KEYWORD: Guideline F

DIGEST: There was no unfair surprise in the Judge's reference to, and consideration of, gambling debts referenced in Applicant's own evidence. Conduct not alleged in a SOR may be considered for certain purposes, such as the sufficiency of an applicant's case for mitigation, a whole person analysis, etc. Adverse decision affirmed.

CASE NO: 10-03430.ind

DATE: 09/19/2011

DATE: September 19, 2011

In Re:	)	
----------------	)	ISCR Case No. 10-03430
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Steven A. Marczeski, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 14, 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 July 1, 2011, after the hearing, Administrative Judge Jennifer I. Goldstein 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 certain of the Judge's findings of fact were based upon substantial record evidence; whether the Judge improperly relied on conduct

not alleged in the SOR; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. He served in the Navy for 25 years, retiring as a Master Chief Petty Officer. Since retiring, he has worked for several Government contractors. He held a top secret clearance while in the Navy and has held a clearance throughout his civilian career as well. He has never had a security violation.

Applicant has numerous delinquent debts, for such things as a utility bill, student loans he co-signed with his son, vehicle insurance, mortgage payments, a repossessed vehicle, and a credit card. Applicant's wife contributed to the family income "until three to four years ago," at which time her childcare business experienced a loss of customers due to a downturn in the economy. Decision at 2. Concerning the student loans, he originally thought they were in his son's name only.[1] Decision at 3. Applicant filed for Chapter 13 bankruptcy protection in early 2011. The plan was accepted, and Applicant has agreed to pay $1,863.18 per month for five years. He has made two payments under the plan. He has received financial counseling pursuant to his bankruptcy filing, and he has striven to reduce his ordinary expenses. His bankruptcy filing shows that Applicant had a gambling loss of $11,500 in 2010.

In her analysis, the Judge stated that Applicant's financial problems have been ongoing since 2008. She concluded that his two payments under the bankruptcy plan were not sufficient to demonstrate a good-faith effort to pay his debts or to demonstrate that his financial problems were under control. In the whole-person analysis, she concluded:

> [Applicant] has failed to act responsibly with respect to his finances. He only recently began to address his financial problems by filing bankruptcy proceedings that will resolve his debts five years from now if he follows plan requirements. Further, his unexplained large gambling losses in 2010, while substantial delinquent financial obligations were largely ignored, are of concern. Decision at 7.

Accordingly, the Judge concluded that Applicant had not mitigated the security concerns arising from the allegations in the SOR.

Applicant contends that the Judge erred in her findings of fact. Specifically, he challenges the statement in the Analysis portion of the Decision that Applicant's financial problems began in 2008. He also challenges the Judge's statement that Applicant had known about his financial problems since that year. Contending that the evidence actually shows that his problems began in 2009, he states that efforts to address them in 2010 should be considered responsible and, therefore, mitigating.

---

[1]"[Q]: Okay. The . . . debt placed by [creditor] for $1,036, what was that debt for? [A]: Was it the one that I denied? [Q]: Correct. [A]: It was actually a debt incurred by my son and I believe it got into my record because we have the same name . . . and it has something to do with his education. [Q]: Did you ever formally dispute that account? [A]: No, I did not 'cause . . . my son reminded me I cosigned it, so it fell upon me as well." Tr. at 51.

A Judge's findings must be based upon substantial record evidence; that is, "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; ISCR Case No. 09-08083 at 3 (App. Bd. Jul. 15, 2011).

We note the following testimony, during Department Counsel's cross examination of Applicant:

> Q: [Y]ou lost the ability to pay these debts when your wife's business took a downturn; is that true?
>
> A: That's correct.
>
> Q: What time frame are we talking about, sir?
>
> A: . . . I would say three or four years ago.

We also note Applicant Exhibit (AE) A, Bankruptcy Petition, at page 19, which lists the IRS as holder of an unsecured claim for unpaid taxes owed in the year 2008. Applicant's own testimony and evidence support a finding that his problems originated three to four years prior to the hearing, which was held in early 2011. Moreover, the evidence supports a conclusion that Applicant was aware of his problems at the time. The Judge's material findings of security concern are sustainable.

Applicant contends that the Judge erred in her consideration of evidence of the gambling losses. He states that, although the Judge described this matter as "unexplained," no one brought it to his attention until the Decision was issued. Had anyone done so, Applicant contends that it could have been easily explained. In support of his argument he presents new evidence, which we cannot consider. *See* Directive ¶ E3.1.29.

The Judge's finding and analysis on this matter derived from Applicant's own evidence, AE A at 35. This is a part of the bankruptcy petition in which Applicant and his wife, as joint debtor, were required to list any losses during the previous year arising from fire, theft, other casualties, or gambling. Applicant contends that he "was never informed that gambling was a consideration for the denial of his security clearance. Gambling was not mentioned in the SOR, nor by the Government Counsel at the hearing, even though Counsel had such knowledge." Applicant Brief at 8.[2] However, under the facts of this case, there can be no issue of unfair surprise to Applicant arising from the Judge's consideration a document that Applicant himself submitted. *See, e.g.*, ISCR Case No. 09-05176 at 2 (App. Bd. Dec. 14, 2010).[3] *See also* ISCR Case No. 02-24512 (App. Bd.

---

[2]We note that Applicant's counsel informed the Judge at the hearing, "I have served on Counsel today a copy of the United States Bankruptcy Court petition . . ." Tr. at 22.

[3]In this earlier case, the Judge made a finding concerning a prior clearance application by the applicant. In appealing the denial of her current application, the applicant contended that she was denied due process. "She states that, until she read the Judge's sentence . . . she was not aware that her 2007 SCA had been disapproved. She contends that, had she known about the prior disapproval, she would have presented her case differently at the hearing . . . [However,

Jul. 27, 2005).

Moreover, conduct not alleged in a SOR may be considered for a number of reasons, including evaluating an applicant's case for mitigation; evaluating the extent to which he has demonstrated successful rehabilitation; and as evidence relevant to a whole-person analysis. *See, e.g.*, ISCR Case No.03-20327 at 4 (App. Bd. Oct. 26, 2006). In the case under consideration here, the Judge explicitly considered evidence of gambling losses as it pertained to mitigation and the whole-person analysis.[4] Accordingly, she evaluated this evidence in its proper context.

Applicant contends that the record is silent regarding significant aspects of this loss and that a complete understanding would lead to a favorable result. However, it was Applicant who bore the burden of persuasion as to mitigation and who had an opportunity at the hearing to clear up what he now contends are ambiguities in his own evidence. In any event, the Judge's decision appears to rest principally on the extent of Applicant's delinquent debt and on the relative recency of his efforts to address it.[5] Although the Judge discussed the gambling losses, this evidence does not appear to have been determinative to the ultimate result.

Applicant contends that the Judge failed to consider significant record evidence, for example that portion of AE A in which Applicant lists certain payments he had made in anticipation of his bankruptcy filing. He argues that this evidence demonstrates that he had begun to address his financial problems earlier than the Judge supposed. A Judge is presumed to have considered all of the record evidence. *See, e.g.,* ISCR Case No. 09-06691 at 3-4 (App. Bd. May 16, 2011). Applicant has not rebutted this presumption. In any event, the cited evidence does not undermine the Judge's overall conclusion that Applicant was dilatory in addressing his financial problems.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the 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 Judge's adverse 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."

---

the] Judge's statement appears to refer to [the applicant's] own testimony concerning the circumstances of her SCA[.]" Accordingly, the Board concluded that the applicant had not been denied adequate notice of the evidence which the Government had used in presenting its case at the hearing.

[4]"His bankruptcy filing shows unexplained gambling losses of $11,500 in the past year. While there was neither an allegation of compulsive or addictive gambling in the SOR, nor sufficient evidence in the record to establish potential disqualification under AG ¶ 19(g), Applicant's recent unexplained gambling losses indicate that, as late as 2010, he has not acted responsibly under the circumstances." Decision at 6.

[5]"Applicant's debt is being managed through his Chapter 13 bankruptcy plan. He filed bankruptcy only two months prior to the hearing, and two months after the SOR was issued, despite being aware of his financial problems since 2008." Decision at 6.

Order

The Judge's adverse security clearance decision 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