judge did not properly interpret the evidence that he submitted after the hearing. To be specific, he contends that the evidence supports a finding that Applicant no longer owes anything to the creditor holding the first mortgage. Applicant cites to a statement from the creditor that the unpaid balance of the loan is \$0.0. AE G. Applicant contends that, when read in conjunction with other evidence, such as a credit report that shows the loan as “[p]aid or paying as agreed” and that it is closed, the Judge should have found that indeed Applicant has no further liability for this debt. AE A.

We agree that the evidence that Applicant has cited constitutes some support for the proposition that he no longer owes anything on the first mortgage. However, AE X can reasonably be interpreted as showing that the creditor was not made whole by Applicant. In any event, the fact that someone could interpret the evidence in a different manner is not sufficient in and of itself to undermine a Judge's finding. *See, e.g., Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). To the extent that the challenged finding meant that Applicant had presented absolutely no evidence that he no longer owed the debt, it was erroneous. However, given the state of the record, the Judge had discretion to conclude that Applicant had not demonstrated resolution of the first mortgage debt in a way that would mitigate security concerns arising from it. The Judge's finding

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<sup>1</sup>*See also* ISCR Case No. 00-0250 at 3-4 (App. Bd. Feb. 13, 2001): “[A] party is not entitled to have the case reopened to allow the introduction of evidence that comes into existence after the close of the record.” This case drew upon *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978), to the effect that if records could be reopened whenever some new fact is discovered, there would be little hope that administrative finality could ever be achieved. (Internal citation omitted)

<sup>2</sup>Applicant also argues that the Appeal Board Judge who ruled on the motion to remand improperly engaged in *ex parte* discussions with Department Counsel. Department Counsel addresses this in a footnote to the Reply Brief. The Judge merely asked Department Counsel to sit in on a phone conversation that the Judge intended to have with Appellant's attorney. Department Counsel avers, and there is nothing in the record to suggest otherwise, that no substantive conversations occurred between the Judge and Department Counsel outside the presence of Applicant's attorney. Out of an abundance of caution, the Judge recused himself from further participation in this appeal. However, we find that the impropriety alleged by Applicant is unfounded.

is a reasonable interpretation of the record that was before him and is sustainable.

Even if the Judge erred, however, we conclude that the error did not affect the overall outcome of the case. A Judge should consider not only the extent to which an applicant may have resolved his or her debts but also the underlying circumstances for what they reveal about the applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015). In addition to the combined total amount of Applicant's mortgage debt, the Judge relied on a paucity of record evidence of financial reform by Applicant and on Applicant's failure to explain why he continued to amass delinquent debt despite having stopped making mortgage payments. These matters support the adverse decision, despite any possible error regarding the first mortgage. Indeed, Applicant concedes that he still has not resolved the second mortgage and "that he does not have a compelling counterargument to [the Judge's] assertion that 'Applicant did not present sufficient evidence . . . regarding the likelihood of recurrence of similar issues.'" Appeal Brief at 9. Accordingly, we conclude that even if the Judge had found that Applicant no longer owes the first mortgage, circumstances set forth in the record and conceded by Applicant persuade us that the Judge would still have held that Applicant had not met his burden of persuasion. Therefore, we conclude that any error in the Judge's findings was harmless.

Beyond the matters discussed above, Applicant's brief consists of an alternative interpretation of the evidence. However, an ability to argue for a different interpretation of the evidence is not enough to show that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 15-08842 at 3 (App. Bd. Feb. 14, 2017).

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, Encl. 2 App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board