

KEYWORD: Guideline F

DIGEST: The Judge’s challenged conclusions are support by the record evidence. It was not a denial of due process to apply the Directive to Applicant’s case. Adverse decision affirmed.

CASENO: 12-10691.a1

DATE: 07/12/2013

DATE: July 12, 2013

In Re:)	
)	
-----)	ISCR Case No. 12-10691
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Applicant’s Sister, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 28, 2012, DoD 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 April 1, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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 found: Applicant is 62 years old. In August 2000, Applicant received a traumatic brain injury in an accident. As a result, he has received medical care for the last 10 years. His psychotherapist reported that the injury significantly impacted his executive function. Early on, he had great difficulty managing his administrative and financial affairs. The psychotherapist indicated that in recent years, Applicant has made significant progress. He has obtained and maintained employment commensurate with his expertise and experience. Witnesses testified that Applicant can handle complex thoughts and analysis, and can be trusted to handle classified information. Applicant believes his brain injury does not affect his ability to safeguard classified information.

Applicant has six delinquent debts, totaling \$565,178. One is a private judgment, one is a private overdue account, three are state tax liens or debts, and another is a federal tax lien in the amount of \$365,000. In January 2013, Applicant received a letter from the state seeking payment of \$66,000. The status of this debt is unclear. This may be a new state tax debt, a duplication of one of the previous state tax debts, or a consolidation of the three previous state tax debts. In addition to his debts, Applicant did not timely file state income tax returns for 2002 and 2005 through 2011 as required by law.

The Judge concluded: Applicant attributes his financial problems to his August 2000 brain injury, divorce, IRS errors, and his exploitation by an unscrupulous financial advisor. These were circumstances beyond Applicant's control. However, he did not establish that he acted responsibly under the circumstances. A witness testified that Applicant has had the mental and executive abilities to safeguard classified information for the last two years. Applicant should have made greater progress getting his state tax returns filed sooner and resolving the four substantial tax debts. Applicant is not given full credit for the financial counseling he received because his progress has been limited, and he did not provide a credible budget showing how he will pay his debts. Applicant is unsure about the extent of his federal and state income tax liability, and he was not able to explain when his tax problems will be resolved. Applicant did not provide enough details to establish the link between the unanticipated circumstances he encountered and his inability to make greater progress paying or resolving his SOR debts over the last two years. He had the means to make more progress resolving his delinquent debts and tax problems. He did not prove that he maintained contact with the IRS and state tax authority, and he did not prove that he made sufficient attempts to timely establish payment plans. He did not establish that there are clear indications that the problem is being resolved or is under control. It is likely that his financial problems will continue.

Applicant principally argues that the Judge ignored the continuous and sustaining nature of his physical disability and its effect on his financial situation. Applicant also argues that the Judge erred in concluding he did not act responsibly under the circumstances he was faced with, and erred because he downplayed Applicant's efforts in attempting to clear up his financial problems. Applicant also asserts that the Judge ignored an upward trend of improvement demonstrated by him in dealing with his financial difficulties. He argues that the Judge based his conclusions only on a small slice of the record. Applicant has failed to establish error on the part of the Judge.

Portions of Applicant's brief state or suggest that the Judge did not consider important evidence in the case. 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). After a review of the Judge's decision and the record, the Board concludes that Applicant has failed to overcome this presumption.

A review of the Judge's decision indicates that he clearly recognized the factor of Applicant's injury and subsequent disability. The gravamen of the Judge's decision is that Applicant's condition has improved in recent years to the point where he holds demanding employment that requires complex analysis and witnesses testified as to his ability to handle classified information. However, there has been no commensurate improvement in his ability to address his financial problems. While finding that Applicant has made progress in resolving his SOR debts, the Judge concluded that Applicant should have made greater progress, especially in the last two years, in debt resolution, considering his circumstances. This conclusion is supported by the record evidence.

Applicant points to evidence indicating that notwithstanding the fact that he has made significant strides in managing his disability, there are still numerous instances where it takes him more effort to perform administrative functions as opposed to other functions. However, a review of the record indicates a paucity of evidence on this particular point, and the evidence is not of significant strength to undermine the Judge's basic conclusion that if Applicant has been functioning at a complex mental level for the past few years, he should be further along in resolving his financial delinquencies. The Board notes that most of the documentary evidence concerning Applicant's efforts to resolve his tax difficulties through the state and federal tax authorities is of very recent vintage.

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). 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 appeal brief essentially argues for an alternate interpretation of the record evidence.

Applicant argues that the standard used by the Judge upon which the analysis of facts and the decision are based is arbitrary in that it is based on a set of norms associated with the general population, and not the particular circumstances of Applicant. Although the brief is not a model of clarity, this appears to be an argument for applying a different adjudicative standard to Applicant based on his brain injury and the resulting difficulties experienced by him. This argument lacks merit. The Directive provides only one set of standards for applicant's with the ultimate determination being whether it is clearly consistent with the national interest to allow an applicant access to classified information. The circumstance of his disability was analyzed by the Judge under Mitigating Condition ¶ 20(b),¹ and Applicant was given partial credit under that provision. It also figured prominently in the Judge's whole-person analysis. It was not a denial of due process to apply the provisions of the Directive to Applicant's case.

In this case, the Judge made sustainable findings that, despite some progress, Applicant still had a significant amount of overdue indebtedness, and there is no current indication as to how or when the indebtedness will be resolved. Applicant was still without a credible budget showing how he would repay his sizable debt, and had not established payment plans. He offered insufficient proof that, in keeping with his improved mental functioning, he had been diligent in establishing and maintaining contact with his creditors and taxing authorities. The Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in his analysis. The Judge found in favor of Applicant as to a number of the Guideline F allegations. However, the Judge offered a narrative explanation as to why the disqualifying conduct under Guideline F was not fully mitigated. The Board concludes that the Judge appropriately weighed the Guideline F mitigating evidence against the seriousness of the disqualifying conduct, and took Applicant's disability and its effects into full consideration.

Applicant asks for alternate forms of relief should the Board not decide to reverse this case outright. These include (1) a reversal where the Hearing Office Judge would presumably be entitled to re-evaluation of the clearance decision after 18 months, upon receipt of Applicant's tax status with the IRS and the state department of taxation; (2) a request that the decision of the Hearing Office Judge be vacated, the record below be reopened for another six months, and the Judge render a decision after reevaluating the facts; and (3) a request that the Judge's decision be vacated and the case remanded for further testimonial and documentary evidence, whereupon the Judge would issue a decision based on an expanded record. The Board's authority is limited to addressing the material issues raised on appeal and then either affirming, remanding, or reversing the decision of the Judge. Directive ¶¶ E3.1.32-E3.1.33.

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

¹ “[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[.]”

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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board