

KEYWORD: Guideline F

DIGEST: Regarding the earlier grant of a clearance, prior favorable adjudications do not undermine the legal sufficiency of a Judge’s subsequent adverse decision. The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. Adverse decision affirmed.

CASENO: 15-05047.a1

DATE: 11/8/2017

DATE: November 8, 2017

In Re:))	
-----))	ISCR Case No. 15-05047
))	
Applicant for Security Clearance))	

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 August 17, 2016, 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 decision on the written record. On August 30, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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 him; whether he was denied due process; whether the Judge erred in admitting the summary of

Applicant's clearance interview; whether the findings of fact contain errors; 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 for a Federal contractor. He holds a bachelor's degree. Applicant worked for a Federal contractor from 2001 to 2008, when he was laid off due to his employer closing a local factory. He held part-time jobs from then until 2012, when his current employer hired him. He has served as an officer in the National Guard and has held a clearance since 2008.

Applicant divorced his wife in 2012. The couple has four children, for whom the ex-wife pays child support. Her payments have been sporadic, however. Moreover, Applicant and his ex-wife were not good at managing their finances. They missed a number of payments and bounced checks over the years. Applicant enrolled in a budgeting class in about 2009, which was beneficial to him.

Applicant's SOR lists five delinquent debts—a past-due mortgage, credit cards, a utility bill, and a medical bill. Regarding the mortgage, Applicant and his wife refinanced their house in 2008 and stopped making payments during the process. They did not set aside funds for making their mortgage payments, resolving other debts instead. Applicant succeeded in bringing his mortgage up to date in early 2009. However, his credit report shows a past-due amount of about \$38,000 as of March 2013. A subsequent credit report shows that this was the date that Applicant made the last payment on this loan.

This house had been awarded to Applicant during his divorce. Applicant chose to live in his mother's house and rent the marital house. However, his ex-wife reneged on her financial obligations. Applicant had the renters vacate the house, and he stopped making payments on the loan. Applicant stated that the lender reclaimed the house as abandoned and sold it for more than the amount owed. Applicant did not provide any documentary evidence regarding the house, in particular he provided nothing to show that the debt has been resolved.

The Judge found that the credit card debts and the utility bill had not been resolved. He also noted Applicant's claim that he had paid the medical bill. The two credit reports contained in the record show that Applicant had made substantial progress in resolving his financial problems, paying off several non-SOR debts. Applicant has incurred no additional debt. However, he did not provide documentary evidence regarding the debts alleged in the SOR, nor did he provide evidence regarding current income or living expenses.

The Judge's Analysis

The Judge concluded that Applicant's financial problems raised four security concerns: inability to satisfy debts; unwillingness to satisfy debts regardless of the ability to do so; a history

of not meeting financial obligations; and consistent spending beyond one's means.¹ In evaluating Applicant's case for mitigation, the Judge stated that his delinquent debts are numerous, some of them not yet resolved. The Judge noted circumstances beyond his control, such as his unemployment, divorce, and his wife's failure to meet her financial obligations, such as child support payments. He concluded, however, that Applicant did not show responsible action regarding the mortgage loan or the other debts. Although Applicant's divorce occurred more than four years ago, he has not presented evidence of any contact with creditors. The Judge noted that Applicant has not disputed the information in his credit reports about the mortgage debt. He observed that the File of Relevant Material (FORM) specifically advised Applicant that the file contained no documentary evidence that the mortgage had been resolved. Despite this notice, Applicant presented no corroborating information in his response to the FORM.

Discussion

Applicant contends that the Judge was biased against him. However, he cites to nothing in the record that would support this contention, and our own examination of the record and the Decision has disclosed nothing either. Applicant is no doubt dissatisfied with the Judge's conclusions, but an adverse adjudication, in and of itself, is not enough to rebut the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 12-10122 at 3 (App. Bd. Apr. 22, 2016); *Bixler v. Foster*, 596 F.3d 751 at 762 (10th Cir. 2010).

Applicant contends that he was denied due process. He notes the Judge's various comments about a paucity of mitigating evidence and argues that, if the Judge believed that he needed additional information, he should have convened a hearing. Applicant also contends that he was not placed on notice that he needed to present corroborating evidence of debt resolution and argues that he should be permitted to submit additional documentation. Applicant's brief includes a number of documents that are not contained in the record.

Regarding the first point, as Department Counsel notes in his Reply Brief, the Directive provides that a hearing may be requested either by the applicant or by Department Counsel. Directive ¶¶ E3.1.4; E3.1.7. There is no provision for a Judge to convene a hearing on his own motion. On the second point, Applicant received guidance from DOHA about his right to make a documentary response to the FORM, to include "any material you wish the Administrative Judge to consider[.]" Cover Letter to FORM, dated September 29, 2016. The FORM itself notified Applicant that he

has not provided any documentation that the mortgage debt is resolved or that he has made any attempt to reach out to creditors or otherwise work to resolve any of his delinquent accounts.

DOHA included a copy of the Directive along with the FORM, which also spells out an applicant's right to make a documentary response. Applicant acknowledged receipt of the FORM and accompanying material on October 7, 2016.

¹Directive, Encl. 2, App. A ¶ 19(a-c), (e).

As the Judge found and the record demonstrates, Applicant is a college educated military officer. There is nothing to suggest that he lacked the ability to understand the guidance that he received, in particular the notice in the FORM about a paucity of evidence of debt resolution. Furthermore, the Directive explicitly states that it is the applicant's burden to provide evidence in mitigation and extenuation. Directive ¶ E3.1.15. Although *pro se* applicants are not held to the standard applied to lawyers, they are expected to take timely steps to secure their rights and present their cases for mitigation. *See, e.g.*, ISCR Case No. 15-08255 at 4 (App. Bd. Aug. 22, 2017). Applicant was not denied the due process that the Directive affords. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. We have no authority to remand a case simply in order for the Judge to consider additional evidence. *See, e.g.*, ISCR Case No. 15-02957 at 3-4 (App. Bd. Feb. 17, 2017).

Applicant contends that the Judge erred in admitting the summary of his clearance interview. He contends that he objected to this document in his response to the FORM. We examine a Judge's rulings on the admission of evidence to see if they are consistent with the Directive or if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 12-02296 at 3 (App. Bd. Mar. 12, 2014). Contrary to Applicant's argument, he did not object to the interview summary. Rather, his objections were directed toward Department Counsel's comments in the FORM. We resolve this issue adversely to Applicant.

Applicant challenges some of the Judge's findings of fact. We have examined the findings in light of the record as a whole. Among other things, Applicant challenges the Judge's finding that the company he worked for from 2001 to 2008 was a Government contractor. This argument is persuasive, in light of the information in Applicant's clearance application and interview summary. However, this factual error did not likely affect the outcome of the case. Therefore, it is harmless. *See, e.g.*, ISCR Case No. 15-07118 at 3 (App. Bd. Aug. 18, 2017). The Judge's material findings 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. Applicant has cited to no harmful error in the Decision.

Applicant challenges the Judge's treatment of his case for mitigation. He cites to favorable evidence, such as his having resolved several debts and that he has not acquired additional ones. He notes that when he first received a clearance, in 2008, he had financial problems. He argues that his circumstances are less dire now than they were then. He also contends that he did not know that he could submit character references or evidence of his military record, work performance, etc.

Regarding the earlier grant of a clearance, prior favorable adjudications do not undermine the legal sufficiency of a Judge's subsequent adverse decision. The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 14-02995 at 2-3 (App. Bd. Apr. 7, 2016). Be that as it may, many of the events surrounding Applicant's mortgage problem occurred after 2008, and this debt appears to remain unpaid as of the close of the record. This is a significant delinquency that was not present at the time of the earlier adjudication, and it supports the Judge's overall adverse conclusions.

We note Applicant's argument that he was not aware that he should or could submit character evidence, etc. However, for reasons set forth above, we conclude that he was placed upon

sufficient notice of his right and obligation to present evidence in mitigation. Each case must be decided on its own merits, and neither the Directive nor DOHA officials can reasonably notify an applicant of all of the kinds of evidence that might be pertinent in a given adjudication. Moreover, Applicant's citations to various things in the record that are favorable to him are not enough to rebut the presumption that the Judge considered all of the evidence in the record. Neither are they enough 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. 15-08711 at 3 (App. Bd. Aug. 24, 2017).

We note Applicant's argument that his credit reports show that he has resolved many of his debts. The Judge made a finding to this effect. However, the contents of credit reports in and of themselves do not provide meaningful evidence that debts have been resolved to an extent sufficient to show mitigation of the security concerns arising from financial delinquencies. *See, e.g.*, ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. 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: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board