

KEYWORD: Guideline F

DIGEST: The Judge’s material findings about Applicant’s resolution of some alleged debts after his receipt of the SOR are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. Adverse decision affirmed.

CASENO: 17-01181.a1

DATE: 04/30/2018

DATE: April 30, 2018

In Re:)	
)	
-----)	ISCR Case No. 17-01181
)	
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 May 3, 2017, 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 February 27, 2018, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 erred in her findings of fact and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge’s decision.

The Judge’s Findings of Fact

Applicant, who is 46 years old, retired as a law enforcement officer in 2006 and receives a monthly pension of \$3,000. From about 2010 to 2016, he experienced periods of unemployment, married and divorced, and underwent back surgery. He began his current job with a defense contractor in 2016. He has three children – ages 22, 21, and 16 – from his first marriage. In 2002, he was ordered to pay \$830 per month in child support. He also has a 12-year-old child with a former girlfriend.

The SOR alleged that Applicant had nine delinquent debts, including a defaulted mortgage loan in foreclosure that was past-due about \$69,000 with a balance of about \$243,000 and a charged-off timeshare account with a balance of about \$14,000. Applicant fully satisfied or settled most of the debts after he received the SOR. The Judge only found against Applicant on the defaulted mortgage loan and charged-off timeshare account.

In 2006, Applicant purchased a home with a conventional mortgage that was modified in 2009. He was 90-days delinquent on that loan about 15 times. During a background interview in 2016, he stated that he made payments on the mortgage loan after it was approved for modification and before it was assigned an account number, and those payments were returned to him. He believed he had about \$150,000 of equity in the home and, if it sold, he would use that equity to satisfy debts. He also stated the current mortgage loan holder wanted an unaffordable lump-sum payment of the past-due amount. In early 2017, a judgment of foreclosure was entered against him for about \$312,000. The property value was assessed at about \$325,000. He was given the opportunity to retain legal title to the property by satisfying the conditions of the mortgage. He testified that he had a purchase offer equal to the mortgage debt. However, he let the bank foreclose on the property when his attempt to lease the property in the hopes of regaining the equity was unsuccessful.

In 2013, Applicant purchased a timeshare financed through a loan of about \$14,000. He made timely payments on the loan until about April 2015, and the loan was charged off later that year. He testified that he contacted the creditor to make a payment to have the timeshare account removed from his credit report but was informed that was not possible. In mid-2017, he received a letter informing him the account was canceled due to nonpayment. Based on the terms of the agreement, all of his payments on that account were forfeited.

“In 2015, [Applicant’s] child support payment (not alleged) was routinely delinquent 30 days, although he brought his child support current in 2016.” Decision at 3. A coworker provided a character letter attesting to his punctuality, work ethic, and leadership skills.

The Judge’s Analysis

In 2017, Applicant lost a home to foreclosure because he stopped making the mortgage payments around March 2013. He had other debts that were charged-off or placed for collection. He had a judgment entered against him for a dental debt. He had contracts with several different telecommunications providers that he canceled and ignored because he did not consider them legitimate debts.

While Applicant’s unemployment and surgery were significant factors in his failure to make his mortgage payments, he did not exercise prudence in some aspects. He knew before his background interview of the delinquent timeshare account and ignored it. He did not address the dental care judgment until it became an issue for his security clearance eligibility. “Applicant was gainfully employed during the summer of 2015, and yet he was behind on his child support despite not making any mortgage payments.” Decision at 9.

Applicant receives credit for payments, albeit belated, in full settlement or satisfaction of most of the alleged debts. He attempted to modify his mortgage loan, but those efforts were unsuccessful in light of the judgment in foreclosure. He had about \$12,000 in equity on his home, which is sufficient to cover the fees for foreclosure. He made no payments towards the charged-off timeshare account. While this debt remains legally enforceable, it is unlikely the creditor will pursue further collection efforts. “Neither debt is likely to be a source of future financial stress for Applicant.” Decision at 9. Although his child support delinquency was not alleged and cannot be considered as a basis for disqualification, it could be considered for other purposes, including in evaluating Applicant’s case in mitigation.

In her whole-person analysis, the Judge, in pertinent part, stated:

[Applicant] has a troubling history of not paying or stopping payments on legitimate obligations when he is either dissatisfied with the service or simply changes his mind. There is no clear indication that he would have resolved the collection and judgment debts had they not become an issue for his security clearance eligibility. Applicant cast some doubt on his judgment by not candidly disclosing his home mortgage delinquency or defaulted timeshare loan when he completed his SF 86.

Applicant's financial irresponsibility is too recent for me to conclude that it is clearly consistent with the national interest to grant him security clearance eligibility.¹

Discussion

Applicant claims the Judge erred in her findings of fact and conclusions. His first two assignments of error are related. First, he contends the Judge erred in finding he brought his child support payments current in 2016. Second, he challenges the Judge's conclusion that he was behind on his child support payments while he was gainfully employed in the summer of 2015 and was not making his mortgage payments. In his arguments, he points to entries in a credit report from June 2016 and argues he brought the child support payments current in August 2015. We note the difficulties inherent in interpreting credit reports spelled out in the Concurring Opinion. For purposes of disposing of the issue raised on appeal, we conclude that, even if the Judge erred in her findings and conclusions about when Applicant's child support payments became current, such errors were harmless because they did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). As the Judge noted, Applicant's child support delinquency was not alleged in the SOR and was not used in applying the disqualifying conditions, but could be used for other limited purposes such as in evaluating Applicant's case in mitigation.² Additionally, the time period that Applicant disputes amount to a difference of less than six months. The exact month that Applicant became current on his child support payments was not an important factor in assessing his national security eligibility.

Applicant also contends that the Judge erred in her conclusion that "there is no clear indication that he would have resolved the collection and judgment debts had they not become an issue for his security clearance." Appeal Brief at 1, citing to Decision at 10. In support of his argument, he cites to his resolution of the child support debt in August 2015, which was before he submitted his security clearance application. However, from our reading of the decision, the Judge was not referring to the child support debt when she used the terms "collection and judgment debts" but instead was referring to the debts alleged in the SOR that he resolved after Applicant received that document. The Judge's material findings about Applicant's resolution of some alleged debts after his receipt of the SOR are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant further argues that he mitigated the alleged security concerns. He highlights such matters as his efforts to resolve the defaulted mortgage and charged-off time share account before the SOR was issued, his back surgery being a significant contributing factor in his late payments on

¹ Decision at 10.

² *See* ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017) for the proposition that a Judge may consider non-alleged debts (a) in assessing an applicant's credibility; (b) in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) in considering whether the applicant has demonstrated successful rehabilitation; and (d) in applying the whole-person concept.

the mortgage, and the Judge conclusion that neither of the two remaining unresolved debts should be a source of future financial stress for him. These arguments, however, amount to a disagreement with the Judge's weighing of the evidence. The Appeal Board has long held that the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

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 national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Charles C. Hale

Charles C. Hale
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE JAMES F. DUFFY

I concur with the majority's decision, but write separately to address an evidentiary concern. The Judge found that Applicant brought his child support account current in 2016. Applicant challenges that finding by claiming he brought that account current in August 2015. From my review of the credit reports in the record, I am unable to determine when exactly that account became current.

In his appeal brief, Applicant highlights the payment pattern on his child support account in a credit report. The payment pattern for that debt contains single digit numerals, either “1s” or “2s,” that represent the payment status of that debt for certain months. In proffering this credit report, which is a combined report from the three credit reporting agencies, the Government did not provide a guide that explains the meaning of the codes used in it. Recognizing that we are prohibited from considering new evidence on appeal (Directive ¶ E.3.1.29), I nevertheless note that the credit reporting agencies appear to apply different meanings for the numerals used in reporting payment patterns. For example, TransUnion uses the numeral “1” to mean “Pays as agreed,” while Experian uses that numeral to mean “30 days past the due date.”³

Credit reports generally contain information that is not self-evident. In this regard, I first note that a party who relies on ambiguous or uncertain information in a credit report to prove a certain fact does so at the risk that such information will not be sufficient to meet the substantial evidence standard (Directive ¶ E3.1.32.1) because the trier of fact will be unable to decipher it. Second, it is questionable that the codes for interpreting a credit report are easily, verifiable, indisputable facts that would be appropriate for either the Judge or Appeal Board to independently take administrative notice. *See, e.g.*, ISCR Case No. 99-0511 at 5 (App. Bd. Dec. 19, 2000) and Federal Rule of Evidence 201(b). Given these circumstances, it is incumbent on a party who is relying on ambiguous codes in a credit report to offer into the evidence a guide for interpreting those codes so that they may be understood.

While it is unclear when Applicant’s child support account was brought current, GE 3 does establish that, as of June 2016, the account was in a “pays as agreed” status and listed no past-due amount. I agree with the majority that any error in the Judge’s findings about when this non-alleged debt was brought current likely had no affect on the outcome of the case.

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

³ Compare, <https://www.transunion.com/resources/transunion/doc/compliance-and-legislative-updates/HowToReadCreditReport.pdf> with <https://www.experian.com/assets/consumer-information/product-sheets/credit-profile-report.pdf>.