

KEYWORD: Guideline J; Guideline E; Guideline F

DIGEST: The presence of some mitigating evidence alone does not compel a favorable decision. There was no inconsistency in the Judge’s whole-person analysis. Adverse decision affirmed.

CASE NO: 10-06763.a1

DATE: 01/03/2013

DATE: January 3, 2013

In Re:)	
)	
-----)	ISCR Case No. 10-06763
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Gayle J. Brown, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 18, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 12, 2012, after the hearing, Administrative Judge Mark Harvey denied Applicant’s request for a security clearance.¹ Applicant timely appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

¹ The Judge entered formal findings favorable to Applicant under Guideline E. Those favorable findings are not challenged on appeal.

Applicant raises the following issues on appeal: whether the Judge erred by finding sufficient evidence of security concerns under Guidelines F and J, and whether the Judge erred in failing to adequately consider mitigating factors under the whole-person concept. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of pertinent fact: Applicant is 58 years old. He married his first wife in 1973, and he was divorced from her in 1998. He married his second wife in April 2003, was separated from her in September 2009, and divorced in January 2012. In August 1997, Applicant's first wife alleged that he illegally entered her residence, woke her up, and took the keys to her truck. In September 1997, a judge granted her request for a domestic violence protective order against Applicant. On September 16, 2009, Applicant argued with his second wife. The wife told police that Applicant pointed an unloaded firearm at her and threatened her. During the same incident, Applicant picked up a hammer and broke three windows on his second wife's car. Applicant was arrested. He ultimately pled guilty to criminal mischief in the third degree, a felony. Applicant is on probation and is compliant. He has been at a minimal level of supervision since October 14, 2010. His probation will be completed on February 4, 2013.

Applicant's SOR and credit reports list 22 delinquent debts totaling \$154,543. Excluding a mortgage account, the total debt is \$52,444. In July 1998, Applicant's nonpriority, unsecured delinquent debts were discharged under Chapter 7 of the Bankruptcy Code. Applicant's bankruptcy in 1998 was caused by his first divorce. He could not afford to pay the family debts without his first spouse's income. Applicant's second wife was responsible for paying the family debts. Applicant was often away from home. In August 2009, Applicant learned he had delinquent debts. His financial situation shocked him, and he told his second wife he wanted a divorce. Earlier, he and his wife had purchased a home in May 2004 for about \$200,000. They later borrowed \$50,000 for home improvement. A refinancing of the house resulted in a larger payment. Applicant could not afford the increased payment and the house went into foreclosure.

Applicant has not received financial counseling. He believed he can afford to pay his creditors a couple hundred dollars a month until he can get other bills taken care of. Applicant provides some financial support for his ill father. Applicant had 10 debts owed to the same creditor for \$2,649. He says he has been in touch with this creditor once or twice, but not recently. He did not provide any correspondence to or from the creditor. Applicant said he has not made any payments to any of his SOR creditors. He has paid off a vehicle that his second wife refinanced, some medical bills and a debt to the IRS. He is paying the IRS \$750 each month to address a non-SOR debt of about \$3,500.

After Applicant and his second wife separated in September 2009, he did not want to pay the debts until the divorce court settled the issue of responsibility for each debt. The divorce court ordered Applicant to pay \$5,654 owed on his truck plus 15 debts totaling \$29,560. From 2006 to 2009, Applicant's income was approximately \$69,000, \$69,000, 71,000 and \$58,000. In the last year, Applicant's second wife has expressed some remorse for her contributions to their marital difficulties.

The Judge reached the following conclusions: Applicant committed two felonies, which are serious crimes. He is on probation until February 4, 2013. Although none of the mitigating conditions fully apply, there are important mitigating factors. The offense is more than three years old and not recent. Applicant admitted his misconduct to the police. He was not convicted of assaulting his second wife. He has scrupulously complied with all terms of his probation, has been continuously employed, and has expressed regret and remorse over the altercation. He deliberately pointed his unloaded firearm at his second wife and threatened her. More time without any criminal misconduct must elapse before there is enough assurance that criminal conduct is unlikely to recur.

Some of Applicant's debts have been delinquent since 2009. Applicant has not taken reasonable action to resolve most of his SOR debts. The circumstances beyond his control were significant. However, he did not adequately explain why he had not made any payments to his SOR creditors, especially after his divorce was final in January 2012. He did not provide documentation proving that he maintained contact with his SOR creditors, and he did not provide any documentation showing his attempts to negotiate payment plans with his SOR creditors. There is insufficient evidence that his financial problem is being resolved and is under control. Applicant failed to prove that he could not have made greater progress resolving and documenting resolution of his SOR debts.

Applicant argues that, regarding Guideline F, no evidence was presented in his case to indicate that he was or is unable or unwilling to eventually satisfy his debts. He also asserts that Mitigating Condition ¶ 20 (a)² and Mitigating Condition ¶ 20 (b)³ apply to the facts of this case. Much of Applicant's factual argument focuses on the role Applicant's second wife played in accumulating the debts in question. Applicant's narrative represents a plausible interpretation of the record evidence. Notwithstanding this, Applicant's arguments do not establish that the Judge's analysis and conclusions regarding his finances are arbitrary, capricious, or contrary to law.

Once the Government produces evidence raising security concerns, the burden shifts to the Applicant to establish mitigation. Contrary to Applicant's assertion, after a review of the record, the Board concludes that the Judge's application of Guideline F disqualifying conditions⁴ was reasonably supported by the evidence. Although the Judge gave ample consideration to the role of Applicant's second wife in contributing to his financial woes, the Judge did not conclude that Applicant's difficulties were solely the fault of his ex-wife, nor did the evidence require him to. Moreover, a principal focus of the Judge's analysis was Applicant's failure to take any meaningful steps toward resolution of his long delinquent debts during the eight month period between the

² “[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[.]”

³ “[T]he 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[.]”

⁴ In this case, ¶ 19(a) (“inability or unwillingness to satisfy debts”), and ¶ 19(c) (“a history of not meeting financial obligations”).

finalization of his divorce and the close of the record in this case, a period unaffected by his ex-wife's shortcomings.

Given this record, 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).

Applicant acknowledges his past criminal acts, but asserts that since the Judge specifically found that despite the allegations of criminal activity asserted against Applicant, there is no evidence of security violations, disloyalty, or that he would intentionally violate national security, an ultimate finding that it is not clearly consistent with the national interest to grant him a security clearance is not warranted. This argument is not persuasive. The federal government need not wait until an applicant actually mishandles or fails to safeguard classified information before it can deny or revoke access to such information. See, e.g., ISCR Case No. 08-09918 at 2 (App. Bd. Oct. 28, 2009). The absence of security violations does not bar or preclude an adverse security clearance decision. See ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005). Similarly, the absence of acts of disloyalty or deliberate violations of national security do not necessarily resolve the government's security concerns. The Judge's finding that Applicant has not, and likely will not, engage in deliberate acts that violate security does not preclude the possibility that Applicant, because of his past conduct, is at risk for committing negligent or inadvertent breaches of national security. Indeed, the Judge specifically concluded that Applicant's criminal offenses (and his failure to pay his debts) show a lack of judgment and raise questions about his reliability, trustworthiness and ability to protect classified information. These conclusions are reasonably supported by the record.

Applicant argues that the Judge found substantial evidence of successful rehabilitation, including the passage of time without recurrence of criminal activity, remorse, and a good employment record, and thus, any reasonable security concern was mitigated. The Judge found that, although there was important evidence in mitigation, none of the Guideline J mitigating conditions fully applied. In ultimately finding against Applicant, the Judge emphasized Applicant's act of deliberately pointing a firearm at his ex-wife, notwithstanding Applicant's denials at the hearing. The Judge's conclusion that more time is needed to ensure that criminal acts will not recur is sustainable on this record.

Applicant also argues that the case against him was mitigated considering the factors enumerated under the whole-person concept. Applicant claims an inconsistency in the Judge's favorable formal findings under Guideline E and his conclusion that Applicant's "personal conduct" when considered under the whole-person factors had not been mitigated. The Board sees no inconsistency. Applicant is apparently labeling all of Applicant's security significant conduct as

“personal conduct” for purposes of evaluating the Judge’s analysis under the whole person. This appears to assume that when the Judge, in his whole-person analysis, commented upon Applicant’s financial and criminal conduct issues in the context of reliability and trustworthiness, he was essentially repeating a Guideline E analysis. However, a review of the SOR allegations and the Judge’s analysis under Guideline E indicates that Applicant’s financial problems were not included in the Guideline E analysis. Thus, it is improper to label the conclusions inconsistent when they differ in scope, and the whole-person analysis necessarily involved a consideration of both financial issues and criminal issues viewed together and view in the context of all the other evidence in the record, both favorable and unfavorable. While Applicant accurately cites several matters in mitigation when discussing the whole-person, the Board concludes that these facts did not compel the Judge to make an ultimate finding in Applicant’s favor.

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 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