

KEYWORD: Guideline F

DIGEST: Once the government has produced substantial evidence to establish security significant conduct or circumstances, the burden is on the applicant to explain, rebut, extenuate or mitigate the security concerns. Adverse decision affirmed.

CASENO: 09-07139.a1

DATE: 09/13/2011

DATE: September 13, 2011

In Re:)
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-----) ISCR Case No. 09-07139
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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

Clarence R. Johnson, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 12, 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 June 1, 2011, after the hearing, Administrative Judge Thomas M. Crean 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 issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 43 years old and his present annual salary is \$54,487. Applicant worked in debt collections from approximately 1989 to 1999. At present he has only two active credit cards with a credit limit of \$500 on each card. The total amount of Applicant’s delinquent debt is approximately \$12,000. Applicant’s wife, who worked previously as an administrative assistant with an annual income of \$30,000, did not work from 2001 to 2005. Most of the delinquent debts originated when Applicant’s wife was unemployed and have not been resolved. She has been employed full time as a fraud analyst since 2006 at an annual salary of \$30,000. During a security clearance interview in 2009, Applicant indicated his intent to dispute some of his debts and to allow others to become uncollectable under the statute of limitations. Applicant did not believe his finances were of security concern after the interview or after he received the SOR in the case because he believed the process was a normal procedure. He did not understand the security implications of his finances until he came to the first hearing in the case, whereupon he requested an attorney to represent him. He has not taken any action on the debts except having his wife contest some of the debts with the credit reporting agencies.

The Judge reached the following conclusions: The lapse of time that Applicant’s debts have been unpaid and the lack of action to resolve the debts establishes a history of both an inability and an unwillingness to satisfy debt. The Government produced substantial evidence to establish the applicable disqualifying conditions. The burden then shifted to Applicant to produce evidence to rebut, explain, extenuate or mitigate the security concerns under financial considerations. None of the mitigating conditions apply. Applicant initially incurred the delinquent debt when he lost his wife’s income in 2001. However, she rejoined the workforce in 2005 at her old salary level. The debts were incurred many years in the past but have not been resolved and are still current. For the last five years, Applicant has had sufficient income to resolve his debts but has not done so. Applicant presented no information concerning financial counseling, and his finances are not under control. Only one of Applicant’s debts alleged in the SOR has been paid. The debt was paid involuntarily (through garnishment pursuant to a judgment) and not by affirmative actions of Applicant. He has not provided significant and credible information to establish a meaningful track record of debt payment. Applicant stated he disputed some debts or the amount of the debts. However, he did not present documented evidence to establish the disputes or indicate any action taken on the disputes.

Applicant asserts that the Judge misapplied the various mitigating factors and that his debts resulted from circumstances beyond his control, essentially the loss of his wife's income following the births of his children. Applicant argues that the Judge did not take into consideration that four years of not having a spouse's income can put a family in a bind and his wife's return to full employment did not fix the four years of not having her income. Applicant states that the interest accrued on his debt as well as rising interest rates made it harder for him to pay off his debt. Applicant's assertions do not establish error on the part of the Judge.

Applicant's appeal brief essentially argues for an alternative view of the record evidence. 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 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed in some detail the applicability of the mitigating factors listed under Guideline F and indicated why the mitigating conditions did not apply. These conclusions were reasonable given the Judge's findings about the nature of Applicant's indebtedness, the circumstances under which it arose, the number of debts that remain unresolved, the failure of Applicant to address meaningfully his debt delinquencies given the monetary resources he has had at his disposal since 2005, the lack of credit counseling, and his failure to establish a satisfactory basis for contesting some of the debts.

Applicant asserts that the Judge erred by providing facts for mitigating factors and then stating that the mitigating factors do not apply. This argument lacks merit. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). Similarly, the presence of some mitigating evidence does not alone compel the application of one or more individual mitigating conditions.

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 his 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 denying Applicant a security clearance 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