

KEYWORD: Guideline F

DIGEST: The Judge's conclusion that there is insufficient evidence of either a permanent repayment plan or of payments under a temporary plan is supported by record evidence and is a sufficient basis for the Judge's ultimate determination. Adverse decision affirmed.

CASENO: 10-06100.a1

DATE: 12/05/2011

DATE: December 5, 2011

In Re:)	
)	
----)	ISCR Case No. 10-06100
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Richard W. Rosenblatt, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 10, 2011, 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). Department Counsel requested a hearing. On August 24, 2011, after the hearing, Administrative Judge Noreen A. Lynch 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, and 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 37 years old, is married, and has no children. In 2000, Applicant purchased his first home. After living in it for three years, he sold it for a profit and gave approximately \$50,000 in profits to his parents. He kept \$50,000 profit for himself. In February 2005, Applicant purchased another home for \$425,000. The mortgage was a two-part loan. The primary loan was 80% and the remaining 20% constituted a home equity loan. After living in the property for one year, Applicant decided to rent the property in 2006. After one year, the renters moved. The property remained vacant, as Applicant could not find renters. In June 2006, Applicant purchased another property as an investment. Applicant's annual salary at the time he bought this property was \$50,000 to \$67,000. The purchase price of the home was \$540,000 and Applicant financed the entire amount. Applicant had an investment partner on this property, but the partner was not liable on the loan. The partner experienced financial difficulties and did not help Applicant with the mortgage.

In 2007, Applicant could not maintain the two mortgages. The two properties were foreclosed. Applicant does not owe any money on the primary mortgages, but the two home equity loans are delinquent. Initially, Applicant disputed the validity of the two home equity debts. When Applicant received information that the debts were valid, he offered a settlement. He has made some efforts in the last two years to resolve the issues with the home equity loans. When the downward spiral in the housing market occurred in 2006-2007, at one point Applicant did not want to bother with his debt difficulties. He wanted to let the debts go and deal with the problems later. He later realized it was important to fix his mistakes. Applicant's brother has agreed to negotiate a settlement for Applicant; however, Applicant did not start this process until late 2010. On July 19, 2011, Applicant sent a letter offering a one-time settlement of 10% on the two delinquent home equity loan balances. Applicant provided documentation that he has a temporary payment arrangement for the two debts, which are in the amounts of \$60,700 and \$81,400. For each, Applicant has agreed in writing to make monthly payments of \$469 and \$334 respectively, for three months. The payments were to begin in August 2011. There is evidence of one payment on the first loan. Applicant did not provide any documentation that he has made a payment on the second home equity loan debt. Applicant's salary with his current employer has increased from approximately \$90,000 to \$97,000 in the last two years. He provides some financial support for his parents. Applicant has been an outstanding employee. He has received several awards and recognition from his current employer in a short period of two years.

The Judge reached the following conclusions: Applicant has two 2007 home foreclosures and two delinquent home equity loans for a total of \$142,100. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns. Applicant financed the second property for \$540,000 with no money down and a variable interest rate on an income of approximately \$60,000. He did make early attempts to pay both mortgages, but he did not follow through on the home equity loans. They are still unresolved. Financial Considerations Mitigating Condition ¶ 20(a)¹ applies in part. Financial Considerations Mitigating Condition ¶ 20(b)² applies in part. It was not until 2010 that Applicant began to address the home equity loans. He acknowledged that he did not “want to bother with it” for a period of time. He began in earnest when he realized that he needed the matters resolved for his employment. He did not act as reasonably as he should have under the circumstances. Financial Considerations Mitigating Conditions ¶ 20(d)³ and ¶ 20(c)⁴ apply in part. Applicant provided documentation of a recent temporary payment plan for both home equity loans. He provided evidence of one payment on one account from August 2011. He has not addressed what follows after the temporary plan. He did not show that he has made any payments on the other account.

Under the whole-person concept, Applicant is a responsible citizen and employee. He has received excellent references and awards from his employer. However, after the primary mortgages on his two properties were resolved, he did not attempt to contact creditors for the two home equity loans. He has just recently started a temporary payment arrangement for the two delinquent accounts. Applicant has not submitted enough information to show that he has resolved the two delinquent home equity loans. He provided documents that note a “temporary payment plan” with no specific settlement amount. It is impossible to ascertain whether the plans will continue and will resolve the two home equity loans. He is on the right track, but any doubt must be resolved in favor of the Government.

Applicant asserts that the Judge did not properly consider all the facts. He argues that his situation is similar to thousands of other people who got caught up in the swift economic decline and real estate market downturn. He states that he did not live above his means, or have other debts. Applicant argues that the Financial Considerations mitigating conditions apply, and that he should be credited with the fact that, rather than file for bankruptcy protection, he chose to enter into settlement negotiations to resolve the debts. Applicant questions the Judge’s conclusion that he did not act as responsibly as he could, asserting that he did not have the means to pay and could do

¹[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[.]

²[T]he conditions that resulted in the behavior 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 reasonably under the circumstances[.]

³[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]

⁴[T]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control[.]

nothing more under the circumstances. He asserts that the fact that settlement negotiations are currently ongoing for the two loans is an important factor that has not been provided enough weight. Applicant's arguments do not establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). In this case, the Judge discussed in considerable detail the full circumstances of Applicant's financial difficulties and also discussed his favorable employment record and achievements. Applicant has failed to establish that the Judge did not properly consider all the facts. Applicant also asserts that the Judge did not properly apply the Guideline F mitigating conditions. A review of the Judge's decision indicates that the Judge acknowledged the presence of mitigating evidence. Indeed, the Judge concluded that four Guideline F mitigating conditions partially applied. However, the mere presence of favorable evidence does not require a Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000). 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*. 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. She adequately discussed why the disqualifying conduct established under Guideline F was not mitigated. Her basic conclusion that Applicant did not act as reasonably as he could have in failing to accept the validity of the outstanding delinquent debts until June 2011 and did not act completely reasonably in not addressing the debts sooner is supported by the record evidence. The Judge's conclusion that there was insufficient evidence of a permanent repayment agreement and insufficient evidence of payments under the temporary agreements is also adequately supported by the record evidence. Notwithstanding the evidence of mitigation, these conclusions provide a reasonable basis for the Judge's adverse security clearance determination.

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. 09-07424 at 2 (App. Bd. Aug. 16, 2011). 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: William S. Fields _____
William S. Fields
Administrative Judge
Member, Appeal Board