

KEYWORD: Guideline F

DIGEST: The Judge's statement that Applicant submitted nothing with regard to the \$14,000 delinquent credit card debt is error but it is harmless because Exhibit submitted by Applicant is not of high probative value. Therefore, it does not justify a remand. Adverse decision affirmed.

CASENO: 09-01800.a1

DATE: 08/19/2010

DATE: August 19, 2010

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
_____	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 28, 2009, DOHA 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 20, 2010, after the hearing, Administrative Judge Richard A. Cefola denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge erred by concluding that there was insufficient evidence to establish that Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.<sup>1</sup> For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings pertinent to the issue raised on appeal: Applicant is liable for a credit card debt in the amount of about \$14,377. Applicant stated that he would address this admitted debt, but, despite having been given two months after his hearing to do so, he has submitted nothing in this regard. This debt has not been addressed, and as such, is still outstanding. Applicant filed his federal tax return for tax year 2004 in January of 2008. In March of 2010, Applicant retained counsel to address the \$27,855 owed in back taxes for tax year 2004. This counsel is in the initial process of gathering the necessary financial data and income source information to address the debt. Applicant filed his state income tax returns for tax years 2005 and 2006 in August 2009. In March 2010 Applicant retained counsel to address the \$16,059 owed in back taxes for tax years 2005 and 2006. The Judge reached the following conclusions: With his retirement from the Navy, Applicant’s income was substantially reduced, and he could not keep paying on his credit card and his children’s college loan payments. There is not enough evidence to show that he initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.<sup>2</sup> Applicant has offered nothing to show that he has addressed his significant credit card debt and he has only recently begun to address his state and federal back taxes, which are substantial. Applicant has not mitigated the security concerns arising from his financial considerations.

Applicant takes issue with the Judge’s analysis of the \$14,000 credit card debt, stating the Judge overlooked and did not consider evidence submitted by him that demonstrated he was addressing the debt, and that progress was being made toward its resolution. Applicant points to a document that he sent to the Judge during a period post-hearing when the record was held open to allow Applicant to present additional matters. The document purports to be a settlement agreement between Applicant and attorneys representing the creditor and contains an assertion that an initial payment toward debt retirement had been made.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.,* ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). In this case, the Judge found that Applicant

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<sup>1</sup>The SOR contained ten allegations relating to Applicant’s financial difficulties. The Judge made formal findings in Applicant’s favor on seven of the allegations. Those favorable findings are not at issue on appeal.

<sup>2</sup>Directive, Enclosure 2, ¶ 20(d).

submitted nothing with regard to the issue of addressing the debt. Given Applicant's submission, included in the record as Applicant's Exhibit D, the Judge's finding is error. Given the Judge's language, it is not clear to the Board whether or not the Judge considered the evidence. Before remanding the case to the Judge, however, the Board must evaluate the error in light of the evidence submitted and the record as a whole to determine whether the error is harmful.

Applicant's Exhibit D is a one page letter authored by Applicant and supposedly submitted to a law firm representing the creditor. It begins, "This memo is drawn up to document the arrangement made over the phone between me and your representative . . . , concerning case # . . . previously held as a . . . account." The letter goes on to make various unilateral representations by Applicant about the nature of the agreement and the fact that an initial payment was made. The date of the letter indicates that it was prepared two months after the hearing at the very end of the time frame afforded Applicant to submit additional documents. The letter is unsigned. Given these attributes, the probative value of the exhibit is not high. The exhibit does not carry nearly the probative force of a signed agreement executed by both parties or other evidence clearly establishing a mutual understanding between the parties and the making of an initial payment. The burden was on Applicant to demonstrate matters in mitigation regarding this debt. After considering the exhibit along with the evidentiary record as a whole, the Board concludes that even if the Judge failed to consider Applicant's Exhibit D, that failure would not have affected the ultimate outcome of the case, as the Judge could have reasonably concluded that the exhibit did not satisfy Applicant's burden of establishing mitigation. Thus, the Judge's error was harmless.

The Board construes Applicant's arguments regarding his tax accounts to be that he either owes much less in back taxes than the government alleges, or, in the case of the state taxes, he now owes nothing at all.<sup>3</sup> Applicant also asserts that his efforts in getting the tax disputes resolved have been ongoing and are therefore mitigating. Much of Applicant's argument regarding delinquent taxes is based on representations and documentary evidence that are not part of the evidentiary record. The Board cannot consider new evidence on appeal. Directive, Enclosure 3, ¶ E3.1.29. After a review of the record, the Board concludes that there is substantial evidence to support the Judge's finding that Applicant owed federal and state tax arrearages as alleged in the SOR, and that the amounts are substantial. The record also reasonably supports the Judge's conclusion that Applicant has only recently begun to address his delinquent income taxes and that these efforts are not of sufficient magnitude to mitigate the government's security concerns.

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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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

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<sup>3</sup>At the hearing, Applicant testified that he might have owed as much as \$50,000 in back taxes, even though he denied the government's allegations regarding back taxes in his answer to the SOR. Tr. at p. 83. Other than his assertions in the SOR and on appeal, there is nothing in the record that undercuts the Judge's findings regarding the income tax arrearages.

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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He adequately discussed why the disqualifying conduct established under Guideline F was not mitigated.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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 *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 denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan  
Michael Y. 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