

KEYWORD: Guideline F

DIGEST: Adverse rulings alone do not demonstrate judicial bias. We have examined the Judge’s Decision in light of the record that was before her. We find nothing therein that would lead a reasonable person to conclude that she lacked the requisite impartiality. It was not erroneous for the Judge to evaluate Applicant’s strategies for addressing his mortgage debts for what they may suggest about his judgment and reliability, even if those strategies were permitted by law. Adverse decision affirmed.

CASENO: 17-03852.a1

DATE: 10/31/2018

DATE: October 31, 2018

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In Re:)	
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-----)	ISCR Case No. 17-03852
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Dan Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 13, 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 decision on the written record. On July 12, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 Applicant; whether the Judge erred in concluding that Applicant’s financial circumstances raised security concerns; whether the Judge’s findings are supported by substantial evidence; 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 has served in the military, both on active duty and in the National Guard, from 1994 until the present. Married with two children, he has worked for his current employer since 2001.

Applicant’s SOR lists several delinquent debts, resulting from real estate transactions and credit card accounts. Applicant began investing in real estate in about 2000, but in about 2007 these rental properties were valued less than the amounts owed on the mortgages. He sought the assistance of an attorney, as a result of which he renegotiated settlements for some of his debts. In his security clearance application, Applicant disclosed an additional rental property debt that was not alleged in the SOR. Two of his properties were the subject of foreclosure sales, and the lenders have cancelled Applicant’s obligations on the resulting deficiencies. For other non-alleged property debts, Applicant has sought loan modifications, with success in one instance.

Two of the SOR debts were accounts owed to banks, at least one of which was a credit card. The Judge found that Applicant had resolved one of these accounts but not the other. Regarding three mortgage debts alleged in the SOR, Applicant stated that his attorney advised him to stop paying the mortgages and attempt to negotiate with the lenders for loan modifications, short sales, etc. The Judge found that these debts were not resolved as of the close of the record.

Applicant and his wife have a gross income of about \$170,000. He earns additional income during periods of active duty, and his wife receives bonuses that increase their income by about \$25,000. Applicant and his wife live within their means.

Applicant submitted character evidence, which describes him as trustworthy, honest, reliable, professional, and dependable. He is active in community and charitable undertakings. Applicant also submitted a copy of a letter from his commanding general requesting that he be permitted to serve past his mandatory retirement date.

The Judge's Analysis

The Judge concluded that Applicant's delinquent debts established three disqualifying conditions set forth under Guideline F: inability to satisfy debts, unwillingness to satisfy debts regardless of the ability to do so, and a history of not meeting financial obligations. Directive, Encl. 2, App. A ¶ 19 (a-c). In analyzing Applicant's case for mitigation, the Judge acknowledged that the economic downturn that occurred in about 2007 was something he could not have predicted. However, she found that he willingly assumed economic risks when he continued to purchase properties. She concluded that Applicant's proposed solutions to his difficulties may reduce the amounts he has to pay his creditors but that they do not necessarily show reliability. She noted Applicant's significant income and that he is financially solvent. She also extended less weight to debts that were forgiven than she did to those that were resolved through payment or settlement.

In the whole-person analysis, the Judge cited to Applicant's educational level and his military service. She reiterated that, while Applicant's strategy for addressing his debts may be legal and in his best economic interests, it does not necessarily demonstrate responsible action towards his creditors. She concluded that Applicant had not met his burden of persuasion.

Discussion

Applicant has submitted matters from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant contends that the Judge did not render a decision that was in the interest of national security but, rather, one that reflected her own personal values concerning financial responsibility. Judges are presumed to be unbiased, and a party who alleges a Judge was biased has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 17-02391 at 2 (App. Bd. Aug. 7, 2018). Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 12-09421 at 2 (App. Bd. Nov. 15, 2017). Adverse rulings alone do not demonstrate judicial bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017). We have examined the Judge's Decision in light of the record that was before her. We find nothing therein that would lead a reasonable person to conclude that she lacked the requisite impartiality. It was not erroneous for the Judge to evaluate Applicant's strategies for addressing his mortgage debts for what they may suggest about his judgment and reliability, even if those strategies were permitted by law. *See, e.g.*, ISCR Case No. 16-02246 at 2 (App. Bd. Dec. 8, 2017) for the proposition that even if debts have been removed by operation of law a Judge may still consider the applicant's circumstances for what they may reveal about his or her clearance eligibility. Applicant has not rebutted the presumption that the Judge was unbiased.

Applicant challenges the Judge's conclusion that his financial problems raise security concerns. He contends that Department Counsel did not prove a causal connection between his financial strategies, which he characterizes as "economic gaming" (Appeal Brief at 10), and the national security. However, the Directive presumes there is a nexus or rational connection between proved or admitted circumstances under any of its guidelines and an applicant's security eligibility.

See, e.g., ISCR Case No. 17-02595 at 3 (App. Bd. Jul. 31, 2018) . Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 17-00507 at 2 (App. Bd. Jun. 13, 2018). In the case before us, Applicant’s admissions and the record evidence demonstrate a fairly substantial amount of unpaid, and therefore ongoing, delinquent debt. This debt load can fairly be characterized as a history of financial problems that Applicant has not resolved. *See, e.g.*, ISCR Case No. 17-03146 at 2 (App. Bd. Jul. 31, 2018). We find no reason to disturb the presumption that Applicant’s problems bear a rational connection with a concern that he may be lacking in characteristics essential to the protection of national security. The nature of Applicant’s response to his debts, whether “economic gaming” or otherwise, is a matter properly to be examined in the context of Applicant’s burden of persuasion as to mitigation, as the Judge did. We resolve this issue adversely to Applicant.

Applicant contends that the Judge’s decision “shows neither evidence of such quality nor weight to meet the substantial evidence requirement.” He goes on to argue that a Judge’s decision may be arbitrary and capricious even if the “specific findings of fact are supported by the record evidence.” Appeal Brief at 12-13. We have evaluated the Judge’s Decision in light of the record and conclude that her material findings are based upon substantial evidence. *See, e.g.*, ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018). Applicant’s argument appears in actuality to be a challenge to the Judge’s weighing of the evidence. However, an ability to argue for a different interpretation of the evidence 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.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018). Applicant’s brief cites to several Hearing Office cases which, he contends, support his effort to obtain a favorable result. We give due consideration to these cases. However, each case must be decided upon its own merits. Directive, Encl. 2, App. A ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018).

Applicant contends that during the processing of his case he received ineffective assistance of counsel. At the beginning of his brief, he states that, due to ineffective assistance of counsel, he decided to act *pro se*. In the conclusion, he argues that the counsel did not prepare a budget or gather material exculpatory evidence. Appeal Brief at 2, 13. Assuming that the record is lacking in evidence that Applicant wishes had been included, he does not explain why an O-5 in the U.S. military with a degree from a renowned university could not have presented it himself. More to the point, the doctrine of ineffective assistance of counsel is not applicable to a DOHA proceeding. *See, e.g.*, ISCR Case No. 15-02040 at 2 (App. Bd. Feb. 16, 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: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board