

KEYWORD: Guideline G; Guideline J; Guideline F

DIGEST: The applicant bears the burden of persuasion as to mitigation. Absence of rebuttal evidence by the Government does not compel a favorable decision. A Judge must weigh the evidence and provide a reasonable explanation for his decision. Adverse decision affirmed.

CASE NO: 09-06837.a1

DATE: 11/17/2011

DATE: November 17, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-06837
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Jim Darnell, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 25, 2011, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s application of the mitigating conditions was erroneous and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s

decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Government contractor. Unmarried and with no children, he has a bachelor's degree in information technology.

Applicant has experienced periods of unemployment. He was laid off from a job in February 2008, finding another in August of that year. This job lasted until September 2008, and Applicant was subsequently unemployed until April 2009. His current job pays less than his previous one. Applicant has numerous delinquent debts. The SOR alleges 15, totaling about \$53,269. Two of these alleged debts are duplicates, three have been paid or settled, four are in the initial stages of resolution, and six are unresolved.

Applicant attributes his financial problems to his unemployment as well as to past decisions underlying the Guidelines G and J security concerns alleged in the SOR. These security concerns arose from Applicant's history of criminal conduct, much of it involving alcohol. The Judge found that Applicant had committed three incidents of driving while impaired by alcohol and that he had been discharged from a court-imposed alcohol education program due to noncompliance.

His record includes other offenses, such as obstructing or interfering with police (alcohol was involved); two charges of failure to appear in court (these charges related to a DUI conviction); violation of probation; and domestic violence (alcohol was not involved in this incident). The probation violation stemmed from a 2006 conviction of DUI. Applicant had attempted to have his probation transferred from one state to another. The case was resolved by Applicant's serving 21 days in jail in the state in which his conviction had occurred. At the close of the record, Applicant was undergoing probation resulting from his most recent DUI.

Applicant has undergone counseling with an addiction therapist, who assesses him as stable, with a need for regular attendance at Alcoholics Anonymous (AA). The therapist opines that Applicant is sufficiently motivated to abstain from alcohol.

Applicant has complied with all terms and conditions of his probation. His probation officer described him as "responsive and responsible." Decision at 4.

In the analysis, the Judge acknowledged the positive aspects of Applicant's conduct—his sobriety, his AA attendance, etc. However, the Judge concluded that, given the recency of Applicant's security significant conduct, it is too soon to conclude that he has demonstrated mitigation. The Judge noted that Applicant had been sober for only four months, and that he was still on probation, as of the close of the record. Regarding Guideline F, the Judge noted Applicant's unemployment, which was a circumstance beyond his control. He also noted Applicant's efforts at debt repayment. He went on to conclude, however, that "what is missing here is a long-term record of repayment of delinquent debts coupled with general financial stability and responsibility." Decision at 10. The Judge held that Applicant had not met his burden of persuasion.

Applicant contends that the Judge did not properly weigh the mitigating conditions. For example, he notes the Judge's statement that Applicant's financial problems resulted in large

measure from unemployment, arguing that the Judge should have concluded that this mitigated the Guideline F security concerns. However, the Directive requires not only that an applicant demonstrate that his financial problems arose from circumstances beyond his control but also that the applicant show he acted responsibly under the circumstances.¹ The Judge's statement that Applicant had not demonstrated a track record of debt repayment is consistent with the record that was before him and is sustainable.²

Applicant also cites to the favorable evidence he presented through his therapist and probation officer. He argues that, insofar as the Government presented no matters in rebuttal, this testimony mitigated the Guidelines G and J concerns.

Once the Government presents substantial evidence of security concerns, the applicant bears the burden of persuasion that he should have a clearance, under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).³ Applicant's admissions to the SOR and the evidence presented by the Government established the concerns alleged in the SOR. While the Judge considered the evidence Applicant presented and discussed it in his analysis, he provided a reasonable explanation for his conclusion that it was too soon to find that Applicant had met his burden of persuasion. The record does not support a conclusion that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant contends that he has satisfied every aspect of Guideline G Mitigating Condition 23(d).⁴ The Judge did not apply 23(d). The Judge did not find that Applicant completed either inpatient or outpatient rehabilitation along with any required aftercare. Nor does the record support such a finding. Therefore, the Judge did not err by deciding not to apply 23(d).

The record supports a conclusion 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 Judge's adverse decision is sustainable on this record. See Directive, Enclosure 2 ¶

¹Directive, Enclosure 2 ¶ 20(b): "the 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[.]"

²See, e.g., ISCR Case No. 10-05277 at 2 (App. Bd. Jul. 8, 2011): "[I]nsofar as Applicant had only recently begun to address her debts, she had not demonstrated a track record of debt resolution."

³The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" See, e.g., ISCR Case No. 09-07139 at 2 (App. Bd. Sep. 13, 2011): "The Government produced substantial evidence to establish the applicable disqualifying conditions. The burden then shifted to Applicant to produce evidence to rebut, explain, extenuate or mitigate the security concerns[.]"

⁴Directive, Enclosure 2 ¶ 23(d): "the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program."

2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Judge’s adverse security clearance decision 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