

KEYWORD: Guideline E; Guideline F

DIGEST: A party’s disagreement with the Judge’s weighing of the evidence is not sufficient to demonstrate error. Applicant failed to demonstrate that the Judge erred in his application of the whole-person factors. Adverse decision affirmed.

CASE NO: 12-09324.a1

DATE: 05/07/2013

DATE: May 7, 2013

In Re:)	
)	
-----)	ISCR Case No. 12-09324
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 2, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under 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 January 31, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Henry Lazzaro denied

Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raises the following issues on appeal: (1) whether the Judge committed harmful error in the application of Guideline F mitigating conditions; and (2) whether the Judge failed to properly apply the whole-person concept in the case. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant accumulated over \$488,000 in student loans while attending medical school. Those loans have now been submitted for collection, charged off as bad debts, or listed as past due. Applicant made two payments totaling \$500 on one student loan account in the spring of 2010. He made one payment of \$60 on another student loan account in 2004 and three more payments of \$60 on the same account beginning in November 2012. Applicant obtained a degree in medicine in 2007. He has taken and failed the examinations required before he could apply to begin a residency. Applicant did not work while studying to become a doctor. Instead, he supported himself and his family with student loans.

The Judge concluded: Applicant's student loan debts have been delinquent for years. Until he was hired by his current employer, Applicant had only worked one year, at a low paying and unskilled job, in the past ten years. In addition to student loans, he primarily survived by borrowing money from his mother. As a result, he not only acquired enormous debt; he also maintained the inability to satisfy that debt. Applicant knowingly placed himself in a precarious financial position by choosing to support himself and his family solely on student loans. He has not acted responsibly in simply ignoring the debt since he acquired it. Applicant's financial problems are ongoing and unlikely to be resolved in the foreseeable future. The few and nominal payments he has made on a couple of his accounts cannot be considered a good faith effort to resolve those debts. Applicant has not overcome the case against him, nor satisfied his ultimate burden of persuasion.

Applicant argues that the Judge erred by not applying the Guideline F mitigating conditions in his favor. He asserts that the student loan debt occurred under circumstances unlikely to recur, namely an unanticipated amount of time being unemployed in addition to a divorce. He asserts that circumstances contributing to his financial problems were largely beyond his control, namely his unemployment, divorce, and the death of his father. Applicant states that the problem is being resolved as he is now making payment plans for larger sums as he is currently employed and making a significant income. Applicant argues against the Judge's conclusions that it is unlikely that he will ever practice medicine. He states that the Judge's conclusion that it will take over ten years to pay off the delinquent debts if Applicant actually makes the payments he says he will make is irrelevant as Applicant is still showing his willingness to satisfy his debt, thus evidencing reliability and trustworthiness. Applicant's arguments do not establish error on the part of the Judge.

¹The Judge entered formal findings favorable to Applicant with regard to Guideline E. Those findings are not at issue on appeal.

Applicant's argues that difficult circumstances outside his control should have been given favorable consideration by the Judge under mitigating condition ¶20(b).² This argument is not frivolous. Applicant presented evidence of unemployment, divorce and a death in the family, all of which raise the first prong of the mitigating condition. However, the mitigating condition has a second prong, dealing with the issue of whether the individual acted responsibly under the circumstances. In this case, the Judge explicitly and reasonably explained why Applicant's conduct did not satisfy the second prong of mitigating condition 20(b). Decision at 7. Applicant has not demonstrated error.

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. The Judge offered a narrative explanation as to why the disqualifying conduct was not mitigated, while making specific reference to the language of the Guideline F mitigating conditions. Central to the Judge's analysis were the conclusions that Applicant unwisely placed himself and his family in a precarious position by relying on student loan proceeds for income over an extended period, and the fact that Applicant has no meaningful prospects for resolving his financial delinquencies in the foreseeable future. The Judge stressed that heretofore, only a few payments had been made on two accounts, and the majority of delinquent accounts had not been addressed at all. Contrary to Applicant's assertion, these conclusions by the Judge, along with his conclusion as to the prospects for meaningful resolution of debt delinquencies within a reasonable time were relevant to a determination as to whether Applicant is evidencing a true willingness to resolve his debts. After a review of the Judge's decision and the record, the Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and reached a resolution that is sustainable.

Applicant argues that the Judge did not properly apply the whole-person concept to the case. The Judge did not engage in a lengthy, separate whole-person analysis in his decision. He did state that he had given appropriate consideration to the whole-person concept. Nothing in Applicant's appeal argument persuades the Board that the Judge failed to consider properly all aspects of the case.

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

²“[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[.]”

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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board