KEYWORD: Guideline F

DIGEST: Applicant's Counsel argues the Judge failed to account for mitigating factors and mis-analyzed the evidence. Much of the appeal brief is a challenge to the Judge's conclusion that none of the mitigating conditions were met. In making those arguments, Applicant's Counsel highlights evidence that supports application of certain mitigating conditions and contends the Judge's analysis was unfair and unreasonable. Even if Applicant is entitled to some credit in mitigation, any error in the Judge's analysis is harmless. The mitigating evidence was not sufficient to compel a favorable decision. A Judge is not required to conclude that a mitigation condition merits full application because some evidence exists to support it. In essence, Applicant's Counsel's arguments amount to a disagreement with the Judge's weighing of the evidence. Adverse decision affirmed.

CASE NO: 18-02862.a1

DATE: 11/04/2020

DATE: November 4, 2020

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Brett O'Brien, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 26, 2019, 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 August 25, 2020, after the hearing, Administrative Judge John Grattan Metz, 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 discussion, we affirm the Judge's decision.

The Judge's Finding of Fact

Applicant is seeking a security clearance as a self-employed consultant. Over the past 20 years, he has held a variety of security clearance and public trust positions.

The SOR alleged that Applicant failed to file timely his 2008-2012 and 2014 Federal income tax returns, and he accumulated over $51,000 in past-due Federal tax debt for 2010 and 2011. In responding to the SOR, Applicant admitted those allegations. The SOR also contained state tax debt allegations that Department Counsel withdrew at the hearing.

Applicant attributed his tax problems to an injury he received while traveling overseas in 2009. This injury resulted in significant surgery and rehabilitation. He claimed the injury left him unable to work and unemployed. He returned to work in late 2011 as a self-employed consultant. While unemployed in 2009, Applicant made premature withdrawals for a retirement account to pay for living expenses without being fully aware of the tax consequences of that action. This withdrawal resulted in significant, unanticipated tax liability. The IRS filed a substitute tax return for him in late 2011. Applicant filed his 2009 Federal income tax return in July 2012. Applicant made some payments towards this debt and had subsequent tax refunds applied towards its payment.

In late 2013, Applicant hired a tax resolution service, which was unsuccessful in reaching an offer in compromise with the IRS. His delinquent tax returns were filed, and he timely filed his 2013 and 2015-2016 income tax returns. For unclear reasons, he was late in filing his 2014 tax return.

In late 2017, Applicant hired a tax attorney who was also unsuccessful in reaching an offer in compromise. In May 2019, Applicant increased his Federal tax withholdings "with an eye to having it seized and applied to his remaining 2010 balance." Decision at 3. In October 2019, he made a lump-sum payment to resolve his 2011 tax liability. In November 2019, he entered into a repayment agreement with the IRS with initial monthly payments of $450 that increase after one year to monthly payments of over $1,300. The tax attorney also indicated that Applicant planned to

obtain a home equity loan to make a lump-sum payment of $50,000 to resolve the 2010 tax liability. It is unknown whether Applicant has followed through with this plan.

Applicant "provided no work or character references[.]" Decision at 3. He also provided no budget or documentation of financial counseling.

The Judge's Analysis

None of the mitigating conditions were met. Applicant's tax problems are multiple, recent, and ongoing. His injury, subsequent surgery and rehabilitation, and unemployment provide some explanation for his failure to file his 2008 and 2009 income tax returns but do not demonstrate that his indebtedness and tax filing deficiencies were due to circumstances beyond his control. Even if the stated reasons justified the delay, it is clear that he has not acted responsibly in addressing his tax problems. Paying delinquent taxes by having subsequent tax refunds seized is not a repayment plan. Although Applicant obtained professional assistance, it was not entirely effective.

Applicant has not received credit or financial counseling. He failed to demonstrate that he has made a good-faith effort to resolve his debts. His recent repayment agreement with the IRS only indicates that his tax issues may be resolved at some point in the future and does not establish any record of payments. "The Government established a case for disqualification under Guideline F, and Applicant failed to mitigate the security concerns." Decision at 4.

Discussion

Applicant's Counsel contends "the Administrative Judge did not address the fact that [Applicant] does not fall under any of the expressed concerns stated in Guideline F" and "[t]he Administrative Judge also failed to recognize that none of the specific concerns listed in Guideline F are applicable . . . ." Appeal Brief at 1 and 6. This assertion of error merits no relief. In his analysis, the Judge specifically concluded that "[t]he Government established a case of disqualification under Guideline F" and, at the end of that paragraph, listed four disqualifying conditions (Directive, Encl. 2, App. A ¶¶ 19(a), 19(b), 19(c), and 19(f)) in a footnote. Decision at 4. While the Judge did not explicitly state those disqualifying conditions applied in this case, his reference to them made it sufficiently clear he was relying on them to conclude "a case of disqualification" was established. Decision at 4. Of note, even Applicant's Counsel acknowledged in his brief that the Judge applied those disqualifying conditions when he stated, "[t]he Administrative Judge mentioned in footnote 3, and ultimately relied upon, four of these conditions in his ruling." Appeal Brief at 5.

Applicant's Counsel argues the Judge failed to account for mitigating factors and mis-analyzed the evidence. Much of the appeal brief is a challenge to the Judge's conclusion that none of the mitigating conditions were met. In making those arguments, Applicant's Counsel highlights evidence that supports application of certain mitigating conditions and contends the Judge's analysis was unfair and unreasonable. Even if Applicant is entitled to some credit in mitigation, any error in the Judge's analysis is harmless. The mitigating evidence was not sufficient to compel a

favorable decision. A Judge is not required to conclude that a mitigation condition merits full application because some evidence exists to support it. In essence, Applicant's Counsel's arguments amount to a disagreement with the Judge's weighing of the evidence. As we have previously stated, 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*. 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. 19-01431 at 4 (App. Bd. Mar. 31, 2020). Furthermore, Applicant's Counsel arguments that the Judge ignored evidence are not sufficient to rebut the presumption the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 18-00110 at 5 (App. Bd. Mar. 31, 2020).

Applicant's Counsel asserts the Judge cited "non-binding precedent" in support of his analysis of Applicant's tax filing deficiencies. Appeal Brief at 6. This argument lacks merit. In the decision, the Judge only cited a U.S. Supreme Court decision (*Department of the Navy v. Egan*, 484 U.S. 518 (1988)) and Appeal Board decisions. The cited decisions were binding precedent on the Judge. *See e.g.*, ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004)(an Administrative Judge must follow an Appeal Board decision even if he or she disagrees with it).

Applicant's Counsel challenges the Judge's "assertion" that there was "no . . . character evidence" and notes that a witness testified at the hearing about Applicant's character. Appeal Brief at 8. In examining this issue, it first merits noting we do not consider individual words, phrases, or sentences in isolation when reviewing a Judge's decision. Rather, we consider them in light of the decision in its entirety. *See, e.g.,* ISCR Case No. 18-02181 at 5 (App. Bd. Aug. 19, 2019). To understand the challenged assertion, more context is needed. The Judge found that Applicant "provided no work or character references" and later concluded Applicant "submitted no work or character evidence which might support a whole-person assessment to overcome the security concerns raised by his conduct." Decision at 3 and 6. We recognize that the quoted conclusion may be read to indicate the Judge considered character evidence but found it insufficient to support a favorable whole-person assessment. On the other hand, given that Applicant presented a character witness at the hearing (Tr. at 48-56), the quoted finding that Applicant presented "no . . . character references" was either wrong or, at best, unclear and confusing. If the Judge was trying to make a distinction between "character references" and other forms of "character evidence," he erred by failing to do so in a clear and understandable manner. From our review of the entire record, we conclude this error, whatever the underlying reason for its occurrence, was harmless because the character witness's testimony did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 18-02239 at 3 (App. Bd. Jul. 20, 2020).

Applicant's Counsel also claims the Judge failed to conduct a whole-person assessment. We find no merit in this assertion. As reflected in the quoted conclusion in the prior paragraph, the Judge indicated he conducted a whole-person assessment. Morever, the Judge noted that the decision was based on all of the record evidence.

In his brief, Applicant Counsel raises the issue of whether the Judge was biased. He contends the Judge conducted a "biased" analysis and "demonstrated clear bias, even disdain, toward" Applicant's evidence. Appeal Brief at 4 and 7. Bias involves partiality for or against a party, predisposition to decide a case or issue with regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. Our review of the record reveals nothing that would persuade a reasonable person that the Judge lacked the requisite impartiality. Applicant's Counsel has not met the heavy burden of persuasion to rebut the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 19-01513 at 3 (App. Bd. Jun. 15, 2020).

Applicant has failed to establish the Judge committed any harmful errors. The Judge examined the relevant evidence 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.'" *Egan* at 528. *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board