

KEYWORD: Guideline F

DIGEST: Even if Applicant's massive mortgage debt is forgiven, that fact does not render the Judge's adverse security clearance decision unsustainable. A security clearance adjudication is not a proceeding aimed at collecting debts. A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness in order to make a decision about the applicant's security eligibility. Even in cases where a delinquent debt is legally unenforceable, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. Adverse decision affirmed.

CASENO: 09-02160.a1

DATE: 06/21/2010

DATE: June 21, 2010

In Re:)	
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Applicant for Security Clearance)	ISCR Case No. 09-02160

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Adam J. Bullian, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 6, 2009, 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 March 19, 2010, after the hearing, Administrative Judge LeRoy F. Foreman 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 adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: Applicant is 33 years old. Between December 2005 and July 2006, Applicant borrowed about \$1.8 million to purchase seven investment properties that were then worth about \$2.3 million. He had ten loans, seven first mortgages and three home equity lines of credit. He borrowed 100% of the purchase price for his first four properties and 90% for the last three. He relied on rental income from those properties to make the mortgage payments, which totaled about \$14,000 per month. At the time Applicant purchased the properties, he was earning about \$80,000 per year. After several of the properties became vacant, Applicant relied on his personal savings to make the mortgage payments. By December 2006 he had exhausted his savings and fell behind on his mortgage payments. Credit reports from mid-year 2009 reflected that foreclosure proceedings had been started on all the properties. Applicant believes all the properties are now worth less than the amounts of the loans. Applicant changed jobs in October 2007 and began working solely on a commission basis. His employer went bankrupt in September 2008, and since then Applicant has been earning less than \$500 per month. He lives with his parents, has no dependents, and has only one expense, which is a \$261 car payment. The SOR alleged four delinquent debts in addition to the seven home mortgage debts. Applicant has resolved three of these debts. The hiring official for Applicant’s present employer testified he learned about Applicant’s financial situation when his security clearance application was preliminarily denied. Based on his own extensive experience in the mortgage business, this hiring official does not believe that the lenders will pursue a deficiency judgment against Applicant on any of the foreclosed properties. Applicant produced no evidence of the terms of the security instruments involved in his real estate transactions or the law of the jurisdiction pertaining to the right of a lender to obtain a deficiency judgment after foreclosure. Applicant indicated that he was trying to reach settlements with the various mortgage lenders, but no settlements had been reached when the record closed.

The Judge reached the following conclusions: The case involved Applicant’s inability to pay debts, arising from a series of reckless investment decisions. Applicant’s financial history raises two disqualifying conditions, an inability or unwillingness to satisfy debts¹ and a history of not meeting

¹Directive, Enclosure 2 ¶ 19(a).

financial obligations.² The application of these two disqualifying guidelines shifted the burden to Applicant to produce evidence to rebut, explain, extenuate or mitigate the facts. Applicant's debts are numerous, and all of the large debts are unresolved. They were incurred during a real estate boom followed by a market downturn, circumstances that may well occur again. While speculative investment is not necessarily an indicator of bad judgment, the level of Applicant's speculation—trying to leverage two million dollars in debt on an annual income of about \$80,000— suggests bad judgment. Directive, Enclosure 2 ¶ 20 (a)³ is not established. Directive, Enclosure 2 ¶ 20(b)⁴ applies because, although Applicant intentionally placed himself in a position where he was subject to the vagaries of the real estate market, the market downturn was beyond his control, and he reacted responsibly by trying to negotiate with the lenders and exhausting his personal savings in an effort to make payments. Directive, Enclosure 2 ¶ 20(c)⁵ is not established because Applicant has not sought or received counseling and his financial situation is not under control. Applicant's employer testified, based on his experience in the mortgage business, that it is unlikely that the lenders will seek deficiency judgments on the foreclosed mortgages. However, even if a delinquent debt is legally unenforceable under state law, an administrative judge should consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. Applicant presented no documentary evidence of negotiations or offers of settlement. He presented no evidence showing that the lender's rights to collect the deficiencies were limited by the terms of his mortgages, that they were willing to forego efforts to collect the mortgage deficiencies, or that a deficiency judgment was precluded by local law. While his testimony is some evidence of a good-faith effort to resolve the debts, he has not shown that he is pursuing a course of action that has a reasonable chance of success. Directive, Enclosure 2 ¶ 20(d)⁶ is not fully established for the delinquent mortgages and lines of credit. Under the whole person concept, Applicant is relatively young, but well educated and intelligent. He was candid and sincere at the hearing, but he remains delinquent on debts totaling about \$2 million. He has no savings, no income, and no plans to resolve his debts. It is unclear whether he has learned his lesson, because he has not yet established a track record of financial responsibility. He has not dispelled the concerns about his judgment.

Applicant argues that the Judge's decision is arbitrary and capricious because of the Judge's application of Disqualifying Conditions ¶ 19(a) and 19(c). He claims that the Judge's conclusions

²Directive, Enclosure 2 ¶ 19(c).

³“[T]he behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.”

⁴“[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.”

⁵“[T]he person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.”

⁶“[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”

in applying these factors fails to articulate a satisfactory explanation, including a rational connection between the facts found and the choice made. Applicant also claims that the Judge ignored significant record evidence and, by wrongly applying the disqualifying factors, the Judge erroneously shifted the burden to him to produce mitigating evidence.

The gravamen of Applicant's argument concerning the Judge's application of the Guideline F disqualifying factors is centered around the testimony of the hiring official for Applicant's current employer. This witness spent most of his career in the mortgage and banking industry, and during his testimony, he indicated his extensive experience in foreclosures and with nationwide mortgage lenders. This witness indicated at several points in his testimony that deficiency judgments will not be pursued against Applicant on the foreclosed properties. Applicant asserts that the testimony of the hiring official clearly qualifies him as an expert witness pursuant to Rule 702 of the Federal Rules of Evidence. Applicant states that because of the witness's status as an expert, the state of the record evidence is such that it is unquestionable that no debts remain outstanding against Applicant related to the mortgages. Applicant states that while the debts were not satisfied through payments by him, the testimony of his expert witness clearly indicates that the debts were satisfied. Applicant claims the Judge ignored the testimony of the expert and made no reference to his testimony when arriving at his conclusion that Applicant was unable to satisfy his debts. Applicant argues that because the hiring official is an expert witness, his expert testimony should be given more weight than a traditional fact or character witness.

There is a rebuttable presumption that the Judge has considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-18303 at 2 (App. Bd. Nov. 13, 2008). Applicant has not overcome that presumption in this case. The Judge specifically references the testimony of the hiring official in his findings of fact and in his conclusions. When articulating his conclusions, the Judge specifically discusses why the testimony of the hiring official, even if accepted, would not justify granting Applicant a security clearance. Regardless of the witness's status as an expert, the Judge's conclusions are sustainable on this record, as will be discussed subsequently.

The purported status of the hiring official as an expert witness requires some comment. It should be noted at the outset that during the course of the proceedings below, no effort was made on the part of Applicant to specifically identify the hiring official as an expert witness. In DOHA proceedings, the Federal Rules of Evidence are not strictly adhered to but rather serve as a guide. Directive ¶ E3.1.19. Given this fact, and making allowances for Applicant's *pro se* status below, the Board will consider Applicant's assertion of the witness's status as an expert on appeal, even though the issue was not raised below. As a practical matter, however, the failure to establish a witness as an expert through the customary method of presenting in detail the background, training, experience, and expertise of the witness and the specific knowledge of the subject area of the witness's testimony undercuts the strength of that testimony.⁷ Inasmuch as Applicant's arguments

⁷This process includes affording the opposing party the opportunity to *voir dire* the witness being offered as an expert to test the foundations that would support lending such a witness expert status.

on appeal rely heavily on the testimony of the hiring official and the notion that his testimony is irrefutable and entitled to more weight than that of a fact or character witness, those arguments are considerably weakened by the posture of the witness below.⁸

Rule 702 provides for the receipt of opinion testimony of an expert if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. A review of the hiring official's testimony indicates that it did not satisfy these requirements. Although the hiring official had experience in the home mortgage lending industry and had familiarity with foreclosures, he offered only general testimony to the effect that deficiency judgments are not pursued. He cited no data, offered no statistics, produced no official statements of policy regarding the lending industry as a whole, or specifically how he reached the conclusion that Applicant's numerous mortgage deficiencies would be forgiven. He offered no evidence whatever regarding the lending practices or potential courses of action that would be taken by Applicant's lenders. Given these factors, the hiring official's testimony is based essentially on vaguely defined personal experiences and, though relevant, is not nearly as probative on the matter of Applicant's future exposure for unpaid mortgage debt as Applicant suggests. *See, e.g.*, ISCR Case No. 03-08813 at 5 (App. Bd. Nov. 15, 2005) (where there was no indication that testimony was based on controlled studies or other precise evidence, that testimony was informal and largely anecdotal). Applicant has failed to establish that the Judge weighed the evidence of the hiring official's testimony in a manner that was arbitrary, capricious, or contrary to law.

Even if Applicant's massive mortgage debt is forgiven, that fact does not render the Judge's adverse security clearance decision unsustainable. A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather, a security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness in order to make a decision about the applicant's security eligibility. Accordingly, even in cases where a delinquent debt is legally unenforceable, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See, e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). In this case, there is no evidence that the mortgage debts are legally unenforceable. Instead, there is only the suggestion that all of Applicant's mortgage creditors will forgo pursuing valid claims. In this setting, the Judge reasonably articulated his concerns about the level of Applicant's investment speculation and how it reflected on Applicant's judgment. The Judge also commented upon the lack of evidence about the rights of the mortgage holders under state law and the lack of evidence that the lenders were willing to forgo efforts to collect the mortgage deficiencies, thus

⁸Applicant cites to no proposition of law for his general, unqualified statement that the testimony of an expert witness is automatically entitled to more weight than the testimony of a "traditional" (Applicant's term) fact or character witness. The Board is unaware of such a proposition. Obviously, the probative value of a witness's testimony is dependent upon many factors that are unrelated to the witness's status as an expert, or non-expert. Expert witnesses differ from fact witnesses only insofar as they are permitted—assuming they are properly qualified—to offer an opinion concerning matters outside their firsthand or personal knowledge, not because anything in their testimony is inherently more worthy of belief.

indicating his doubts that Applicant faced no exposure for the debts in the future. The Judge's conclusion that two Guideline F disqualifying conditions apply to this case is sustainable.

Applicant argues in the alternative that the Judge erred by not applying Guideline F mitigating conditions in his favor. Again, Applicant's assertions regarding mitigation rely heavily on the testimony of the hiring official and the premise that the mortgage debts are now completely resolved. Given the Board's analysis in preceding paragraphs, these assertions are seriously undercut, and do not satisfy Applicant's burden of establishing error. Regarding the whole-person analysis, Applicant essentially repeats his previous arguments about the Judge not examining record evidence (the testimony of the hiring official) and reaching conclusions that run contrary to record evidence. This argument also fails to establish error.

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). Notwithstanding Applicant's statements to the contrary, his appeal arguments are essentially objections to the Judge's weighing of the testimony of the hiring official and the Judge's overall interpretation of the record evidence.

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. He discussed the applicability of the mitigating factors listed under Guideline F and indicated in some detail why some mitigating conditions did not apply and why others only partially applied and why those partial applications did not ultimately mitigate the financial concerns raised in the case. 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 his 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

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