

KEYWORD: Guideline F

DIGEST: The Judge’s overstatement is harmless error. Adverse decision affirmed.

CASENO: 09-03236.a1

DATE: 07/28/2010

DATE: July 28, 2010

In Re:))	
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))	
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 November 25, 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 May 12, 2010, after the hearing, Administrative Judge Robert Robinson Gales 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 issues on appeal: (1) whether certain of the Judge's findings of fact are supported by the record evidence; and (2) whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.¹ For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings pertinent to the issues raised on appeal: In 2001 Applicant had a steady job with a large corporation and was earning \$75,000 per year. During 2001 he sustained an injury in a non-work-related accident which required two surgeries. His car was then rear-ended and he sustained additional injuries requiring further surgeries. Because of the extensive time lost due to his medical problems, Applicant's employer terminated him. He was unemployed from March 2002 until December 2004, but he did receive \$40,000 per year in long-term disability payments. Applicant and his wife voluntarily relocated several times during this period, and Applicant held a variety of positions before obtaining his current position in December 2008. His 2009 salary was \$57,300. Until Applicant's first injury in 2001 his credit history was excellent. After that, according to Applicant, things started to snowball out of control and his finances steadily went downhill from there, a little bit at a time. In March 2008, Applicant's wife started having serious, health-related problems which led to several surgical procedures. There combined medical problems depleted their savings. One credit card account opened in 1994 had become delinquent by the end of 2009, with an outstanding balance of \$2,139, of which \$133 was past due. Applicant claims he made reduced monthly payments for about a year before stopping payments altogether about four months prior to the hearing. Applicant did not submit any documents to support his claims of payment. A second credit card account accumulated a balance of \$3,782 by November of 2009 and it was charged off. As with the first credit card debt, Applicant claimed that the delinquency arose because of his wife's medical costs. Again, he claimed that he made reduced "hardship" payments to the creditor for about a year before stopping payments five or six months prior to the hearing. No documentation was provided regarding payments. A third debt is a collection account on a home mortgage loan for a "manufactured" home that Applicant purchased in 2000. Applicant paid the original mortgage holder between \$750 and \$800 per month before the account became delinquent after he relocated to another state. After the relocation, Applicant attempted to sell the home but, after experiencing difficulties, he voluntarily relinquished the home to the original mortgage holder. The mortgage company told him that once the home was sold, he would not be responsible for any deficiency. The original mortgage holder went bankrupt, and in 2003 or 2004 the successor mortgagee disavowed the agreement holding Applicant harmless from any short sale deficiencies. The deficiency was \$42,867, and this was eventually charged off to profit and loss. Applicant has had no contact with the successor mortgagee since 2004. He plans to resolve this debt sometime in the future by including it in a Chapter 7 bankruptcy filing.

¹The Judge made formal findings favorable to Applicant on three allegations (out of a total of six allegations) presented in the SOR under Guideline F. Those favorable formal findings are not challenged on appeal.

Applicant stated that he never received financial counseling. He maintained that he was current on all financial obligations and would have no delinquencies in the future. However, at the hearing, Applicant admitted that in addition to the delinquencies listed in the SOR, he had a delinquent retail account, several delinquent medical accounts and two delinquent credit card accounts belonging to his wife. Applicant and his wife intend to file for joint bankruptcy and have begun paying an attorney for this purpose.

The Judge concluded that while Applicant's injuries and his wife's medical problems led to his financial problems, Applicant's financial situation is continuing in nature even when his physical limitations were eliminated long ago and his wife's health issues are now of lesser concern. Applicant's numerous relocations and their associated costs, and the purchase of ever more expensive residences increased his obligations and did little to reduce his delinquencies. Applicant did not act aggressively, timely, or responsibly to resolve his remaining delinquent debts. He claimed to have made payments on them, but has not furnished documentary evidence establishing same. He chose to dispute two outstanding debts, including the sizable \$42,000 debt, but he failed to provide documentation establishing any reasonable basis to dispute their legitimacy. Since 2004, he has taken no significant actions to address delinquent debts. The mitigating factors under Guideline F have very limited application. Applicant's handling of his finances casts doubt on his current reliability, trustworthiness, or good judgment. Under a whole person analysis, the insufficient good-faith efforts at debt repayment or evidence to reflect actual payments are sufficient to raise continuing security concerns.

Applicant raises several objections to the Judge's findings of fact, the main thrust of which is Applicant's contention that his finances were in order until late 2008 when his wife's medical issues intervened. Applicant also claims that he does not owe the \$42,000 delinquent debt stemming from the relinquishment and short sale of the manufactured home. A review of the record indicates that there was substantial evidence that Applicant experienced some financial difficulties well before 2008. Additionally, the Judge's finding that Applicant still owes the \$42,000 debt is reasonably supported by the evidence. Applicant labels as "purely assumption and speculation" the Judge's conclusion that he continued to obtain services and goods from a variety of creditors, but had no ability or intention to pay for them. Applicant also states that the Judge's conclusion contains an insinuation of fraud. The Judge's statement is general and contains no details that place it in a precise context or that link it to specific evidence. A review of the record evidence indicates that the Judge's language sweeps too broadly, and lacks meaningful context. There is evidence that, despite financial difficulties, Applicant managed to meet some of his obligations during the multi-year period in question. To the extent that it overstates the state of Applicant's financial difficulties, or does not provide adequate context, the conclusion is error. However, the Board does not focus on individual or isolated passages in a Judge's decision when deciding whether the Judge's overall decision is sustainable. *See, e.g.*, ISCR Case No. 08-06591 at 2 (App. Bd. Oct. 16, 2009). The Board concludes that there is substantial evidence in the record of this case to support the Judge's ultimate decision, and that he has adequately articulated a rational basis for that decision. In the overall context of the case and the decision, the Judge's error is harmless. Moreover, the Board concludes that a claim of a suggestion of fraud is not a reasonable interpretation of the Judge's language.

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. He discussed the applicability of the mitigating factors listed under Guidelines F and indicated in some detail why the mitigating conditions applied only minimally and why those minimal applications did not ultimately mitigate the concerns raised in the case. Also, the Judge appropriately expressed concerns that Applicant allowed numerous smaller debt delinquencies to go unsatisfied over time despite having the means, at least, to satisfy them partially and that Applicant has recently elected to resolve his debts via bankruptcy rather than attempt to make payment arrangements with the outstanding creditors.

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: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

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