

KEYWORD: Guideline F

DIGEST: The basis of the Judge's adverse decision was Applicant's failure to address responsibly a substantial, long delinquent debt. Adverse decision affirmed.

CASENO: 11-14431.a1

DATE: 12/13/2013

DATE: December 13, 2013

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In Re: )  
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 ----- ) ISCR Case No. 11-14431  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Gregory A. Schnitzer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 25, 2013, DoD 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 24, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge made an erroneous finding of fact when he determined that Applicant owed a second mortgage debt; and (2) whether the Judge erred in his conclusion that no mitigating factors applied to the case. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant's husband lost his job in 2009 and had two knee operations in 2009, which caused him to be disabled and unable to work. This, coupled with the crash of the housing market in 2008, has caused Applicant's current financial difficulties.

In her answer to the SOR, Applicant admitted owing a delinquent refinanced mortgage debt in the amount of about \$75,000. At the hearing, she deferred to her husband's testimony, as he handled matters relating to the property. The husband indicated that they could not keep up with the payments on their rental property, which they had refinanced four or five times. They made a decision to "let the house go." The husband indicated that he has made a good faith effort to follow up on this foreclosure debt, but Applicant did not submit anything in writing in support of this contention. A realtor who had worked with Applicant and her husband testified that in her conversations with the creditor, she was informed that there was no balance due on the loan. An IRS Form 1099-A which purportedly showed taxable income of \$70,500 was referenced by the realtor in her testimony, but no such form is contained in Applicant's tax filing for 2010 or anywhere else in the record. Instead, the 2010 tax records include a declared loss of \$31,113 under "Sales of Business Property" on IRS Form 4797. The \$75,000 second mortgage debt is still outstanding.<sup>1</sup>

The Judge concluded: Applicant has a significant past-due debt, which she has not yet resolved. No countervailing mitigating conditions are applicable. Although Applicant's past-due indebtedness can be attributed to the crash of the housing market in 2008 and her husband's unemployment and disability in 2009, she has failed to show a good-faith effort to address her substantial debt on the second mortgage. Applicant, her husband, and their realtor testified as to how this admitted past-due debt was addressed. However, the documentation submitted by the Government and by Applicant "belie" their assertions. Applicant has not met her burden of persuasion. As Applicant has over \$75,000 in past-due indebtedness that she has yet to address, there are questions and doubts as to Applicant's eligibility and suitability for a security clearance. Applicant has not mitigated the security concerns under the whole-person concept arising from her financial considerations.

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<sup>1</sup>A second allegation of indebtedness contained in the SOR concerned a past-due principal mortgage on the same property in the amount of \$357,000. This loan was modified, and the Judge found that Applicant is current with this modified loan.

Several of Applicant's arguments on appeal are based on her assertion that the Judge disregarded testimony and documentary evidence. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). After a review of the entire record and the Judge's decision, the Board concludes Applicant fails to overcome this presumption.

In support of her appeal, Applicant has submitted new matters in the form of a credit report that post-dated the close of the record below. The Board may not receive or consider new evidence on appeal. *See* Directive ¶ E3.1.29.

Applicant argues that the Judge erred in making his finding that Applicant still owed the \$75,000 debt on the second mortgage. Applicant asserts that the Government did not establish this fact by substantial evidence. After a review of the record and the Judge's decision, the Board finds no error.

When a Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. . . ." Directive ¶ E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 03-05647 at 2 (App. Bd. Dec. 30, 2004). 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). In this case the Judge was called upon to resolve a conflict in the evidence regarding whether or not the debt alleged in SOR subparagraph 1.a. was outstanding and delinquent. The Judge noted the conflicting evidence in some detail in his decision before finding that the \$75,000 debt was still outstanding, including a specific statement as to why the evidence he discounted was less worthy of belief. Moreover, Applicant admitted the debt in her response to the SOR, stating, "[s]aid amount owed to [bank] has been listed as a charge-off and remains outstanding." This admission alone is sufficient to support the challenged finding. The Board concludes that the Judge's finding is reasonably supported by the record using the substantial evidence standard.

Applicant cites to several aspects of her overall credit rating and the circumstances under which the second mortgage debt fell delinquent in support of her arguments that the Judge erred when he did not apply mitigating factors in Applicant's favor and did not find in her favor under a whole-person analysis. Applicant fails to establish error on the part of the Judge. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. The gravamen

of the Judge's decision was his conclusion that there were unmitigated security concerns based on Applicant's failure to responsibly address a very substantial, long-delinquent debt . His findings in this regard are supported by the record evidence. Given this fact, the Judge was not compelled ultimately to conclude in Applicant's favor notwithstanding otherwise positive evidence regarding her credit history.

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 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 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 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