

KEYWORD: Guideline F

DIGEST: The Judge made factual findings about Applicant's taxes which were not alleged in the SOR. The Judge did not discuss those findings in his analysis. There is no presumption of error. The Board will not presume that the Judge used the findings improperly. Adverse decision affirmed.

CASENO: 10-00922.a1

DATE: 11/03/2011

DATE: November 3, 2011

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In Re:)	
)	
-----)	ISCR Case No. 10-00922
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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 March 9, 2011, 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 August 22, 2011, after the hearing, Administrative Judge Michael H. Leonard 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’s decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: Applicant is 47 years old and he has some college and military education. He is married, and he and his wife provide financial support for their two children, ages 19 and 20. He has had multiple moves and multiple jobs over the years due to military assignments. He wife is employed as a federal civilian employee. Altogether, Applicant and his wife earn an annual gross income of approximately \$100,000 to \$150,000. Applicant has a history of delinquent debts. Concerning the eight delinquent debts alleged in the SOR, Applicant has paid or settled three debts for about \$3,320 in total. Five debts remain unresolved for a total of about \$13,000. In addition to the matters listed in the SOR, Applicant has owed back taxes to the IRS. As of August, 2010, Applicant completed an installment agreement to repay back taxes for tax years 2003 and 2006 for a total of about \$2,356. Applicant may also owe \$4,000 in back taxes for tax year 2010, but the matter is pending. Concerning financial assets, Applicant and his wife have unknown, but likely small, amounts of money in 401(k) accounts. They also have a couple thousand dollars in a bank account but otherwise have no financial assets.

The Judge reached the following conclusions: The evidence here supports a conclusion that Applicant has a history of financial problems or difficulties, and these matters are ongoing. All of the mitigating conditions have been considered in light of the evidence as a whole, and none, individually or in combination, is sufficient to rebut, explain, extenuate or mitigate the security concerns stemming from Applicant’s history of financial problems or difficulties. Although Applicant and his wife are now earning more than \$100,000 annually, they have little in the way of financial assets. This is relevant concerning Applicant’s ability to repay the delinquent debts. His delinquent debts are largely unresolved. During the hearing, Applicant came across as lacking in command or knowledge of his finances, which does not inspire confidence, and it suggests a degree of unwillingness to repay. What is missing here is responsible conduct coupled with a good-faith effort during the recent past to repay or otherwise resolve his delinquent debts. His good intentions and honorable military service are insufficient to mitigate the security concerns raised by his ongoing financial problems.

Applicant states that he disagrees with the Judge’s findings on three of the SOR allegations. On one of the allegations, Applicant indicates that he has obtained a document post-hearing that represents a settlement with the creditor. On another, he claims that there was a mix-up on the account number, payment arrangements have been made, and he has been successfully paying on

the account for some months. On the other allegations, Applicant maintains that the charges are possibly fraudulent, and that he has attempted to contact the creditor, with negative results. Applicant's assertions do not establish error on the part of the Judge.

A number of Applicant's assertions about his debts involve new matters not presented or asserted below. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29. Also, Applicant's assertions are reiterations of claims about his finances made below. These assertions constitute nothing more than a disagreement with the Judge's reading of the evidence. After a review of the Judge's decision and the evidence, the Board concludes that the Judge's findings of fact and conclusions regarding Applicant's finances are reasonably supported by the record. 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 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).

Applicant takes issue with the Judge's use of information about his income taxes in the decision. Applicant correctly notes that the issues with his income taxes were not alleged in the SOR. Applicant indicates his impression that this was an attempt "to add further negative information on granting my security clearance." Given the state of the Judge's decision, Applicant's concern is not a frivolous one.

It is appropriate for a Judge to consider conduct and matters not alleged in the SOR for such limited purposes as evaluating a claim of extenuation, mitigation or changed circumstances, and when weighing relevant and material information under the whole person concept. *See*, ISCR Case No. 09-08108 at 6 (App. Bd. Feb. 15, 2011). Because the legitimate use of such evidence is circumscribed, it is important for Judges, once they have chosen to incorporate such evidence into their findings of fact, to provide some analysis indicating how those findings relate to their conclusions and the ultimate disposition of the case. Here, although the Judge made findings in some detail about Applicant's owing of back taxes for several years, there is no mention of these facts in the Judge's analysis or conclusions. The Judge's failure to discuss the factual findings about taxes in his analysis prompts the issue of whether the evidence was used for a legitimate purpose. However, there is no presumption of error below, and the Board will not presume that the Judge used the evidence improperly in the absence of indications that he did so. Also, in this case, the evidence of Applicant's financial difficulties was of sufficient strength, and the Judge's articulation of such potent factors as the weakness of the case for mitigation and Applicant's lack of command and knowledge of his finances were of sufficient magnitude, to provide a reasonable basis for the Judge's unfavorable security clearance decision, irrespective of any consideration of the evidence of back taxes.

The Board does not review a case *de novo*. 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). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, notwithstanding the matter noted above, "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