

KEYWORD: Guideline F

DIGEST: The Board evaluates any particular sentence in a Judge’s decision in light of the record as a whole. Applicant failed to demonstrate that he was precluded from presenting evidence in his behalf. Judge’s statement that this was a close case is consistent with his adverse holding, because a Judge must resolve close cases in favor of national security. Adverse decision affirmed.

CASE NO: 10-04562.a1

DATE: 07/11/2011

DATE: July 11, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-04562
)	
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 October 27, 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 May 4, 2011, after the hearing, Administrative Judge Robert Robinson Gales 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 mis-weighed the record evidence; whether the Judge denied Applicant his due process rights; 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 a senior systems integration and test engineer seeking to retain his security clearance. Married since 1984, he has no children.

Applicant and his wife both lost their jobs in 2006. They lived off their savings and off withdrawals from their 401(k) plans. A different employer offered Applicant a job in December 2006, though at a lower salary than his previous one. Additionally, the new job required him to move to another part of the state.

Applicant owns three pieces of real estate. One of them is the house he and his wife lived in before they lost their jobs. Another is a piece of rental property in another town. The third is the house they purchased when they moved to accept the new job. Applicant and his wife had hoped to profit from the real estate boom. However, a combination of job losses and the decline of the housing market resulted in circumstances in which they did not make payments on their rental property and were unable to sell it. Additionally, Applicant had delinquent debts resulting from: (1) his having taken a second mortgage on his primary residence; (2) the use of a credit card to pay ordinary living expenses; and (3) a signature loan which he obtained to enable him to install protective windows on one of his houses.

In 2007, Applicant purchased the house in which he and his wife currently reside. He leased an automobile and purchased another, resulting in monthly payments of \$286 and \$570 respectively. He has engaged the services of two attorneys to negotiate settlements of his existing debts. These attorneys have been successful in securing the cancellation of certain non-SOR debts. Applicant has a monthly remainder of \$1,714 after expenses for discretionary expenditures. He is putting \$1,200 each month in his and his wife's 401(k) accounts. Applicant is involved in community activities and enjoys a good reputation for his work performance and integrity.

Applicant contends that the Judge did not properly weigh the record evidence. He points to the following comment in the Analysis portion of the decision which, he believes, is based upon a misunderstanding of the evidence: "[O]nce [Applicant] calculated the economic realities and decided not to continue using his protected assets to pay the respective accounts associated with [the first two properties] . . . he failed to act responsibly." Decision at 11. Applicant contends that the Judge did not understand Applicant's true financial situation, that Applicant in fact did not have a substantial amount of liquid assets left and that what he did have was necessary to pay his legal fees.

In evaluating any particular sentence by a Judge, we must consider it in light of the record as a whole, rather than in isolation. *See, e.g.*, ISCR Case No. 05-07983 at 3 (App. Bd. Oct. 1, 2007). The challenged sentence at issue here is one found in the Judge's analysis of Applicant's case for mitigation. The Judge acknowledged that Applicant's financial problems originated from unemployment, which was beyond Applicant's control. However, he concluded that Applicant's conduct in regard to his debts had not evidenced responsibility. In support of this conclusion, he

made the statement at issue here. He also noted Applicant's purchase of a third house, his lease and purchase of two cars, and his efforts to diminish the amounts due his creditors rather than try to develop a reasonable means for paying the debts off. The record, viewed as a whole, supports the Judge's evaluation of the evidence and provides no reason to question the propriety of the challenged statement.¹ Applicant has not demonstrated that the Judge considered Applicant's circumstances outside of the proper context or that he weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

Applicant has raised a due process issue. He states that he was deprived of an opportunity to discuss the automobile purchase that the Judge had found to be irresponsible. He contends that Department Counsel had objected to his efforts to explain this matter, although the purchase was already in evidence. We have examined the entire record, including the transcript, and can find no instance in which Department Counsel objected to Applicant's efforts to discuss this purchase. Moreover, although Applicant briefly discussed the car purchase, he never stated to the Judge that he wanted to provide more information on the topic than he already had. While at one point toward the end of the hearing the Judge cautioned Applicant against launching into his closing argument prematurely, there is no basis to conclude that he prevented Applicant from presenting any documents or testimony or that he otherwise improperly restricted Applicant's efforts to present his case. There is no reason to conclude that the Judge denied Applicant the due process afforded by the Directive.

Applicant cites to certain language by the Judge to the effect that this was a close case. He argues that the evidence, properly understood, should have resulted in a favorable decision. However, Applicant has not demonstrated the Judge erred. The Judge's statement about the case being a close one does not undermine his adverse decision, in light of 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." *See also* ISCR Case No. 08-04990 at 2 (App. Bd. Mar. 18, 2010) ("This is a close case, and as such the Judge was obligated to resolve it in favor of national security rather than in favor of Applicant").

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).

Order

¹We note Applicant's testimony that his and his wife's 401(k) plans were, at the time of the hearing, worth approximately \$120,000. Tr. at 84. Even assuming, as Applicant testified, that not all of that amount could be withdrawn, a reasonable person could conclude that Applicant had at his disposal funds that could be used to pay off debts but which were not being so used.

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin _____
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board