KEYWORD: Guideline F

DIGEST: Nothing in the record supports Applicant's contention that she was subject to ridicule or prejudice by the Judge and Department Counsel. Adverse decision affirmed.

CASENO: 14-03108.a1

DATE: 05/20/2015

DATE: May 20, 2015

In Re:	)	
---	)	ISCR Case No. 14-03108
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 October 7, 2014, 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 17, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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 harmful factual errors; (2) whether the Judge was biased; (3) whether Applicant was denied her right to counsel; and (4) whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following findings: Applicant is 44 years old. She has a history of financial problems. She filed Chapter 7 bankruptcy three times, and her debts were discharged in 1997, 2005, and 2014. Applicant gave birth to a child without medical insurance, which created financial problems leading to her 1997 bankruptcy. Applicant's sister had a drug problem, and she took in her sister's children, which led to the 2005 bankruptcy. Applicant contributed to the funeral expenses of three relatives who passed away between 2005 and 2008. Applicant's husband was also unemployed for extended periods, and Applicant's employer cut her overtime opportunities.

Applicant did not pay her federal taxes for 2010 when they were due. She completed a payment plan with the IRS and paid the taxes in 2013 or early 2014. On her 2014 bankruptcy petition under Debtor's Statement of Intent, Applicant stated that her home would be "surrendered." Despite this statement, Applicant is still living in the home, although she testified that she would be moving out soon as she received a notice that the house was soon to be auctioned. She has not paid any rent since the bankruptcy discharge, and she did not pay the mortgage loan for several years before the discharge. Her credit reports list the date of last activity as October 2009. Applicant owes about $30,000 in student loans, and is current on payments of $300 per month. She has a $11,000 loan for a car she purchased after her 2014 bankruptcy discharge. She received financial counseling as a requirement of her bankruptcy. Her husband is scheduled to return to work and she now has health insurance. This should eliminate any future medical debts.

The Judge concluded: Applicant accumulated delinquent debts and was unable or unwilling to pay her financial obligations. She filed multiple bankruptcy petitions. Although some of her life's circumstances had a financial impact upon her and were beyond her control, she did not act responsibly under the circumstances. Financial concerns remain despite the presence of some mitigation. Applicant required a third bankruptcy in 2014 despite receiving a fresh start through two previous bankruptcies and not paying her mortgage loan or rent for years. It is not clear that she will take full advantage of her latest fresh start and not slip into further financial difficulties. Her current financial situation appears stable, but that stability will be tested when Applicant finally moves out of her "surrendered" home. She has not mitigated the financial considerations security concerns.

Applicant takes specific issue with two of the Judge's findings of fact. First she states that, in contrast to the Judge's finding, she received her financial counseling from a private consumer credit firm as opposed to the bankruptcy process. While there is evidence of such counseling in the record, there is also evidence , in the form of Applicant's testimony, that she received counseling

as part of the bankruptcy process. Thus, substantial evidence exists to support the Judge's finding that Applicant received counseling as a requirement of her bankruptcy. Applicant also asserts that the Judge erroneously found that her 2008 vehicle purchase required payments of $1,000 per month. The Board disagrees with Applicant's reading of the Judge's findings. The Judge made no specific findings regarding Applicant's monthly payments. He described a $1,000 payment which, in the context of the rest of his findings on the matter, clearly referred to a down payment for the vehicle. The Judge noted that the payment was accompanied by an $11,000 loan on a $12,000 purchase price. Applicant has failed to establish error in the Judge's findings of fact.

Applicant argues that the Judge and Department Counsel displayed prejudice against her based on the manner of their questioning of her about her continued presence in her house post-bankruptcy. She asserts that the Judge and Department Counsel made humiliating comments and joked about her filing multiple bankruptcies. The Board has carefully reviewed the record, including the hearing transcript, and concludes there is no basis for Applicant's assertions. 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). The same presumption applies to federal employees in general, which includes Department Counsel. There is also 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). Nothing in the hearing transcript suggests that the Applicant was subject to ridicule or was otherwise treated improperly or unfairly by the Judge or Department Counsel.[1]

Applicant asserts that Department Counsel acted improperly, in that he implicitly advised her that she did not need an attorney. In making this assignment of error, she asserts matters from outside the record. However, the Board will consider such evidence insofar as it pertains to threshold issues such as due process or jurisdiction. *See, e.g.*, ISCR Case No. 12-05232 at 2 (App. Bd. Feb. 10, 2014).

Applicant states that, prior to the hearing, Department Counsel called her and advised her that the hearing was an easy process and that the majority of applicants don't need an attorney. Applicant states that Department Counsel also advised her to bring copies of her bankruptcies. She asserts on appeal that she did need an attorney at the hearing "because of the prejudice the Judge and [Department Counsel] displayed."

[1]Both the Judge and Department Counsel did question Applicant at length regarding her continued occupancy of her home long after she had indicated that the home was "surrendered" on her bankruptcy petition. Rather than attempting to ridicule or embarrass her, it appears from the transcript that the Judge and Department Counsel were trying to understand Applicant's presence in the home under circumstances that made her presence seem illogical. During the fact-finding portion of the hearing, the Judge and Department Counsel questioned her concerning her multiple bankruptcies, but did so in a professional manner. The Board concludes that Department Counsel's closing argument remarks that Applicant relies on the bankruptcy courts to "wave a wand," and would likely be filing bankruptcy again were within the bounds of fair argument.

After a review of the record, the Board concludes that, assuming Applicant's representations to be true, she was not denied due process in this case. The Board concludes that no reasonable person in Applicant's circumstances would have understood Department Counsel to have meant that there was no reason for Applicant, specifically, to hire counsel. Moreover, Applicant received pre-hearing guidance advising her of her right to counsel. At the outset of the hearing, the Judge examined her at some length about whether she had received guidance on her right to counsel, and whether or not she intended to proceed on her own. Tr. at 5. At that time, Applicant gave no indication that she was acting on any advice she purportedly received by Department Counsel. The Judge also asked Applicant if she had a basic grasp of the rules and procedures used in DOHA hearings and whether she felt competent to represent herself. Applicant responded affirmatively to both questions. Tr. at 6. Additionally, in her appeal brief, Applicant has specifically predicated her need for counsel on the alleged misconduct of the Judge and Department Counsel. As the Board has previously indicated, there is no evidence of any such misconduct in this case. Thus, any claim of denial of due process by Applicant is to some degree undercut by the absence of any such misconduct.[2]

Applicant argues that there was mitigating evidence in her case that should have resulted in a decision in her favor. She asserts that the Judge acknowledged that her finances were in good standing, that all the debts listed in the SOR are resolved, and that the debts were due to circumstances beyond her control. The Judge did conclude that Applicant's finances had reached a level of relative stability after her 2014 bankruptcy discharge and that some factors contributing to her financial troubles were beyond her control. However, Applicant fails to establish error on the part of the Judge. 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. 06-25157at 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 gravamen of the Judge's decision is that the stability of Applicant's current financial situation must be viewed in light of a bankruptcy discharge, her long history of financial problems, and the fact that she has been living in her home essentially cost-free for an extended period of time– a circumstance that was due to end shortly after the conclusion of the hearing. This conclusion is sustainable. The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App.

[2]In ADP Case No. 14-0154 (App. Bd. May 12, 2015), the Board noted, in similar circumstances, the advisability of Department Counsel not going beyond the language of the Directive and the current Prehearing Guidance in any interaction with applicants regarding the right to counsel. The Board reiterates that statement here, and notes that it is important for Counsel, as well as Judges, to make it explicit to applicants that DOHA personnel have no authority to provide advice on how they should make choices involving this right.

Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation.

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 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 Ra'anan
Michael 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