

KEYWORD: Guideline F

DIGEST: A Judge is not limited to considering only those debts alleged in the SOR. Non-SOR debts may also be considered on other issues, such as extenuation, mitigation, and credibility. Adverse decision affirmed.

CASE NO: 09-06771.a1

DATE: 01/04/2011

DATE: January 4, 2011

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In Re:)	
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-----)	ISCR Case No. 09-06771
)	
Applicant for Security Clearance)	
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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 May 10, 2010, 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 October 6, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr., 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 denied Applicant due process; whether the Judge's decision was not supported by record evidence; whether the Judge failed to consider all of the record evidence; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge found that Applicant is a vice-president of a company which he founded along with his sister. The SOR alleged two delinquent debts, one for \$46,429 past due on mortgage payments and the other for \$985 for a telecommunications bill. The real estate debt was the result of Applicant's having purchased a house in a resort city for the purposes of "flipping" it and making a profit. The purchase price was about \$490,000. Applicant was not able to lease it for a rent sufficient to enable him to cover his mortgage payments. Other factors affected Applicant's financial condition: the real estate market collapsed, and his business suffered a downturn, resulting in Applicant's annual income diminishing by more than half. Applicant discovered that he could not make the monthly mortgage payments plus the maintenance dues for the property. Eventually, the bank sold the property. Applicant was left with a \$150,000 deficiency.¹ The past due mortgage payments were unpaid at the close of the record, as was the smaller one to the telecommunications company.

The Judge noted that Applicant's finances had improved recently. Applicant's annual salary is now over \$100,000. He has paid down debts not alleged in the SOR, for example reducing a credit card debt from \$80,000 to \$35,000. However, Applicant has not negotiated a repayment plan for his real estate debt, because the lender will not work with him before a Form 1099 is issued. Also, Applicant has not demonstrated any effort to challenge or address the other SOR debt.

In the Analysis portion of the decision, the Judge acknowledged that Applicant's financial problems were affected by the recent economic downturn and collapse of the real estate market. However, the Judge also noted that Applicant was an experienced businessman who entered into a risky real estate venture without adequate financial resources to protect him in case of a business downturn. While Applicant may not have foreseen the specific economic circumstances of the past few years, he should have been aware of the cyclical nature of business and factored that into his decision of buy the property. All in all, the Judge concluded that the circumstances of Applicant's purchase of the rental house, and his apparent neglect of the telecommunications bill, raised questions about his judgment and reliability which Applicant's presentation at the hearing was not sufficient to mitigate.

Applicant contends that the Judge denied him due process by considering non-SOR debts, such as the credit card debt. However, a judge is not limited to considering only those debts alleged in a SOR. In developing a full and complete record, he must take into account not only the conduct specifically alleged in the SOR, but it must also evaluate an applicant's case for mitigation of the security concerns which the allegations may raise. To that end, conduct not alleged may be relevant

¹The Judge's decision discusses two deficiency amounts, \$150,000 and \$250,000. The \$150,000 appears to be owed by Applicant based on the first mortgage on the property. Applicant testified that his mother owes a \$100,000 deficiency arising from the second mortgage on the property. Tr. at 38-39.

to evaluating an applicant's evidence for extenuation or mitigation and for assessing his credibility. *See, e.g.*, ISCR Case No. 09-06770 at 3 (App. Bd. Nov. 8, 2010). In this case, the Judge evaluated Applicant's non-SOR debt in the context of Applicant's case for mitigation. Accordingly, he considered it in its proper context. There is no error in his having considered this particular debt in the manner in which he did.

Applicant also contended that the Judge erred in not holding the record open enough time for him to obtain a Form 1099. However, the Judge held the record open for over two weeks after the hearing for Applicant to submit additional evidence. He submitted his income tax forms and other documents. In any event, although the Judge discussed the absence of a Form 1099, it is not clear what such a document would report or that it would necessarily be mitigating. Applicant testified that he was told that the creditor "will most likely forgive the debt and issue you a 1099." Tr. at 42. Such testimony indicates only a probability of resolution down the road rather than a fact awaiting documentary corroboration. Moreover, it is not clear why Applicant apparently has not paid off the debt arising from his failure to make mortgage payments. Applicant's own evidence, Exhibit B, a credit report, shows this past due amount to be \$52,573. This is a sum certain, apparently provided to the credit reporting agency from the lender. There is a paucity of evidence in the record to demonstrate what efforts Applicant has made to address this aspect of his financial record. Additionally, there is little evidence to explain why a Form 1099 is a condition precedent to resolution of the deficiency judgment. As the Judge noted, doubts arising from Applicant's security concerns must be resolved against him. *See* Directive, Enclosure 2 ¶ 2(b). All in all, there is no reason to believe that Applicant was denied an opportunity to present his case for mitigation or that he was otherwise denied due process.

Applicant's appeal presentation is not sufficient to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). The record supports a conclusion 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 *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The record evidence, viewed as a whole, supports the Judge's decision. Accordingly, the decision is sustainable. "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).

Order

The Judge's adverse security clearance decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan

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

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board