

KEYWORD: Guideline F; Guideline E; Guideline B

DIGEST: Applicant failed to demonstrate that the Judge mis-weighed the evidence. False statements in Applicant’s bankruptcy petition, combined with all the other evidence, supports whole-person assessment of questionable judgment, untrustworthiness, and unreliability. Adverse decision affirmed.

CASE NO: 12-09314.a1

DATE: 03/20/2014

DATE: March 20, 2014

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Charles D. Swift, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 19, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations); Guideline E (Personal Conduct); and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 18, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge

David M. White denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Applicant raises the following issue on appeal: whether the Judge's decision is 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: Applicant is 55 years old and is married for the second time. After a period of financial difficulties and a downturn in home prices in the area where he lived, Applicant filed his first petition for Chapter 7 bankruptcy relief, and received a discharge of his debts in 1996. In 2009, his divorce from his first wife was finalized. The divorce decree made Applicant and his wife jointly liable for payment of mortgage loans on the home. They had borrowed so much equity out of the house that, after the real estate market collapse, they owed significantly more on the loans than the house was worth. In 2009, while Applicant was overseas, his wife stopped making mortgage payments and the house was repossessed. Applicant's wife also filed for and was granted Chapter 7 bankruptcy, leaving Applicant solely responsible for their formerly joint debts. Applicant earned about \$300,000 during the year he was assigned overseas. Although he had numerous delinquent debts, he did not use these funds to repay them. He instead chose to spend this money on travel and entertainment, make extra payments of alimony to his ex-wife, and to make maximum contributions into his retirement investment accounts that would be exempt from allocation to creditors in bankruptcy proceedings.

Applicant's overseas assignment was troubled. He was apprehended for a security violation. He was accused of unauthorized revelations of sensitive and company-proprietary information, and he behaved disruptively at work and in a hotel where he resided. He was later evicted from an apartment. He was found sleeping on duty on one occasion. A human resources representative from his company reported that he was terminated for cause as a result of these incidents.

Applicant married a foreigner in 2010. They spent a year and a half in the wife's country. Applicant considered himself retired, although her had no funds from which to pay his extensive delinquent debts. A month prior to returning to the United States with his wife in 2011, Applicant filed for Chapter 7 bankruptcy relief without hiring an attorney to represent him. He used his daughter's U.S. address and certified on the petition that he had been domiciled in the bankruptcy court's district for 180 days immediately preceding the date of the petition. He claimed his 2009 income was \$75,000. He listed his ex-wife on various parts of the petition, but did not list his current wife. He also failed to disclose his current wife's ownership of substantial property in her home country. Applicant could not obtain an ownership interest in his wife's foreign property. However, Applicant became part owner in a foreign corporation that enabled him to share in that property. Applicant listed a \$13,700 student loan he had co-signed with his son as a claim on the bankruptcy petition. He thought it had been discharged with his other debts, but now realizes that

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<sup>1</sup>The Judge entered formal findings favorable to Applicant under Guideline B. Those findings are not at issue on appeal.

the loan is not dischargeable. He has made arrangements to rehabilitate the loan and to begin repayment.

Applicant declared no real property and more than \$150,000 in personal property on his 2011 bankruptcy petition. Of that personal property, he claimed more than \$150,000 as exempt IRA investments. He declared more than \$250,000 in liabilities to creditors holding unsecured claims. He was granted a bankruptcy discharge in September 2011.

Applicant's wife runs a small business to support them. Of the more than \$150,000 he claimed in exempt retirement savings at the time of his bankruptcy, he had withdrawn and spent about \$135,000 by October 2012 to start his wife's business, and for vacation and travel expenses.

The Judge reached the following conclusions: Applicant's 2011 discharge of more than a quarter million dollars worth of unsecured debts through bankruptcy, rather than making payments toward them during 2009 while earning over \$300,000, was recent and followed his similar treatment of previous debts in 1996. His failure to resolve the non-dischargeable student loan debt is ongoing. He offered insufficient evidence from which to conclude that such disregard of voluntarily incurred obligations is unlikely to recur, or does not cast doubt on his current reliability or judgment. He neither showed that his serious indebtedness was caused by his later divorce or unemployment, nor demonstrated responsible action under the circumstances during the year he earned about \$300,000. Applicant failed to sufficiently investigate or document a valid basis to dispute the legitimacy of the student loan debt. He established no clear indications that his financial issues have been or are being resolved, and are under control for the future.

Under Guideline E, although Applicant claims that bankruptcy did not concern his current wife or any debts incurred during their marriage, his use of his daughter's address to file the petition and his certification that he had lived in that court district during the preceding 180 days when filing the petition by mail from overseas support the conclusion that he intended to conceal his true marital and resulting financial status from the bankruptcy court. This concealment together with the series of incidents during his 2009 employment overseas establish significant security concerns. When combined with all available information, Applicant's conduct supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations. Applicant did not demonstrate a change in personal attitude or financial circumstances that would support a finding of permanent behavioral change, or a finding that recurrence of untrustworthiness and questionable judgment is unlikely.

Applicant argues that the Judge erred by not correctly weighing the mitigating factors in his case. With regard to Guideline F, he cites such facts as his divorce, his loss of his job, and his support of his ex-wife and his adult children as circumstances that led to his 2011 bankruptcy. He indicates that in 2009 he was current on all his debts. Concerning the \$13,700 student loan debt, Applicant asserts that he believed he had a reasonable basis to dispute the legitimacy of the debt. Applicant's arguments with regard to his debts do not establish error on the part of the Judge.

The Board has examined the record evidence and the Judge's decision. We find no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). Two conclusions were central to the Judge's analysis under Guideline F. One was his conclusion that Applicant had not adequately demonstrated that his serious indebtedness prior to his 2011 bankruptcy was caused by his divorce or by his period of unemployment. Another was his conclusion that Applicant chose to resolve his debts in 2011 by filing bankruptcy rather than making payments toward them in 2009 while he was earning over \$300,000, and that this resolution was similar to his treatment of previous debts in 1996. These conclusions, and the findings upon which they are based, are supported by substantial record evidence. Regarding the \$13,700 student loan debt, the Judge concluded that Applicant failed to sufficiently investigate or document a valid basis to dispute the legitimacy of the debt, which remained outstanding. This, too, is supported by substantial evidence. We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation under Guideline F.

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).

Applicant's brief consists largely of a presentation of a different interpretation of the record evidence.

Regarding Guideline E, Applicant asserts that he did not deliberately provide false or misleading information when preparing his bankruptcy documents, nor was he terminated from his employment in 2010 as a result of misconduct. In concluding that Applicant deliberately failed to disclose pertinent information on his bankruptcy petition, the Judge considered a variety of circumstances, including the fact that Applicant did not disclose the identity of his current wife and her financial status, and used his daughter's address in the United States on the bankruptcy petition while he was living overseas. The Judge's conclusions regarding Applicant's failure to disclose are supported by substantial evidence.<sup>2</sup> Likewise, the Judge's conclusion that Applicant engaged in numerous questionable practices and misconduct while employed overseas in 2009 is supported by substantial record evidence.<sup>3</sup> His conclusion that these matters were not mitigated is also sustainable on this record.

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<sup>2</sup>Part of Applicant's argument makes specific reference to the foreign country's property laws. These references were not made part of the record below. Consequently, they are new evidence, which the Board cannot consider on appeal. Directive, ¶ E3.1.29.

<sup>3</sup>Government Exhibit 7, an e-mail memo from the company human resources department, speaks directly to Applicant's termination from his company and the reasons therefor. The authenticity of the document has not been challenged.

Applicant argues that the Judge erred when applying the whole person concept. The principal issue under this analysis is whether Applicant demonstrated that he has made significant changes to his conduct. The Judge concluded that Applicant did not demonstrate a change in personal attitude or financial circumstances that would support a finding of permanent behavioral change indicating trustworthiness and good judgment. After a review of the record and the Judge's decision the Board concludes that the Judge's whole person analysis is supported by substantial record evidence.

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 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 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: 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