

KEYWORD: Guideline F

DIGEST: Applicant cites to new evidence regarding the economic conditions of 2008 and 2009. The Board declines to remand. Given the facts of this case, it is unlikely that remand would produce a different result. Adverse decision affirmed.

CASENO: 14-02394.a1

DATE: 08/17/2015

DATE: August 17, 2015

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In Re:)	
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-----)	ISCR Case No. 14-02394
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brian M. O'Connor, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 9, 2014, 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 May 26, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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’s SOR lists one allegation, a delinquent home equity account of about \$48,000. He bought a town home in the mid-2000s as a residence for himself. He financed the purchase with a first mortgage and an equity loan. His monthly payment was \$2,100, but, by 2010, it was \$2,500.

A couple of years after the purchase of the town home, Applicant bought another property as an investment. However, because the house was located in a “poor” area, Applicant had a difficult time keeping it rented. He did not have enough income to pay mortgages on both his personal residence and the investment house. Eventually, the investment house went into foreclosure, the sale leaving a deficiency of over \$120,000. Applicant is trying to settle this account.

Applicant bought a third property the same year as he did the investment house. He intended this house for investment as well. However, this house also went into foreclosure, leaving a deficiency that Applicant settled for \$1,000.

In 2009, Applicant had to move to another state for purposes of his job. He rented his town home, making up the difference himself between the rent and the mortgage payment. After a year the renter left, and Applicant reduced the rent for the next one, who did not make consistent payments. Applicant stopped making mortgage payments in 2011 and attempted to restructure the loan. However, the bank did not agree to a modification. He also pursued a short sale. The bank agreed to settle the first mortgage, but it did not forgive the second home equity loan. Applicant did not contact the bank about this debt until he had received the SOR.

Applicant moved back to his home state but not into the town home because a friend was living there. The friend paid over \$1,000 a month, but Applicant did not provide this to the lender, concerned that he would not be able to refinance the loan if he did. Applicant eventually moved back into the home, living there for about four months. He paid nothing to the lender. Foreclosure proceedings began.

Applicant incurred other expenses by taking care of his father, who lives in another country. He paid off another equity loan, and, from examining Applicant’s credit reports, the Judge

concluded that he pays his accounts. Applicant makes about \$125,000 a year and has about \$5,200 net monthly income. He lives with a girlfriend, who helps with expenses. He estimates that his monthly remainder is about \$2,300. Applicant argues that the allegation in his case results from a one-time failure. He intends to contact the lender again.

The Judge's Analysis

The Judge cited to evidence that Applicant's financial difficulty did not result from circumstances that were largely outside his control. She also concluded that he had not demonstrated responsible action in regard to his delinquent debt. The Judge stated that Applicant does not have a plan to resolve the debt that is the basis for the sole allegation in the SOR. In the whole-person analysis, the Judge noted that Applicant had provided support for his father, who lives abroad. She also cited to Applicant's acknowledgment that it was a mistake to invest in multiple properties without sufficient income to cover his expenses should something go wrong. She stated that a promise to pay debts in the future is not sufficient to mitigate the concerns arising from his delinquent home equity loan.

Discussion

Applicant cites to matters outside the record concerning the depth and extent of the recession that occurred in 2008 and 2009 and its effect on the housing market. He requests that we take official notice of these matters which, he argues, show that Applicant's financial problems arose from circumstances outside his control.

We do not have authority to consider new evidence on appeal. Directive ¶ E3.1.29. Neither do we have fact-finding power. *See, e.g.*, ISCR Case No. 14-02480 at 2, note 1 (App. Bd. Jun. 1, 2015). In previous cases, when we have taken official notice of legislative facts, or the equivalent, that were germane to an issue on appeal, we have remanded the case to the Judge for the purpose of expanding the record to include the officially noticed matters. *See, e.g.*, ISCR Case No. 05-11292 at 3-4 (App. Bd. Apr. 12, 2007).¹ In this case, however, we decline to remand. The Judge's decision was based in large measure on evidence that Applicant's single SOR allegation was due to his having moved to another state; his inability to find suitable renters for his home; his purchasing more than one house without sufficient funds to cover foreseeable contingencies; his (admittedly laudatory) expenditure of funds on the care of his father; his apparent financial ability to resolve the delinquent home equity loan; and a paucity of evidence to show that Applicant attempted to resolve it in a timely or responsible manner. Moreover, Applicant did not attribute his problems to the recession but to mistakes in judgment that he did not intend to repeat. The evidence and findings

¹In ISCR Case No. 05-11292 at 4, note 1, we stated that official pronouncements by the President or by other appropriate Federal agencies on matters of national security are equivalent to legislative facts for the purpose of DOHA adjudications and, therefore, are not subject to refutation. Although the 2008-2009 recession is not a legislative fact, Federal courts have taken judicial notice of it as an adjudicative fact. *See, e.g., Eclectic Properties East, LLC v. Marcus & Millchap Co.*, 751 F.3d 990 at 998, note 6 (9th Cir. 2014). *See also* Federal Rule of Evidence 201 and accompanying commentary.

upon which the Judge relied support her adverse decision, and we find no reason to conclude that remand, even if it were otherwise appropriate, would be likely to result in a different overall result.

Applicant cites to record evidence, such as his having had to relocate to another state due to his job requirements and that the delinquent debt has been written off and is not the subject of a collection effort. A Judge is presumed to have considered all of the evidence in the record, and Applicant's argument is not sufficient to rebut that presumption. Moreover, the extent to which a debt is not being actively pursued by creditors, or has become legally uncollectable, does not show that Applicant has resolved the debt in such a way as to mitigate the concerns raised in the SOR. *See, e.g.*, ISCR Case No. 12-02596 at 3 (App. Bd. Mar. 12, 2015). Even if an applicant has actually paid his debts, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's worthiness for a clearance. *See, e.g.*, ISCR Case No. 14-01607 at 4 (App. Bd. Apr. 9, 2015). Applicant's argument on appeal amounts to a disagreement with the Judge's weighing the evidence, 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.*, ISCR Case No. 14-03108 at 4 (App. Bd. May 20, 2015).

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 the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anani

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

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board