

KEYWORD: Guideline G; Guideline E; Guideline F

DIGEST: The Judge cleared Applicant under Guideline G. However, failure to be truthful and candid during the clearance process is of special interest in evaluating an applicant’s eligibility. Also, promises of future payment are not a substitute for a meaningful track record of debt resolution. Adverse decision affirmed.

CASENO: 12-01578.a1

DATE: 09/24/2014

DATE: September 24, 2014

In Re:)	
)	
-----)	ISCR Case No. 12-01578
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Cathryn E. Young, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 30, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul

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 some of his findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline G are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal. Applicant holds bachelor's and master's degrees. He served in the military from 1990 to 2000. He seeks a clearance in connection with his employment by a Defense contractor.

Applicant's SOR alleged that he failed to disclose to his facility security officer (FSO) a 2008 arrest for DUI. He was ashamed, embarrassed, and concerned he would lose his job.¹ He admitted this allegation in his response to the SOR. He also conceded this failure in an answer to a DOHA interrogatory.² At the hearing, he testified that he did not believe that he was required to report the arrest. He did not provide this explanation in his SOR response or in his clearance interview. He acknowledges that he should have reported it but did not want to do so because he was afraid he would lose his job.

The SOR also alleged that Applicant failed to disclose his delinquent debts in reply to pertinent questions in his SCA. These questions inquired about whether he had (1) had bills turned over to collection agencies, (2) had any accounts suspended or charged off, or (3) had been over 120 days delinquent on any of his debts. His "no" answers to these questions were untrue, in light of his substantial financial problems, alleged under Guideline F. Applicant stated in his SOR response that he was undergoing a divorce at the time he completed his SCA and had not been aware of "gross delinquencies of debt." Decision at 4. He testified that he had not been aware that his debts met the criteria set forth in the SCA. He admitted that, at the time he completed the SCA, he had filed for bankruptcy. However, he claimed that he did not know that his debts were more than 120 days delinquent and that he did not know what collection or charged off accounts were.

Under Guideline F, the SOR alleged 34 delinquent debts, totaling \$123,042. He claimed that all of his delinquent accounts were being resolved through Chapter 13 bankruptcy. He testified that his plan was to make monthly payments of \$845 for the next five years. One of his exhibits confirms that he has made one payment under this plan, and other exhibits show that he has received the financial counseling required by bankruptcy law.

¹Although the Judge resolved the Guideline G allegations in Applicant's favor, he found that Applicant had a prior DUI and had received treatment for alcohol abuse.

²The Judge did not expressly state that Applicant held a clearance at the time of his 2008 DUI, although it is implicit in his findings concerning this allegation, as well as in Applicant's SOR admission. *See* Security Clearance Application (SCA) at 28, stating that Applicant was granted a clearance in 2007.

His bankruptcy lawyer provided a letter in which he stated that the bankruptcy process was in the “pre-confirmation” phase. He also stated that the initial creditor’s list was not complete and had to be modified. He estimated that the plan would be approved in summer 2014. The exhibit that included this letter also advised that Applicant owed \$168,719 in unsecured nonpriority claims.

Applicant attributed his financial problems to expenses due to medical treatment and his divorce, that left him with responsibility for a large student loan incurred by both himself and his wife. He testified that he was in arrears in child support and that the \$114,000 student loan cannot be discharged in bankruptcy. Much of Applicant’s mitigation evidence related to the Guideline G allegations. He enjoys an excellent reputation for his honesty, integrity, and professionalism.

The Judge’s Analysis

As stated above, the Judge cleared Applicant under Guideline G. Regarding the Guideline E allegations, however, he found that Applicant had deliberately failed to disclose relevant information during the processing of his application for a clearance. He stated that Applicant should have known that at least some of the SOR debts were more than 120 days delinquent, especially since he had reviewed his debts during his divorce action and had begun the bankruptcy process. The Judge stated that Applicant provided no reasonable explanation for not informing the Government of his financial condition.

Under Guideline F, the Judge noted Applicant’s divorce, which was a circumstance outside his control. However, he also stated that Applicant’s extensive medical treatment was elective in nature and, therefore, could not be considered unexpected, as required by mitigating condition 20(b).³ Moreover, he found that, although Applicant had begun to act responsibly by filing for Chapter 13 bankruptcy protection, his plan had yet to be approved by the Judge as of the close of the record. In any event, even if Applicant were to be discharged, he would still owe \$114,000 for his student loan. He stated that it is too soon to see if Applicant’s financial problems are being resolved.⁴

Discussion

Applicant contends that he had not deliberately failed to advise his FSO about his DUI arrest. He also denies that he had deliberately failed to disclose his financial problems in his SCA. We examine a Judge’s findings of fact to see if they 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. In evaluating an applicant’s *mens rea*, a Judge should evaluate the statements or omissions in light of the entire record. *See, e.g.*, ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014).

³Directive, Enclosure 2 ¶ 20(b): “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]”

⁴Directive, Enclosure 2 ¶ 20(d): “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

Concerning Applicant's failure to disclose his arrest, we note that he admitted the allegation, stating that his failure was due to embarrassment and concern over losing his job. As the Judge found, neither in his SOR response, his clearance interview, nor his interrogatory answers did he contend that he had not been aware of his obligation to self-report. A reasonable person could conclude that his hearing testimony was a recent effort to minimize the gravity of his conduct.⁵ *See, e.g.,* ISCR Case No. 11-00193 at 4 (App. Bd. Jan. 24, 2013). Concerning Applicant's omission of his delinquent debts, evidence that he had known about the student loan debt since his divorce and that he had filed for bankruptcy protection at the time he completed his SCA undercut his claim of ignorance. A reasonable person could conclude that Applicant sought to withhold information that might impair his chance for a clearance and, therefore, threaten his job. We find no error in the Judge's conclusion that Applicant had not exhibited the candor required of those who hold clearances. We give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. After considering all of Applicant's arguments regarding this assignment of error, we conclude that the Judge's material findings of security concern are supported by substantial record evidence or constitute reasonable conclusions from the evidence.⁶ *See, e.g.,* ISCR Case No. 11-13984 at 3 (App. Bd. Feb. 20, 2014).

Applicant challenges the Judge's mitigation analysis. He cites to evidence of his medical treatment and his divorce which, he contends, were significant causes of his financial distress. He also cites to evidence of his struggles with alcohol, arguing that his financial problems were connected with these difficulties. He contends that his recent sobriety shows that he has gained mastery over the challenges that were part of the cause of his Guideline F concerns. Applicant's argument is, to a large extent, a disagreement with the Judge's weighing of the evidence. An ability to argue for a different interpretation of the record is not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Neither has Applicant rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.,* ISCR Case No. 13-00175 at 3 (App. Bd. Mar. 20, 2014). The Judge's conclusion that Applicant's promises of debt resolution were essentially speculative was consistent with the evidence that was before him.

Applicant challenges the Judge's whole-person analysis. He cites to evidence of his military service, his dedication to his children, his excellent job performance, etc. However, we conclude that the whole-person analysis complied with the requirements of the Directive, in that the Judge

⁵Applicant's appeal brief asserts not merely that he did not believe he had to report the DUI, but that he was in fact not under an obligation to have done so. "Whatever his intentions were for not disclosing the incident are . . . moot. He was not under an obligation to report the incident, so he did not." Appeal Brief at 11. This argument is without merit. *See* DoD 5200.2-R, *Personnel Security Program*, January 1987, which states that persons with clearances must promptly report their security significant conduct, including criminal conduct. ¶¶ C9.1.4.2 and C2.2.1.8. *See* Note 2, *supra*.

⁶In arguing this assignment of error, Applicant cites to a Hearing Office case in which an applicant's omissions were found not to be intentional. He argues that his circumstances are similar. We give this case due consideration as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judge or on the Appeal Board. *See, e.g.,* ISCR Case No. 13-00917 at 3 (App. Bd. Jul. 8, 2014). Each case must be decided on its own merits. Applicant's citation to this other case is not sufficient to undermine the Judge's findings.

evaluated Applicant's security concerns in light of the evidence as a whole. *See, e.g.*, ISCR Case No. 11-13984, *supra*, at 3-4 (App. Bd. Feb. 20, 2014). As stated above, Applicant has not provided a reason to believe that the Judge failed to consider all of the evidence in the record or that he misweighed the evidence.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. Failure to be truthful and candid during the clearance process is of special interest in evaluating an applicant's eligibility. Directive, Enclosure 2 ¶ 15. Promises of future payment are not a substitute for a meaningful track record of debt resolution. *See, e.g.*, ISCR Case No. 13-00175, *supra*, "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: Michael Ra'anan
Michael 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