KEYWORD: Guideline F

DIGEST: The Judge's error regarding Applicant's current company does not necessitate remedial action. The Judge's ultimate adverse decision was based a number of conclusions independent of the single erroneous comment. The error was harmless. Adverse decision affirmed.

CASENO: 11-13529.a1

DATE: 09/14/2012

DATE: September 14, 2012

In Re:	)	
------	)	ISCR Case No. 11-13529
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Kenneth Saks, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 20, 2012, 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 June 8, 2012, after the hearing, Administrative Judge Robert E. Coacher 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 conclusions under Guideline F were arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is a 70-year-old president of a defense contractor company. The SOR alleges seven delinquent debts, two tax liens and two judgments. The total of all his delinquent obligations is $600,112.

Applicant started his current company, Co. 2, in 2005. From 1995 through 2005, Applicant was the president and CEO of a prior company, Co. 1. Applicant relied on government-funded contracts to keep this business operating. Because the contract payments by government agencies to Co. 1 were delayed, Applicant hired a "factoring" credit agency to supply a steady monthly cash flow by purchasing the company's accounts receivable. During 2005, Co. 1 was working on an overseas contract that was significantly delayed. Co. 1 was expecting to earn approximately $500,000 upon completion of the contract. The factoring company became concerned that Co. 1 would not complete the contract and thus not receive the contract payments. A receiver was appointed for Co. 1, and a Chapter 11 voluntary bankruptcy petition was filed in November 2005. In January 2007, the case was converted to a Chapter 7 bankruptcy. Applicant had personally guaranteed many of the loans of Co. 1. Consequently, even though the company was discharged from its liabilities, Applicant was personally responsible for those loans he guaranteed. Applicant was able to pay about $100,000 of the loan guarantee debts. Those debts are not listed in the SOR.

A federal tax lien of $397,000 resulted when Co. 1 failed to pay payroll taxes for several quarters in 2005. Applicant did not realize at the time that the taxes were not being paid. He is in the process of negotiating an offer in compromise with the IRS, and he has paid $9,000 toward the debt. Applicant also paid off three smaller debts alleged in the SOR, which total $907. The remaining debts are for Applicant's loan guarantees. The aggregate amount of these debts is approximately $175,000. The debts are in various stages of settlement negotiations but are currently unresolved.

Applicant started Co. 2 in 2005 to engage in the same type of business as Co. 1. He has built the business by obtaining contracts with government agencies. He has 14 employees, and Co. 2 currently has about $200,000 in the bank and was just awarded a government contract for about $96,000.

The Judge reached the following conclusions: Applicant is delinquent on taxes to the IRS. He has two judgments against him and owes on the remaining loan guarantee debts. Therefore he was unable or unwilling to satisfy his obligations. The evidence is sufficient to raise disqualifying conditions AG ¶ 19 (a)[1] and AG¶ 19(c)[2]. The delinquent taxes, judgments, and debts are unresolved and ongoing. He has started a new business, but not addressed many of his financial problems. Similar financial problems will recur, since he is still in the same type of business that originally incurred the debts. AG ¶ 20(a)[3] is not applicable. Applicant made a business decision to personally guarantee the loans that Co. 1 incurred. Also, as president and CEO of Co. 1, he was responsible to ensure that the payroll taxes got paid. These were not financial conditions beyond his control. AG ¶ 20(b)[4] is not applicable. There is no evidence of financial counseling, and although a few debts were paid, the larger obligations remain unpaid, with no firm settlement plan in place. AG ¶ 20 (c)[5] does not apply. AG ¶ 20(d)[6] applies to the debts that were paid. Applicant's finances remain a concern despite the presence of some mitigation.

Applicant asserts that the Judge failed to sufficiently consider the "whole-person" concept, that his analysis was "incomplete," and that he failed to sufficiently consider the mitigating circumstances in the case. More specifically, he argues that the Judge erred in finding against him under AG ¶ 19(a) because Applicant's behavior does not demonstrate an inability or unwillingness to satisfy debts. Applicant fails to demonstrate error. While Applicant expressed a desire to repay his debts, and has managed to make modest payments to retire small debts and slightly lower the IRS debt, the record indicates that his overall large debt load remains because he is currently in no position to meaningfully reduce it. Thus, the record clearly reflects Applicant's inability to satisfy his debts and provides a reasonable basis for the Judge's application of AG ¶ 19(a). Regarding mitigation, despite the debt repayments made by Applicant, the state of the record evidence does not mandate a conclusion on the part of the Judge that Applicant has engaged in a good-faith effort to repay debts that overrides the government's security concerns. Applicant also states that he was the victim of circumstances beyond his control. While certain circumstances that caused Co. 1 to fail may have been beyond Applicant's control, the Judge accurately pointed out that factors more directly related to Applicant's financial arrearages, such as his decision to personally guarantee the

[1]"[I]nability or unwillingness to satisfy debts[.]"

[2]"[A] history of not meeting financial obligations[.]"

[3]"[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[.]"

[4]"[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[.]"

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

[6]"[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

business loans and his failure to oversee the timely payment of payroll taxes, were matters within his control.

There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Thus, there is a presumption that the Judge properly considered those mitigating conditions in the Adjudicative Guidelines that were applicable to the case. Similarly, 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). Applicant fails to overcome these presumptions.

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).

When discussing potentially applicable matters in mitigation, Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence.

Applicant argues that the Judge based his ultimate decision on an inference that has no basis in the record evidence. Specifically, Applicant takes issue with the Judge's conclusion that similar financial problems will recur in the future because Applicant is still in the same type of business (with Co. 2) as the type that originally incurred the delinquent debt. Applicant asserts that although Applicant is currently in the same line of business, there is no evidence that he will incur similar financial hardships in the future. Applicant's argument has merit. There is no record evidence concerning the existence of current financial problems for Co. 2 or the existence of external problems with customers or internal business practices of Co. 2 that could lead a reasonable person to conclude that Co. 2 is experiencing, or will experience, problems similar to those encountered by Co. 1. The limited amount of evidence available concerning Co. 2 suggests that, although it is a new company, it is currently on a firmer financial footing than Co. 1 was during its formative stages. Therefore, the Judge's conclusion that similar financial problems will recur in the future lacks any basis in the record evidence. *See, e.g.*, ISCR Case No. 98-0066 at 3 (App. Bd. Aug. 28, 1998).

Having found error, the Board must assess whether the error necessitates remedial action. The Board does not consider individual sentences or passages in a Judge's decision in isolation, but rather will assess those passages in the context of the decision as a whole. *See, e.g.*, ISCR Case No. 03-02374 at 3 (App. Bd. Jan 26, 2006). Here, the Board notes that the Judge based his ultimate decision on a number of conclusions independent of his single comment about the presumed financial future of Applicant's Co. 2. After a consideration of the whole of the Judge's decision, the

Board concludes that the remark was not a principal determinant of the Judge's ultimate security clearance decision.[7] Therefore, the error is deemed to be harmless.

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 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

[7]The Board notes that the passage found to be in error occurred only in one specific context, namely during the Judge's discussion of the applicability of AG ¶ 20(a). There is no indication in the Judge's decision that it had broader impact on his analysis. AG ¶ 20(a) is only one of three mitigating conditions analyzed and ultimately rejected by the Judge in the case. Also, the language in question was not the sole basis of the Judge's conclusion not to apply AG ¶ 20(a) in Applicant's favor.