

KEYWORD: Guideline F

DIGEST: The Judge’s conclusion that Applicant had not demonstrated a sufficient track record of debt repayment to justify a favorable decision was sustainable. The Judge explicitly addressed matters favorable to Applicant, such as the effect of illness on Applicant’s finances. However, the Judge adequately explained her reasons for denying Applicant a clearance. Adverse decision affirmed.

CASE NO: 10-04054.a1

DATE: 11/08/2011

DATE: November 8, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-04054
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffrey, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 10, 2010, 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 August 16, 2011, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 was 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: In 2002, Applicant's four-year-old daughter was diagnosed with cancer. Applicant moved his family to another state and adjusted his work status, which resulted in a decline in income, to be closer to his daughter and deal with her health issues. Even though they questioned whether they could afford it, he and his wife obtained an adjustable rate mortgage at a higher interest rate after being turned down for a conventional 30-year loan. Applicant's mortgage debt was transferred to new lenders, and each time the amount of the debt rose. Applicant and spouse had \$50,000 in unsecured debt discharged in a Chapter 7 bankruptcy in 2004. Over the next six years, they ran up new credit card balances around \$16,173 on six accounts as of May 2010. Between August 2008 and May 2010, the IRS and state Y filed tax liens against him totaling \$34,711. As of April 2011, one state tax lien in the amount of \$2,238 had been released. Applicant's and his spouse's monthly expenses exceeded their net income by \$725, and their negative cash flow cannot entirely be attributed to the high, adjustable rate mortgage they obtained in 2002. Applicant was leasing a 2001 model-year Lexus for \$386 per month, and the couple had sizable credit card debt at that time.

Applicant filed a Chapter 13 bankruptcy in May 2010. At that time, he owed delinquent federal taxes for 2005, 2006, and 2007, and state taxes for 2007, 2008, and 2009. These tax arrearages are in addition to the largely joint \$16,173 credit card debt and \$5,863 in medical debt that have accrued since the Chapter 7 bankruptcy discharge. Problems with satisfying their mortgage obligations led Applicant and his spouse to modify their Chapter 13 payment plan. Under the modified plan, a mortgage arrearage of \$21,679 is to be paid in full. Nonpriority creditors, including some income tax debt, are to receive about eight or nine percent of their claims. Assuming Applicant and his spouse complete the plan, the remainder of their tax debt will be discharged in January 2015. Applicant and his spouse have not missed a payment under the plan, nor have they made a late payment. Their bankruptcy trustee considers Applicant to be very motivated to follow through with the plan.

As of late April 2011, Applicant and his spouse have no savings, despite not paying their mortgage for the past three months. Their payment to the bankruptcy trustee is scheduled to rise to \$1,160 per month starting in June 2011. The couple's joint wage annual earnings in 2010 were about \$125,000. Applicant has an excellent work record, and is well respected by his company's customer.

The Judge reached the following conclusions: Applicant's financial problems are too recurrent and recent to be mitigated. His daughter's cancer diagnosis is an unforeseen circumstance that had an adverse financial impact. Applicant's subsequent employment decision, with its tax and personal credit implications, was within Applicant's control, but it is also understandable under the circumstances. However, Applicant's decision to then commit to a high-rate adjustable mortgage in 2002, when he had concerns about its affordability, raises issues about his financial judgment. Applicant's Chapter 7 discharge falls short of the good-faith effort to repay or resolve debts required by the Guideline F mitigating conditions. Applicant has made payments pursuant to Chapter 13 and has received counseling in conjunction with his bankruptcy, but because this is his second bankruptcy within the last seven years, these facts are not fully mitigating without substantial

progress in the bankruptcy to guarantee that he is likely to complete it, and without favorable changes in his financial habits to afford the conclusion that his financial problems are not likely to recur. There are legitimate ongoing concerns about Applicant's handling of his home loan. Although he is incurring no new credit card debt, he needs to show more progress in repaying his delinquent debt through the bankruptcy, and a sustained track record of timely payments of his living expenses. It is too soon to conclude that his financial problems are behind him and that he can be counted on to manage his personal finances responsibly. Applicant's record for professionalism and dedication on the job is unassailable, but it does not overcome the judgment concerns raised by the mismanagement of his personal finances, including his income tax obligations.

Applicant asserts that the Judge's application of Guideline F was arbitrary, capricious, and contrary to law. Specifically, he argues that because he has made a good-faith effort to address his past debts and has created a definitive plan for repayment, any security concerns arising under Guideline F have been mitigated. Applicant states that he has developed a plan for addressing and satisfying his past due accounts, his financial problems are a direct result of his daughter's cancer diagnosis, and he received financial counseling in conjunction with the plan for satisfying his outstanding obligations. Applicant has failed to establish error on the part of the Judge.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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). Applicant'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 made sustainable findings that Applicant had a lengthy and serious history of not meeting financial obligations and had made numerous choices regarding his finances that reflected questionable judgment. Applicant again encountered serious financial difficulties after receiving a fresh start pursuant to a 2004 bankruptcy discharge. After that discharge, Applicant continued to underpay his income taxes after returning to full-time employment, he allowed credit card accounts to become delinquent, and he was chronically late in loan payments. At the time of the hearing, Applicant still had an unresolved three month mortgage indebtedness. He and his wife had no savings. He was successfully making payments on a Chapter 13 plan, but the monthly payments were due to increase. Given these circumstances, the Judge reasonably concluded that Applicant needs to show more progress in repaying his debt through the bankruptcy, and a sustained track record of timely payment of his living expenses. The Judge explicitly addressed Applicant's daughter's illness and the manner in which it contributed to his financial troubles. She also articulated why Applicant had not always acted prudently subsequent to that difficult and unforeseen circumstance. 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. She adequately discussed why the disqualifying conduct established under Guideline F was not mitigated.

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 her 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