

KEYWORD: Guideline F

DIGEST: Applicant’s disagreement with the Judge’s weighing of the evidence is not sufficient to demonstrate error. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Any error in the decision is harmless. Adverse decision affirmed.

CASE NO: 11-08271.a1

DATE: 05/30/2013

DATE: May 30, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-08271
)	
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 June 8, 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 March 12, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Joan Caton Anthony 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 decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: In 2005, Applicant purchased a condominium apartment for \$417,000. He financed the property with two mortgage loans. The primary loan was for \$332,000 and the secondary loan was for \$62,000. Applicant's monthly payments totaled approximately \$3,300. After purchasing the condominium, Applicant's income continued to rise. His net after-tax income in 2009 was about \$95,000; in 2012 it was approximately \$105,000; and in 2011, it was between \$130,000 and \$140,000. Applicant's total net monthly income was \$11,595 in 2012. After ongoing fixed expenses were paid, Applicant's net monthly remainder was \$8,095. His current financial assets total \$349,238.

Beginning in 2007, the financial downturn in the housing market caused Applicant's condominium to lose value. By 2010, the property had depreciated to \$181,000. Applicant decided he did not want to keep the property, even though paying the two monthly mortgages was not a financial hardship for him. Professional advisors told him that a strategic default was the best way to protect his financial situation and allow him to save for retirement. Attempting to effect a short sale, Applicant stopped making payments on the second mortgage in December 2010. Six months later, he stopped making payments on his primary mortgage. His mortgage lender rejected three offers Applicant put forward from potential short-sale purchasers. The lender sold the property at foreclosure in 2011 for \$144,900.

The Judge concluded: Applicant's financial delinquencies arose in 2010 and 2011 when he elected to stop making payments on two mortgage debts because he was disappointed with the way in which a financial downturn in the real estate market had diminished the value of his property. Applicant had sufficient funds to make the monthly payments on the two mortgages as well as a substantial monthly remainder. Nevertheless he stopped making mortgage payments in the hope of qualifying for a short sale, and the property eventually went into foreclosure. His decision to default on his two mortgages, despite having funds to satisfy them, casts doubt on his current reliability, trustworthiness, and good judgment. Applicant did not act responsibly under the circumstances when he elected to "walk away" from a contractual obligation he had incurred voluntarily because he was disappointed with the outcome of his bargain. Applicant followed the advice of professionals he had consulted and acted in his self-interest. However helpful to one's self-interest a good business decision may be, other matters should also be considered when one has been granted a security clearance. Applicant had a good-faith obligation to honor his financial commitments and contracts. Applicant failed to mitigate the security concerns in this case.

Applicant argues that the Judge had a bias against strategic defaults which clouded the Judge's ability to evaluate properly and weigh all the evidence under the whole-person concept.¹ He also asserts that the Judge gave inadequate weight and discussion to the affidavits he submitted

¹The Judge found that "strategic default" refers to a situation where a borrower stops paying on a debt or contractual obligation even though he or she has the financial means to make the payments.

from the professionals who provided him with advice. Applicant states that the Judge's conclusion that he simply "walked away" from his mortgage obligation exhibited bias on the part of the Judge and ignored the numerous activities he engaged in to resolve the situation. Applicant also argues that the Judge erred when she concluded that Applicant had failed to address his inability to meet the hardship provision of the short sale. These arguments do not establish error on the part of the Judge.

Applicant is not asserting that the Judge was biased against *him*. Rather, it appears that Applicant is arguing that the Judge took a biased view of the evidence, particularly the strategic default. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008). Also, there is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Applicant has failed to overcome these presumptions. A reading of the record and the Judge's decision indicates that the Judge considered the numerous steps Applicant took during the resolution of the mortgage indebtedness, including his efforts to secure suitable short-sale purchasers. Her use of the phrase "walked away" taken in context, refers to Applicant's basic decision to not pay the mortgage indebtedness, not that he did not expend efforts toward the problem in the process. The Board does not review isolated sentences or phrases in a Judge's decision; rather the Board will read the Judge's decision in its entirety to determine what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 00-0311 at 2 (App. Bd. Mar. 8, 2001). The Board is convinced that the Judge exhibited no bias in her treatment of the evidence, and that she fairly characterized the decision Applicant made with regard to the debt. Additionally, the Board does not agree with Applicant that the Judge focused too heavily on his decision to deliberately short sale his property, to the detriment of her consideration of other evidence.

Applicant asserts that the Judge either did not consider or gave inadequate weight to the evidence contained in the affidavits he submitted into evidence. A Judge is presumed to have considered all the evidence in the record unless she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Similarly, a Judge is not required to discuss each and every piece of record evidence in making a decision. *See* ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). The Judge's decision makes note of the fact that Applicant sought the counsel of a tax and a real estate professional before electing to default on his mortgages. The fact that the Judge did not discuss the affidavits in more detail, or did not assign them the weight that Applicant feels they deserve does not establish error.

The Judge's decision contains a footnote (p. 8) wherein the Judge states that Applicant did not address his inability to meet the hardship provision of the short sale. Whether or not the footnote is limited to the context of the hearing is unclear, although the sentence that the footnote augments is limited to a discussion by the Judge of Applicant's hearing testimony. There was no discussion of the hardship issue at the hearing, but documentary evidence in the record includes a hardship

statement prepared by Applicant.² To the extent that the Judge's footnote references the case as a whole, it is in error as the documentary evidence establishes that Applicant did, at one time, address this issue. However, the written statement prepared by Applicant stresses factors other than financial hardship, and to the extent that it suggests Applicant suffered a reduction of income around 2010, it is contradicted by Applicant's hearing testimony, which showed increasing income during the period. Thus, the record as a whole does not establish that Applicant was suffering financial hardship. If the Judge's statement in the footnote was error, the error was harmless. The Judge's view as to whether Applicant had addressed the issue of hardship is not dispositive of the case. Given the central issues in the case, a conclusion by the Judge that Applicant had addressed the issue of hardship would not reasonably be likely to change the outcome.

Applicant takes issue with the Judge's analysis under the Guideline F mitigating factors. We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. Like other portions of Applicant's brief, the assertions regarding the mitigating factors consists of a disagreement with the Judge's weighing of the evidence. Applicant cites to his overall history of financial stability, to evidence of his efforts to resolve the problem, his career achievements, and to other evidence which he believes that the Judge did not examine in their proper context. However, while the Judge considered the evidence which Applicant has cited, her decision rested in large measure on evidence that Applicant had the financial capacity to make the mortgage payments had he chosen to do so, and his failure to do so was indicative of poor judgment. 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 that 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. 11-04742 at 2 (App. Bd. Jun. 20, 2012).

Applicant contends that the Judge did not address his security-significant conduct in the context of his entire adult life. Insofar as this is a challenge to the Judge's whole-person analysis, we conclude that the Judge complied with the requirements of Directive, Enclosure 2 ¶ 2(a). She made findings about his military career and other positive aspects of his life, and the record supports a conclusion that she considered the totality of his circumstances in arriving at her decision. *See, e.g.*, ISCR Case No. 11-02441 at 3 (App. Bd. Feb. 15, 2013).

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

²A single page statement prepared by Applicant dated September 19, 2010, which discusses hardship and is directed to his mortgage lender is contained in Government Exhibit 3.

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