

KEYWORD: Guideline F

DIGEST: Conduct not alleged in the SOR may be considered limited purposes such as credibility and evaluation of the case in mitigation. Adverse decision affirmed.

CASENO: 10-08560.a1

DATE: 12/05/2011

DATE: December 5, 2011

In Re:)
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 -----) ISCR Case No. 10-08560
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT

Terry L. Elling, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 25, 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 September 9, 2011, after the hearing, Administrative Judge Edward W. Loughran 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 erred in his credibility determination; whether the Judge denied Applicant due process; whether the Judge erred in his application of the mitigating conditions; and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. Married with two minor children, he has a bachelor’s degree.

Applicant enjoyed a large income in the early 2000s. However, he lost his job due to a reorganization of the company, and his new one was not so remunerative. He experienced unemployment before he was hired by his current employer. In addition, he has a child who requires extensive medical treatment, along with modifications to the family home. Applicant was unable to pay his bills, and they became delinquent.

In the mid-2000s, Applicant incorporated a side business for the purposes of buying and selling real estate, although the company never actually bought any. Applicant guaranteed some of the business’s debts, and these were among his delinquencies.

Applicant retained a law firm to assist him in resolving his financial problems, but the firm did not pay any creditors. Applicant terminated his relationship with the firm. He did settle several of his delinquent debts and restructured the mortgages on his house.

The SOR alleged two debts, one for \$9,998 and another for \$16,702. Applicant claimed that he had a payment plan for the first one and that he had settled the second. However, he did not provide documentary corroboration for these claims, and, during the course of his security clearance investigation, he made inconsistent statements about the debts.

Applicant is currently living within his means and is not accumulating any additional delinquent debt. His wife has a part-time job. Applicant enjoys an excellent reputation for his job performance, trustworthiness, responsibility, and honesty.

In the Analysis, the Judge noted that Applicant had resolved several of his debts. He also cited to Applicant’s evidence of good character. However, the Judge stated that Applicant failed to provide documentation to support his claims of a repayment plan for one of the alleged debts and

settlement of the other.¹ Additionally, the Judge noted Applicant's inconsistent statements and his failure to provide an explanation for them. The Judge stated that the record left him with "significant unanswered questions" about the extent to which Applicant's finances are under control. "Under AG ¶ 2(b),² I am required to resolve my doubt in favor of national security." Decision at 10.

On appeal, Applicant contends that the Judge erred in his assessment of Applicant's credibility. He argues that he has never "misled or knowingly misstated any of the facts and circumstances surrounding his financial circumstances." He also asserts, in a footnote, that, by considering Applicant's inconsistent statements, the Judge was raising Guideline E security concerns without giving him appropriate notice and an opportunity to respond, as required by the Executive Order and the Directive.³ Applicant Brief at 6.

We defer to a Judge's credibility determination, unless it is not supported by the record evidence. *See, e.g.*, ISCR Case No. 99-0007 at 2-3 (App. Bd. Nov. 28, 2000). We have examined the Judge's treatment of inconsistencies in Applicant's accounts of his debts. The Judge's comments are supported by the record. Applicant made inconsistent statements concerning important aspects of the repayment plan pertaining to the \$9,998 debt.⁴ His presentation concerning the other debt likewise contained inconsistencies.⁵ Applicant's brief, viewed in light of the record, provides no reason to disturb the Judge's credibility determination.

¹Applicant presented evidence of a check in the amount of \$750, which he claimed had been paid toward one of the SOR debts. However, the Judge concluded that this check actually pertained to another, non-alleged, debt. The evidence supports this conclusion by the Judge.

²Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

³Executive Order 10865 is included in the Directive as Enclosure 1. It provides, at Section 3, that an applicant is entitled to a written statement of reasons for denial of a clearance, opportunity to reply in writing, and an opportunity to appear personally before a Department Official. In preparing for such an appearance, an applicant is entitled to a reasonable time to prepare, to be represented by counsel, to cross examine witnesses, and to a written decision. The Directive provides that a hearing before a DOHA Administrative Judge satisfies the provision for a personal appearance. Directive ¶ E3.1.8.

⁴The Judge found that Applicant's discussion of this debt, for example in his answers to interrogatories and in his clearance interview, did not agree as to the amount he was supposed to pay each month, as well as to the length of time during which he claimed to have been making payments. Decision at 3. Government Exhibit (GE) 4, Personal Subject Interview, conducted in March and June 2010, and Answers to Interrogatories, signed March 9, 2011, support the Judge's finding.

⁵The Judge found that Applicant, in his answers to interrogatories, stated that he did not recognize the acronym of the alleged debtor. He told the security clearance interviewer that he owed \$20,000 on this debt, but, during a re-interview three months later, he stated that the debt was paid off. Applicant testified that he could not explain this discrepancy, except that the day of the interview was a long one. GE 4 and Tr. at 57 support the Judge's finding.

Concerning the due process argument, conduct not alleged in a SOR may be considered for certain limited purposes, such as a credibility determination and evaluating an applicant's case for mitigation. *See, e.g.*, ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 20, 2010). In the case under consideration here, the Judge addressed Applicant's inconsistencies as they bore on Applicant's credibility and on whether he had met his burden of persuasion as to mitigation under Guideline F. The Judge considered the inconsistent statements in their proper context. He did not deny Applicant the due process rights afforded by the Directive.

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,'" both as to the mitigating conditions and the whole-person factors. *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 Judge's adverse 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 Judge's adverse security clearance decision is AFFIRMED.

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