

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant's concern regarding Department Counsel's characterization of a document (which was neither put in evidence nor served on Applicant) is not frivolous. However, there is no reason to believe that it factored into the Judge's decision. Adverse decision affirmed.

CASENO: 14-02403.a1

DATE: 08/18/2015

DATE: August 18, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-02403
)	
)	
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 22, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 28, 2015, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raises the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge made the following findings: Applicant is 51 years old. He has an overdue debt for a second mortgage that is more than 120 days past due in the amount of \$58,916, with a balance in the approximate amount of \$130,000. Credit reports admitted into evidence establish the debt and the fact that it has not been resolved. Applicant also has an overdue mortgage account that is more than 120 days past due in the amount of \$204,273, with a balance in the approximate amount of \$640,626. The credit reports in evidence also establish this debt and the fact that it has not been resolved.

Applicant purchased a home in 2003 or 2004. In 2008 he experienced financial difficulties because of a pending divorce and his inability to pay all his bills. He was unable to make payments on his mortgage. Attempts to resolve matters through a short sale of the house failed, in part because of the poor economy. He stopped making payments on the house in 2009, at which time he moved out of the premises. When he left the home, he understood that he still owed money on the two mortgages. At some point after he left the home, he sold his interest in the home to another individual (Purchaser), and to a representative of the purchaser (Purchaser). Applicant never received any money for the sale from Purchaser, and got just the promise that he would receive some payment from Purchaser if she was able to resolve the mortgage with the mortgage holder. Applicant has received no notice, either in written or oral form, informing him that he does not owe the mortgage holders on the mortgages. Applicant concedes that he never received approval from the mortgage holder for the transfer of the home to the Purchaser, and no evidence of same appears in the record. There is also no evidence that Purchaser has made any payments on either mortgage to the mortgage holder.

The Judge reached the following conclusions: Applicant’s overdue finances occurred as a result of his divorce and the downturn in the economy. However, Applicant has not acted responsibly because he failed to contact the mortgage holder to seek approval for the transfer of his property, and he has never ascertained the status of his home and the two mortgages. Applicant has not initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. No evidence

¹The Judge made a favorable formal finding under the one allegation brought under Guideline E. That finding is not at issue on appeal.

was introduced to establish that his current financial situation is stable. Applicant has not mitigated the Government's security concerns.

Applicant argues that the credit reports relied upon by the Government were inaccurate and failed to establish that the mortgage accounts were still active, failed to establish that a balance remains due, and failed to establish that he owed the balance. He references a more recent credit report that supports his appeal position that he no longer owes on the mortgages. He then asserts that the arrangement he entered into with the Purchaser was a reasonable one as he was aided by a real estate expert who would maximize the chances that he and the Purchaser had toward reaching an agreement with the creditor. Applicant has failed to establish error on the part of the Judge.²

Applicant's arguments rely largely on a credit report that post-dated the hearing. The Board cannot consider new evidence on appeal. Directive, ¶ E3.1.29.

In this case, the Judge made sustainable findings that Applicant entered into an agreement with Purchaser to take title to his house and assume the mortgage payments without consulting the mortgage holders beforehand, and without subsequently taking any steps to ensure that the Purchaser was satisfying the obligations. There is absolutely no record evidence that contradicts the listing of the debts as delinquent on the credit reports in evidence.³ Regardless of the precise status of the debts, the gravamen of the Judge's decision was that Applicant, in essence, simply walked away from his obligations. Regarding Applicant's arrangements with Purchaser and a third party to transfer ownership of his house, the Judge's conclusion that Applicant's actions were not mitigating is sustainable.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting

²Applicant began his brief with a due process argument. At the hearing, Department Counsel discussed an updated credit report on Applicant that he had obtained the night before. He did not serve it on Applicant. He stated for the record that it contained no updated information on Applicant's finances. This report was never offered for inclusion in the record. Applicant asserts that the Government "relied" on the contents of the report, did not allow him to compare the report with those being offered into evidence, and he was therefore unfairly prejudiced. Applicant's arguments are not frivolous given the fact that Department Counsel never provided the report to his party-opponent. Department Counsel's characterization of the report was made verbally, on the record, and in front of the Judge, wherein it had the potential to influence. However, there is nothing in the record or the Judge's decision to show that the report factored into the resolution of the case. The Board will not presume error below. *See, e.g.*, ISCR Case No. 08-10644 at 2 (App. Bd. May 28, 2010). Applicant has failed to demonstrate how Department Counsel's mentioning of the updated report had a deleterious effect upon his ability to present his case. Also, Applicant's reliance on purported requirements of the Fair Credit Reporting Act is misplaced.

³It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the Government's obligations under E3.1.14 for pertinent allegations. *See, e.g.*, ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006). In this case, the credit reports were detailed and straightforward enough to establish the Government's case regarding Applicant's mortgage indebtedness.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). “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). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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