

KEYWORD: Guideline F

DIGEST: The applicability of a particular adjudicative condition is not necessarily dispositive. Adverse decision affirmed.

CASENO: 11-05994.a1

DATE: 07/25/2013

DATE: July 25, 2013

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| In Re: |) | |
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| ----- |) | ISCR Case No. 11-05994 |
| |) | |
| Applicant for Security Clearance |) | |
| _____ |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 13, 2012, DoD 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 6, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul 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 issues on appeal: (1) whether the Judge made a factual error; (2) whether the Judge did not properly apply the Guideline F mitigating conditions; and (3) whether the Judge failed to apply a whole-person analysis. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant has ten overdue debts which total approximately \$104,000. Applicant's financial problems occurred as a result of some periods of underemployment and unemployment. He also purchased three investment properties in 2005. As the economy collapsed, he attempted to retain the homes, but ultimately all three homes were foreclosed. He borrowed on his credit cards in an effort to save his investments. Ultimately, he could not make the required payments on the cards. An adjustable rate mortgage on his primary residence also created problems. There is a settlement agreement in place on three of the debts, and Applicant has begun paying on them. Applicant has considered filing bankruptcy but it is not his preference; and at the present time he does not have enough money to pay an attorney. Witnesses and character letters from people who have known Applicant in his professional and private life speak in laudatory terms about Applicant.

The Judge concluded: The evidence has established that Applicant has accumulated significant delinquent debt. Applicant testified that his financial problems resulted from several factors beyond his control, including periods of underemployment and unemployment, and the collapsing economy that resulted in his three investment properties being foreclosed. While Applicant has attempted to act responsibly regarding these debts by making some small payments on a few of the smaller debts, he is still overdue on more than \$100,000 of past debt. Therefore, Mitigating Condition ¶ 20(b)¹ is not applicable. Similarly, Guideline F Mitigating Condition ¶ 20(d)² is not applicable because, while Applicant has initiated a good-faith effort to repay a few of the smaller overdue creditors, there is still far too much outstanding debt to allow this mitigating condition to be applied. No other mitigating condition is a factor for consideration in this case. Until Applicant has significantly reduced or resolved his overdue debts in a far more significant amount, he has not mitigated the financial concerns of the Government. The record evidence leaves significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. Applicant has not mitigated the security concerns.

Applicant argues that the Judge erred by not properly applying the mitigating conditions to his current financial situation. He asserts that the Judge did not properly consider the fact that his

¹“[T]he conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsibly under the circumstances[.]”

²“[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

situation was caused by forces outside of his control. He also asserts that he has been working through a challenging financial situation for six years without wavering or faltering.

The Judge concluded that since Applicant was still overdue on more than \$100,000 of past debt, “I cannot consider this mitigating condition (¶ 20(b)) applicable.” Similarly, the Judge concluded with regard to mitigating condition ¶ 20(d), “there is still far too much outstanding debt to allow this mitigating condition to be applied.” The Judge’s language is problematic, as it is not clear what he means by “applying” a mitigating condition. If he meant that Applicant’s amount of outstanding debt precluded him from considering at all the applicability of the mitigating conditions, such analysis would be error. The size of Applicant’s outstanding or delinquent debt is not a basis for excluding the applicability (meaning consideration of or analysis of) of otherwise pertinent mitigating conditions. On the other hand if the Judge concluded that the presence of so large an amount of debt precluded him from resolving the case *in Applicant’s favor*, then the Judge did not err. The applicability of a particular condition, mitigating or disqualifying, is not necessarily dispositive of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Even if a Judge concludes that a particular Adjudicative Guidelines disqualifying or mitigating condition is applicable, the Judge must still consider what weight is reasonably entitled to be given in light of the other applicable provisions of the Adjudicative Guidelines and the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-05110 at 4-6 (App. Bd. Mar. 22, 2004).

An option available to the Board would be to remand the case to the Judge to clear up the ambiguity. However, the Board determines that remand is not necessary as it can resolve the ambiguity through reference to other portions of the Judge’s decision. The Board does not review isolated sentences of a Judge’s decision. Rather, when considering and evaluating appeal issues, the Board considers a Judge’s decision in its entirety to ascertain what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 03-05645 at 5 (App. Bd. Sep. 15, 2004). The Board notes that the Judge discusses various components of mitigating condition ¶ 20(b) and mitigating condition ¶ 20(d) in other parts of his decision, which indicates that he did subject them to some analysis and considered their basic applicability, notwithstanding any other language suggesting the contrary. The Board determines that the Judge did not conclude that the size of Applicant’s debt trumped *any* consideration of the mitigating conditions.

Also, remanding the case would serve no useful purpose as the Judge’s ultimate resolution of it is supported by the record evidence. 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. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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). The Judge’s basic conclusion that Applicant has yet to develop a positive financial track record sufficient to mitigate the Government’s concerns is sustainable on this record.

Applicant asserts that the Judge made a fact-finding error with regard to the status of a debt listed at subparagraph 1.d. of the SOR. Applicant asserted below and asserts on appeal that he is now current on this debt. The Judge references a letter submitted into evidence by Applicant, and states that the letter only establishes the principal balance of the debt. The Judge states, “I cannot determine from the evidence that Applicant is current on this loan.” Applicant correctly points out that the document referred to contains the statement, “Account is Current as of 07-25-2012.” Applicant also testified that the account was current, and he was keeping it current.³ Given this evidence, there is no basis for the Judge to conclude that Applicant is not current on the debt.⁴ The Board concludes, however, that considering the entire record, this error is harmless. The allegation involves a debt arrearage of \$983, and Applicant’s total delinquent debt load exceeds \$100,000. Thus, this particular error would not reasonably be likely to change the outcome of the case, given the extent of the total debt.

Applicant asserts that the Judge did not adequately consider his “entire body of work” including his unblemished record and his success as a professional in the whole-person analysis. He states that the Judge ignored pages of written text describing the positive aspects of his background. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant does not overcome that presumption here. The Judge’s decision contains a section labeled “Mitigation” wherein the Judge discusses evidence derived from witnesses and character letters indicating Applicant’s high standards of ethics and professional skill. While the Judge does not go into an in-depth analysis of this positive evidence in his whole-person analysis, that analysis does reference facts and circumstances surrounding the case, which would necessarily include the positive evidence discussed under the “Mitigation” section. The Board concludes that the Judge’s whole-person analysis is sustainable.

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 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 general standard is that a clearance may be granted only when ‘clearly consistent with the interests

³Tr. At 55-56.

⁴Additionally, the credit report evidence indicates that the debt is now current. A February 2012 credit report (Govt. Ex. 4) lists the debt as past due in the amount of \$983, and is the basis for the SOR allegation. A January 2013 credit report (Govt. Ex. 8), however, lists the same account with no showing of an amount past due.

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 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