

KEYWORD: Guideline F

DIGEST: Judge did not err in taking into account Applicant's bankruptcy filing. In a Guideline F case, a Judge's decision must be based on a consideration of an applicant's overall financial history. Adverse decision affirmed.

CASENO: 08-00435.a1

DATE: 01/22/2009

DATE: January 22, 2009

In Re: _____ Applicant for Security Clearance))))))))	ISCR Case No. 08-00435
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 29, 2008, 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 October 28, 2008, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Specifically, Applicant argues that the Judge committed a factual error in stating that Applicant had \$40,000 in delinquent debt. Applicant also contends that the Judge's decision was improperly based in part on Applicant's filing for bankruptcy, and that the Judge should have applied mitigating conditions in Applicant's situation because he had discharged substantial amounts of debt and was working to accomplish that goal before he applied for a security clearance.¹ Applicant also points out that he has safeguarded "confidential and secret material" for over nine years as a Department of Defense contractor. Applicant's Brief at 2.

The Judge made the following relevant factual findings: The SOR allegations against Applicant include a 2002 bankruptcy, a judgment, and ten other delinquent debts. In his response to the SOR, Applicant admitted most of the debts; he denied the judgment only because the balance due is now much lower. Applicant has significant debt which is not listed in the SOR. This includes personal loans at high interest rates and money owed to the Internal Revenue Service. Applicant filed for bankruptcy shortly after he bought a house in 1999, because he and his wife separated and he could no longer afford the payments. His delinquencies were caused in part by his lack of organization; he put unpaid bills in a box and forgot about them. Applicant received financial counseling in the past, but stopped working with the company because he paid a high fee and no money was being applied to his debts. He began to receive financial counseling with another organization four days before the hearing. At the time of the hearing, Applicant was supporting his son and others.

In his response to the government's SOR, Applicant admitted all but three of the allegations.² His admissions established the government's case. The burden then shifted to Applicant to rebut, explain, extenuate, or mitigate the facts he admitted. The ultimate burden of persuasion to obtain a favorable security clearance decision rested with Applicant. *See* Directive ¶ E3.1.15. Applicant testified as to the origin of his financial difficulties. In his testimony, he also identified significant debt not listed in the SOR, including several high-interest personal loans known as "payday loans" and amounts owed to the IRS. Applicant testified that he was paying his current obligations in a timely manner. He also noted that at the time of the hearing he was paying off the high-interest personal loans and had signed a credit counseling agreement with the YWCA four days before the hearing.

In her decision, the Judge referred to Applicant's testimony and found in Applicant's favor as to five of the debts listed in the SOR. The Judge discussed the possible application of mitigating conditions in Applicant's case and explained why the mitigating evidence Applicant provided was not sufficient to overcome the government's security concerns. Applicant contends that the Judge

¹The Board cannot consider new information supplied by Applicant in his appeal brief which was not part of the record below. Directive ¶ E3.1.29.

²Applicant denied one of those three, a judgment, only as to the amount of the unpaid balance. Another, he testified should have been paid by health insurance or medicaid. The third he had paid off through the use of a credit card.

did not give sufficient weight to his mitigating evidence. 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*. An applicant'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. 07-00553 at 2 (App. Bd. May 23, 2008). The record supports the Judge's conclusions regarding Applicant's attempts to reduce his debt.

With regard to Applicant's allegation of factual error, Applicant testified that at the time of the hearing he had about \$40,000 in total debt. Transcript at 64. A large portion of that amount was not delinquent. Transcript at 64-69. The Judge erred in stating that Applicant's delinquent debt totaled \$40,000. However, that error is harmless, since the Judge reasonably explained the basis for her decision apart from that erroneous figure.

Applicant contends that the Judge improperly based her decision in part on Applicant's filing for bankruptcy. Although filing for bankruptcy was a legally available option for Applicant to exercise in 2002, it was not arbitrary, capricious, or contrary to law for the Judge to take the bankruptcy into account when evaluating Applicant's conduct and circumstances under Guideline F. The government is not precluded from considering the negative security implications of an applicant's overall history of financial difficulties merely because the applicant exercises the right to seek a discharge of debts in bankruptcy. *See, e.g.*, ISCR Case No. 01-27082 at 3 (App. Bd. Aug. 5, 2003).

With regard to Applicant's argument that he safeguarded "confidential and secret material" for over nine years as a Department of Defense contractor, the government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An unfavorable security clearance decision can be based on circumstances that raise security concerns sufficient to preclude a determination that it is clearly consistently with the national interest to grant or continue a security clearance for a given applicant. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). A history of financial problems is a circumstance that raises security concerns. *See, e.g.*, ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). In light of the record here, the Board concludes that the Judge had a rational basis for concluding that Applicant's history of financial difficulties raised such concerns and that Applicant did not present evidence sufficient to extenuate or mitigate those concerns. The Judge's decision is sustainable.

Order

The Judge's decision 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board