

KEYWORD: Guideline F

DIGEST: A letter from Applicant’s bankruptcy attorney stating that all of Applicant’s debts were included in his bankruptcy plan was sufficient evidence to establish the fact. The Judge erred in not so concluding. However, the error was harmless as the Judge’s focus on circumstances underlying Applicant’s debts was sufficient to support his decision. Adverse decision affirmed.

CASENO: 12-00725.a1

DATE: 10/03/2014

DATE: October 3, 2014

In Re:)	
)	
-----)	ISCR Case No. 12-00725
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 13, 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). Department Counsel requested a hearing. On June 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA)

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 issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

In the late 1990s, Applicant found himself with a fairly substantial net worth. He decided to become an entrepreneur. He did some research, concluding that investors like to see persons "maxed out" on credit cards and mortgages, because "that shows commitment." He stated that they like to see someone who "will be desperate enough to take any deal they give you." Decision at 2. Applicant invented a product with potential and recruited several business partners. He devoted proceeds from the sale of another business into this venture and accepted a part-time job with his current employer to raise money for the new undertaking. As the stock market rose, he took two loans on his home and subsequently refinanced.

Applicant was not able to raise sufficient funds or attract enough investors as his venture required. Though intending to devote himself more fully to it, he developed chronic fatigue syndrome, which impaired his energy level. He became unemployable due to this condition, although he was able to do some work for his new business. He persevered, inspired by an exhortation by a celebrity investor that "marketable winners . . . never, never, never give up." *Id.* at 3.

Applicant began living off his credit cards, using them for work-related expenses and for personal ones, like his mortgage. "I am living off the credit cards and trying to push the business through, and that is exactly what the venture capitalists and angel investors want you to do . . . that is what my business partners expected me to do" *Id.* Unfortunately, the economy faltered and Applicant filed to Chapter 13 bankruptcy protection. He was to pay his unsecured creditors a total of \$15,000, which was only 7.3% of the total unsecured debt.

The SOR alleges four debts. Applicant contended that they were all included in his bankruptcy plan, although the Judge found that it was not clear whether two of them were actually related to bankruptcy entries regarding the same creditor. He stated that Applicant failed to provide documentary evidence that another of the SOR debts was included in the bankruptcy plan. Applicant submitted a letter from his attorney, who cited to documents not contained in the record, for example a Schedule F. The Judge stated that no "alternative creditor names, collection agents, or successors were identified or demonstrated to be linked to the SOR-identified creditors." *Id.* at 4.

The Judge's Analysis

The Judge concluded that Applicant had not mitigated the concerns arising from his delinquent debts. He noted that Applicant did not dispute the validity of the SOR debts. He also noted Applicant's evidence of his chronic fatigue syndrome, though stating that, despite this

infirmity, Applicant was still able to work on his private business venture. He also cited to Applicant's evidence that he "burned through" borrowed money during his illness. *Id.* at 6. The Judge concluded that, without more information, he was unable to say that the 7.3% payment rate for unsecured creditors constituted a good-faith effort at repayment. He concluded that it was unclear whether the four SOR debts were actually included in Applicant's bankruptcy plan.

In the whole-person analysis, the Judge reiterated this point, concluding that Applicant had not met his burden of persuasion as to mitigation. The Judge went on to say that, even aside from the question of whether the SOR debts were covered by Applicant's bankruptcy, the circumstances underlying the debts evidenced "reckless and disturbing behavior." *Id.* at 7. He stated that Applicant's conduct in acquiring his debts showed a willingness to take unnecessary risks and impugns his good judgment.

Discussion

Applicant notes that he represented himself at the hearing, arguing that, had he been represented by counsel, he could have made a better showing. The record shows that DOHA provided Applicant with pre-hearing guidance that included notice of his right to employ counsel and to present witnesses and documentary evidence. The record also shows that Applicant submitted documentary evidence, including post-hearing exhibits addressing concerns that arose during the course of the hearing, and testified in his own behalf. There is nothing in the record to suggest that Applicant was denied the due process afforded by the Directive, whether arising from his *pro se* status or from some other cause. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014).

Applicant cites to evidence he submitted in his own behalf, including character references and documents relating to his bankruptcy plan. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-04413 at 2 (App. Bd. Feb. 16, 2012). He cites specifically to Applicant Exhibit (AE) C, a letter from his bankruptcy attorney, who states that all of Applicant's debts have been addressed in the plan. He argues that the Judge erred in concluding that it was unclear as to whether this was so.

We find this argument persuasive. After examining the AE C in light of the entire record, we conclude that it is sufficient to show that the SOR debts were included in his bankruptcy filing. However, even if the Judge had not made this error, his overall decision would have been the same. His analysis placed great emphasis on the circumstances underlying Applicant's financial problems, that he found to have impugned Applicant's judgment. *See, e.g.*, ISCR Case No. 10-06975 at 2 (App. Bd. Apr. 19, 2012) (The Judge's focus upon circumstances underlying the applicant's debts supported his adverse decision, despite evidence of a good security record, character references, and a discharge in bankruptcy).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL RA'ANAN

Applicant's Exhibit C is a post-hearing submission from a bankruptcy attorney. It consists of a three page letter and nine pages of attachments. The letter explains in considerable detail how two debts cited in the SOR have been covered under Applicant's Chapter 13 bankruptcy. For a third debt, the letter explains that the unsecured creditor (a bank) has failed to take steps necessary to receive distributions from the Trustee although the creditor and its collection agent were provided notice. The attachments are: 1. The mailing matrix which included all the cited creditors and the collection agent and 2. The Trustee's Notice of Claims Filed and Intention to Pay Claims which includes the two creditors at issue who took the necessary steps to ensure distribution.

The Judge's decision to lend this exhibit little weight relies on the absence of one particular piece of corroborating evidence (Schedule F) referred to by the attorney but not attached. Given the significance of the attorney's explanation and the attachments provided, I am uncertain what additional significance would have been added by the presence of Schedule F. The Judge also says "No evidence was submitted showing that any creditor ultimately decided not to file a claim." Perhaps, but Applicant provided evidence that the creditor failed to take reasonable action to preserve its interests. The Attorney wrote that the creditor failed to take required action after the creditor and its agent were given notice. I am not sure what standard reasonably requires an applicant to provide evidence of an affirmative decision by a third party creditor.

Signed: Michael Ra'anana _____

Michael Ra'anana
Administrative Judge
Chairperson, Appeal Board