

KEYWORD: Guideline F

DIGEST: Applicant failed to rebut the presumption that the Judge was unbiased. The Judge’s material findings were based upon substantial record evidence. Adverse decision affirmed.

CASE NO: 09-05554.a1

DATE: 03/14/2011

DATE: March 14, 2011

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In Re:)	
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-----)	ISCR Case No. 09-05554
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 25, 2010, 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 December 29, 2010, after the hearing, Administrative Judge Jennifer I. Goldstein denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge was biased; whether the Judge erred in her findings of fact; and whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law

In this case, the Judge's essential findings were as follows: Applicant is a 45-year-old employee of a defense contractor. He is married, has four children, and has worked for the same employer since 1997. From 2006 to the present, his gross annual income from his employment has ranged from approximately \$108,390 to \$106,150. Decision at 2.

During the 2004-2005 time period, Applicant, in conjunction with his wife, obligated himself to pay over \$2,000,000 in mortgages on ten investment properties, hoping to make a profit by renting the units. When the rental payments for the properties failed to cover the full amount of the mortgages and maintenance fees in 2006, he began relying on credit to maintain his investments. He borrowed against his 401K pension plan and incurred a large amount of credit card debt in order to make the monthly payments on his properties. In 2006, Applicant's total loss was \$229,000. However, despite his serious financial problems, he acquired an eleventh property in October 2006 for \$360,000, with \$43,000 down and a loan for \$324,000. *Id.* at 2-5 and 6-8.

The Judge concluded that although Applicant attributed his financial problems to a failing economy, problems with management companies, and the inability to get tenants in the rental units, he and his wife had not acted diligently with respect to the properties. In that regard, Applicant's wife, who managed the investments, had never visited the three properties located in another state. As a result of his continuing financial problems, Applicant eventually filed for Chapter 7 bankruptcy and received a discharge in April 2010. However, he continued to maintain ownership of one property, that was reaffirmed in bankruptcy, and owes approximately \$1,241,504 on it. *Id.* at 7. Applicant produced no character evidence to support his trustworthiness. *Id.* at 9.

On appeal, Applicant argues that the Judge was biased, asserting that the Judge erred as to some of her findings and conclusions. The Board does not find this argument persuasive. There is presumption that Judges are unbiased and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. The standard is not whether the appealing party personally believes that the Judge was biased, but whether the record of the proceeding contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness of the Judge. *See, e.g.,* ISCR Case No. 99-0710 at 5 (App. Bd. Mar. 19, 2001). Moreover, bias is not demonstrated merely because the Judge made legal errors or reached adverse conclusions. After reviewing the record, the Board finds nothing which would indicate that the Judge was biased.

Applicant also argues that the Judge erred in her findings of fact as to the details of several of Applicant's complex financial transactions, misconstruing portions of the record evidence in a way that resulted in erroneous adverse conclusions. The Board does not find this argument persuasive.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the same record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing

two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

After reviewing the record, the Board concludes that the Judge's material findings of security concern are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Based on the record as a whole, the Judge's material findings of security concern are sustainable.

Finally, Applicant cites to evidence he maintains supports a granting of his security clearance. 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. 06-17409 at (App. Bd. Oct. 12, 2007).

In this case, the Judge found that Applicant had a lengthy and serious history of financial problems. At the time the case was submitted for decision, Applicant had only recently received a discharge in Chapter 7 bankruptcy, and still had significant outstanding debts and residual financial issues attributable to his series of bad business ventures. In light of the foregoing, the Judge could reasonably conclude that there were ". . . significant unresolved concerns about Applicant's finances and judgment." Decision at 9. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying circumstances, and considered the possible application of relevant conditions and factors. She reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____

William S. Fields
Administrative Judge
Member, Appeal Board