KEYWORD: Guideline F; Guideline E

DIGEST: A party's disagreement with the Judge's weighing of the evidence or an ability to argue for a different of the evidence, is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious or contrary to law. Adverse decision affirmed.

CASENO: 12-06228.a1

DATE: 05/22/2014

DATE: May 22, 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
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 10, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 11, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert J. Tuider 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.[1]

The Judge made the following findings: Applicant is 46 years old. He has seven delinquent debts, the largest of which are a past-due mortgage account for $44,855 and a 2008 bankruptcy court judgment for $102,933 entered against him for fraudulent pre-petition money transfers made prior to filing a Chapter 7 bankruptcy. After a successful career in another industry, Applicant opened his own business in 2003. As a result of the downturn in the economy in 2006, Applicant was forced to close his business in 2007, and he filed for bankruptcy the same year. Applicant's debts were brought to his attention in 2012 when he was interviewed by a government investigator. Applicant advised the investigator that he got behind on his bills as a result of being unemployed. Applicant received further notice of his debts when he received his 2013 SOR and when he received a copy of his credit report prior to his hearing. Applicant has taken no action to contact his creditors, attempt to settle or dispute his debts, or otherwise resolve his debts. Applicant has not sought financial counseling.

Regarding the bankruptcy judgment, Applicant's attorney failed to appear at a scheduled hearing and a $102,933 default judgment was entered against Applicant. Applicant acknowledges the default judgment, although he was unaware of it for a time. Currently, Applicant is not drawing a paycheck and states that he will have work as soon as his clearance is granted. He estimates that his family monthly income is approximately $3,000.

The Judge reached the following conclusions: None of the Guideline F mitigating conditions are established. Applicant's delinquent debts are numerous, recent, and not the result of circumstances making them unlikely to recur. His business failing is a circumstance beyond his control, but he has not acted reasonably. He made no effort to address his debts even after they were brought to his attention.

Applicant's brief contains a number of factual representations that are not part of the record evidence in this case. The Board cannot consider new evidence in the process of deciding appeals. Directive ¶ E3.1.29.

Applicant argues that the record shows that he has been making progress in addressing and paying his outstanding delinquent debts and, therefore, the Judge's conclusion that he has taken no

[1]The Judge entered formal findings favorable to Applicant under Guideline E. Those findings are not at issue on appeal.

action to contact his creditors, attempt to settle or dispute the debts, or otherwise resolve them is in error. He points principally to three credit reports in the record, prepared in 2009, 2012, and 2013, which Applicant states show a progression of lessening amounts of outstanding debt, and, therefore, constitutes evidence that he has been active in paying down his debts. The credit reports in question contain variances in the accounts listed and the amounts identified as outstanding and overdue, but they do not establish a discernable downward progression in the amounts owed by Applicant. Thus, the information contained in the credit reports does not undercut the Judge's findings and conclusions. Moreover, Applicant's hearing testimony provides a reasonable basis for the Judge's findings and conclusions concerning his lack of due diligence. On cross-examination, Applicant was queried in detail about what actions he had taken on individual accounts to address his debt delinquencies. For nearly all of the accounts, he testified that he had done little or nothing.

Applicant argues that the Judge erred in finding he had not received financial counseling. Other than Applicant's uncorroborated testimony that he had received counseling as part of the bankruptcy process, there is no record evidence establishing that he received such counseling. Even if the Judge's finding is deemed to be erroneous, the Board concludes that such error would be harmless. After a review of the Judge's decision and the entire record, we conclude that an opposite finding on this point would not reasonably be likely to change the outcome of the case, given the extent of the evidence of Applicant's otherwise unmitigated financial difficulties. *See* ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006).

Applicant cites to evidence he believes provides mitigation in his case. These include the failure of his business due to circumstances beyond his control, his subsequent unemployment, and the death of his bankruptcy attorney, which hindered his ability to address the lawsuit filed against him by the bankruptcy trustee and which resulted in the $102,933 default judgment. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157at 2 (App. Bd. Apr. 4, 2008). 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.

In this case, the Judge made sustainable findings that Applicant had a lengthy history of not meeting financial obligations, and that those delinquencies remain unaddressed. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing and unmitigated. *See, e.g.*, ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007). Applicant has not demonstrated that the Judge erred when he weighed the mitigating evidence against the seriousness of the disqualifying conduct.

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 Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed; Jeffery D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board