

KEYWORD: Guideline F

DIGEST: The Judge failed to resolve apparent inconsistency in his decision. However, this error is harmless in light of the Judge’s sustainable conclusion that Applicant had failed to provide enough evidence to mitigate the security concerns in his case. Adverse decision affirmed.

CASENO: 09-03764.a1

DATE: 04/01/2010

DATE: April 1, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-03764
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Samuel Bluck, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 24, 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 Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On December 17, 2009, after the close of the record, Administrative Judge David M. White 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 decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found that Applicant incurred significant delinquent debts between 2000 and 2005 while unsuccessfully attempting self-employment as a consultant. The Judge found that Applicant had amassed \$304,663 in delinquent debts. As a result, he filed for Chapter 13 bankruptcy relief in 2007, but the case was dismissed because Applicant could not afford to continue payments due to the loss of a job he obtained in late 2005. Applicant recently began another Chapter 13 proceeding. The Judge concluded that notwithstanding the more recent Chapter 13 filing, Applicant failed to show ongoing solvency and failed to present matters sufficient to mitigate security concerns. The Judge concluded that Applicant's financial irresponsibility is recent, involves large sums and numerous creditors and continues to date. He concluded that Applicant remains substantially in debt and provided no evidence concerning his current financial situation that would support a finding that the delinquent indebtedness is unlikely to recur.

Applicant argues that the Judge failed to examine relevant evidence because the Judge stated that Applicant submitted no evidence about his current income, living expenses, or ability to make the required bankruptcy payments without incurring further delinquent debts. Applicant asserts that this statement is reflective of the heavy weight the Judge gave to his conclusion that the absence of any evidence showing his current solvency while meeting his bankruptcy obligations precluded a finding of mitigation. Applicant claims that there was ample evidence of income and financial solvency contained in his Chapter 13 bankruptcy plan, and also claimed that if Applicant did not have sufficient income to make his Chapter 13 payments, the bankruptcy court would not have confirmed the plan.

The Judge's approach to this case, as reflected in his decision, is largely about the insufficiency of Applicant's evidence in mitigation. The Judge concluded that the government had established a case under Guideline F. That conclusion is not challenged on appeal. Once Department Counsel established its case, the burden shifted to Applicant to provide matters in mitigation sufficient to overcome the government's security concerns. After a review of the record, and especially the Chapter 13 plan mentioned by Applicant, the Board is unable to conclude that the record contains the detail about Applicant's overall financial profile that Applicant suggests. The Chapter 13 plan documents contain no evidence regarding either Applicant's income or living expenses. There are Internal Revenue Service documents in the record showing Applicant's income, but these provide only general information about Applicant's taxable income in past years and are not current. Applicant's assertion that the bankruptcy court's approval of his current Chapter 13 plan proves his ability to handle the bankruptcy without incurring more debt has limited force. The approval of an earlier Chapter 13 plan for Applicant and the subsequent dismissal of that plan for lack of ability to keep up payments belies the notion that the bankruptcy court's acceptance of a Chapter 13 plan is a strong indicator of overall financial solvency.

There is a rebuttable presumption that the Judge has considered all the evidence unless he or she states otherwise. *See, e.g.*, ISCR Case No. 01-22566 at 3 (App. Bd. Jun. 26, 2003). Applicant has not rebutted that presumption here, as the details about his finances that he complains were not

considered by the Judge are not contained in the record. The Judge's concerns about the lack of evidence necessary for him to reach favorable conclusions about mitigation, as it relates to the bankruptcy, are reasonable given the state of the evidence and Applicant's burden. Applicant has not established error on this point.

Applicant argues that he has satisfied the requirements for mitigation and states that applicants are not required to be debt-free, nor are they required to have a plan for immediate or simultaneous repayment of debts. Applicant states that all that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment of debts, accompanied by concomitant conduct that evidences a serious intent to effectuate the plan. Applicant asserts that he meets this requirement by not taking on significant new debt since 2005 and by pursuing the Chapter 13 bankruptcy.

Regarding Applicant's mitigation argument, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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 Adjudicative Guidelines ¶ 20 at some length, but indicated with considerable detail why those Guideline F mitigating conditions could not be invoked in this case to alleviate the government's security concerns. Central to the Judge's analysis was his conclusion that the limited amount of evidence provided by Applicant did not give him a sufficient basis for concluding that, notwithstanding the Chapter 13 bankruptcy plan, Applicant's financial problems were resolved or under control, or that Applicant had made a good-faith effort to resolve them. Another factor in the mitigation analysis cited by the Judge includes the fact that, even if the current Chapter 13 plan is successfully carried out, Applicant will have avoided paying the vast majority of the debts that he owes his creditors. The degree to which a Chapter 13 bankruptcy plan makes an applicant's creditors whole is a factor that a Judge is entitled to consider when evaluating whether an applicant is acting reasonably to rectify his financial difficulties. Again, in this case, the Judge indicated that he was hindered in making that determination by the lack of record evidence of Applicant's overall financial profile, including income, other assets, and expenses.

When evaluating the applicability of mitigating conditions in Applicant's case, the Judge noted that Applicant's indebtedness was not a result of a situation beyond his control, but instead resulted from a failed business venture entered into voluntarily by Applicant. The Judge also concluded that Applicant had failed to present evidence establishing that the continued operation of a failing business for over four years, while accumulating delinquent debt, was reasonable, or that Applicant had taken steps to minimize that debt. The judge also commented on the lack of evidence

of any effort on Applicant's part to repay any of his creditors, other than partial payments through his Chapter 13 bankruptcies.

Applicant argues that the Judge's decision does not articulate a rational connection between the facts found and the choices made. Specifically, in his findings of fact section, the Judge found that the vast majority of Applicant's delinquent debt arose during the 2000 to 2005 period and that these debts would be addressed in the Chapter 13 bankruptcy. The Judge further found that Applicant's debt delinquencies primarily arose during the four-and-a-half-year period when he was attempting to sustain an unsuccessful self-employed consulting business and Applicant had not evidenced any consistent spending beyond his means since late 2005. Applicant claims that these findings are at odds with the Judge's conclusion that Applicant demonstrated "financial irresponsibility that continues to date." Applicant argues that because he has incurred no new debts in the last five years and is addressing the debts via payment under a Chapter 13 plan, he is not engaging in fiscally irresponsible behavior that "continues to date."

When reviewing an Administrative Judge's decision, the Board does not consider individual sentences in isolation from the rest of the decision; rather, the Board considers the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 at 4 (App. Bd. Apr. 4, 2003). The Board notes that the Judge's conclusion that Applicant's financial irresponsibility "continues to date" appears twice in the decision and is difficult to square with the Judge's finding that Applicant did not spend frivolously in the years since 2005. However, the Judge also found that minor new delinquencies had arisen in the years since 2005 which were not the result of *consistent* (emphasis added) spending beyond his means. With this language, presumably, the Judge is making a finding that some unreasonable amount of spending has occurred periodically after 2005 and up to the present. Such spending, although of a lesser magnitude than previous spending, could support a conclusion of continued financial irresponsibility. The Judge does not elaborate on these findings, and whether the latter finding provided the basis for the Judge's conclusion that Applicant demonstrated irresponsibility that continued to date is a matter for speculation, since he did not specifically discuss it in the context of his conclusion of continuing irresponsibility. The Judge failed to provide enough detail to connect the findings to the conclusion and resolve these inconsistencies, and such failure was error. However, based on a reading of the decision as a whole, the Board concludes that, with this possible exception, the Judge's findings and conclusions are consistent. Any error or inconsistency in the Judge's decision on this point is harmless since there are other bases for the Judge's ultimate determination that are 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, with the exception of the matter discussed in the previous paragraph, 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