

KEYWORD: Guideline F

DIGEST: The record discloses no basis to conclude that Applicant was denied the rights due him under the Directive or that he had not been advised of those rights. The record supports the Judge’s conclusion that the disqualifying conduct under Guideline F was not mitigated. Adverse decision affirmed.

CASENO: 10-02170.a1

DATE: 02/06/2012

DATE: February 6, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-02170
)	
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 April 27, 2011 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 October 6, 2011, after the hearing, Administrative Judge Jennifer I. Goldstein denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 44 years old, is unmarried and has no children. Applicant is indebted to two creditors in the approximate amount of \$45,041. The first debt was listed as a credit card account totaling \$32,345, and the second was a credit card account totaling \$12,696. Applicant attributes his recent financial problems to a series of events beyond his control. In 2001 Applicant purchased a home for \$200,000. He was able to afford the payments with the income from an insurance business and through selling pharmaceuticals. In 2005, Applicant refinanced the home and borrowed \$265,000 with a three-year adjustable-rate mortgage. In 2008, the mortgage on his house adjusted upward from monthly payments of \$1,441 per month to payments of \$2,258 per month. At the same time, the patent on the pharmaceuticals he was selling expired and they became available over-the-counter. His insurance business also declined due to the economy. As a result of these two events, his income declined from approximately \$80,000 to \$20,000 per year. Applicant attempted to meet his mortgage obligations, including using his credit cards to make mortgage payments and pay for living expenses. Eventually, however, he defaulted on his mortgage. After his home was foreclosed upon in 2009, Applicant worked diligently to repair his credit. He hired a law firm to represent him in negotiations with his outstanding creditors. Although one of Applicant's debts not listed in the SOR was settled, the law firm failed to reach a settlement with the two listed credit card debts. Applicant hired a second law firm to settle the two debts. With the aid of the second law firm, Applicant got one creditor to agree to accept payments on the debt. An e-mail indicated that Applicant made the first payment of \$915 on August 17, 2011, and that he wished to make monthly payments on the 11th of each month until the agreement was satisfied. The second law firm contested the second debt, as the statute of limitations had passed, and there were other discrepancies. However, the second law firm later verified that the debt was still delinquent. In a post-hearing submission, Applicant provided evidence of an offer to settle this debt for 12 monthly payments of \$267 for a total payoff of \$3,200. There is no indication whether the creditor accepted this payment offer. Applicant currently lives within his means. He has a positive monthly remainder after his monthly expenses are met. He has \$4,000 in cash saved toward settling his debts. He testified he had another \$10,000 in assets that he could liquidate to repay his debts. He has received financial counseling from his church.

The Judge reached the following conclusions: Applicant was unable to satisfy his two delinquent credit cards totaling \$45,041. Applicant's financial indebtedness was caused by his decision to satisfy his mortgage through the use of his credit cards. While he could not control the downturn in his insurance business, he could have anticipated the expiration of the pharmaceutical patent. It was his choice to refinance his home at an adjustable interest rate and then to use his credit cards to continue to pay his mortgage. These choices indicate Applicant did not use good judgment with respect to his finances. Applicant has not established that he acted reasonably under the circumstances. He only recently established a payment plan with the first credit card creditor and

has no repayment plan with the second. There is little indication that the counseling from his church or the assistance of the two law firms had a significant impact on the delinquent accounts. Applicant had several offers to negotiate from his creditors, but he failed, until recently, to make any payments, despite his savings and assets. He failed to establish a track record of acting responsibly with respect to his finances. None of the mitigating conditions apply.

As a preliminary matter, Applicant asserts that he did not have legal representation at the hearing or at the time of appeal, and if given the opportunity, he would like to have this option. He indicates that he did not have the money to hire a lawyer in regards to his clearance, and also states that at the time of the hearing he was instantly overwhelmed and felt he wasn't able to articulate his case in the way a prepared professional could.

An applicant's right to be represented by counsel (or personal representative) of his choice is not absolute, and an applicant may waive it, for example, by failing to take reasonable steps to exercise it. *See* ISCR Case No. 98-0619 at 4 (App. Bd. Sep. 10, 1999). After reviewing the record, the Board notes the following: (1) Applicant was sent Prehearing Guidance which notes in numbered paragraph 1 “. . . The Applicant has the option of appearing by himself or herself without an attorney, or being represented by an attorney selected and paid for by Applicant, or by being represented by a Personal Representative such as a friend, family member, or union representative”; and (2) the hearing transcript reveals that, prior to receiving any evidence, the Judge asked Applicant if he was aware of his right to hire an attorney or have a personal representative present, and then specifically asked Applicant if he had chosen to represent himself. The Judge then asked Applicant if he was ready to proceed, and Applicant indicated that he was. At no time during the hearing did Applicant express any second thoughts about proceeding without representation. The record discloses no basis to conclude that Applicant was denied the rights due him under the Directive or that he had not been adequately advised of those rights. *See* ISCR Case No. 03-25024 at 2 (App. Bd. Feb. 8, 2007). There is no basis to remand the case to allow Applicant an opportunity to obtain representation.

Applicant argues that the Judge's conclusion that his case was not mitigated was erroneous and that the evidence showed that he displayed constant and consistent effort to satisfy his creditors and that he exercised due diligence. Applicant has failed to establish error on the part of the Judge.

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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. She adequately discussed why the disqualifying conduct established under Guideline F was not mitigated.

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