

KEYWORD: Guideline F; Guideline J

DIGEST: Judge’s conclusion that Applicant had failed to mitigate Guideline J concerns despite passage of eight years from offense to SOR was sustainable. Also, Applicant’s response to his debts was dilatory in light of the totality of the record evidence. Adverse decision affirmed.

CASENO: 08-00472.a1

DATE: 01/26/2010

DATE: January 26, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-00472
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Samuel Bluck, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 15, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 23, 2009, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 decision.

Regarding Guideline F, the Judge found that Applicant and two partners started a business in 1997 and obtained a \$100,000 loan pursuant to a promissory note wherein the lender held a security interest in the business's assets. Applicant and other company officers executed documents guaranteeing the loan. A second line of credit, also in the amount of \$100,000, was also guaranteed by Applicant and the CEO. Applicant was not involved in handling the finances of the business. He invested some of his own assets in the business, and borrowed \$27,000 from his brother to put into the business. Subsequently, the business failed. The company offered its inventory as collateral to the banks when it could no longer make loan payments. In 2000, both banks filed lawsuits against the company and the loan guarantors. In June 2000, one of the banks, Applicant, the CEO and the company stipulated to a Judgment of \$116,418. In the same month, the other lender obtained a judgment against Applicant for \$112,130.

Applicant sold his residence and the \$32,000 proceeds went to partially satisfy the \$116,418 judgment. As of December 2005, the credit bureaus were reporting that one of the lenders had filed in court to attach Applicant's assets to recover a \$120,000 debt balance. In 2006 or 2007, after he applied for a security clearance, Applicant retained legal counsel to represent him in settling the judgment debts against him. Settlement negotiations ensued, but no agreement was reached and, as of July 2009, Applicant had paid nothing toward the judgment debts. Applicant believes that one of the creditors received proceeds from an auction of the inventory of the failed business, but there is no information available confirming his belief. As of the summer of 2009, Applicant was making his credit card account payments and his mortgage payments on time. In July 2009, Applicant estimated his annual income at about \$180,000. He had available to him about \$20,000 to \$30,000 in cash assets to pay the judgments.

Regarding Guideline J, the Judge found that during the course of a lawsuit concerning the business debts, Applicant was subpoenaed to testify in June 2001. Applicant provided false testimony under oath. Applicant was subsequently indicted on three counts of perjury in October 2001. In March 2004, Applicant pleaded *nolo contendere* to two counts of false swearing, a Class A misdemeanor. After Applicant signed a form acknowledging that he understood he was admitting the truth of the charges against him, a finding of guilty was entered for both counts. Applicant underwent a voluntary psychological evaluation in April 2009 by a clinical psychologist to determine whether he exhibited clinical indicators of lying behavior. The psychologist found no significant indication of lying behavior at the time of Applicant's testimony and opined that Applicant was not deceptive. Applicant was not willing to acknowledge at his July 2009 hearing that he had knowingly provided false testimony in the lawsuit.

The Judge concluded that Applicant's two outstanding judgments raised security concerns under Guideline F. The Judge indicated that despite some matters in mitigation, she was unable to fully apply the Guideline F Mitigating Conditions. This was because of Applicant's demonstrated irresponsibility in not making the restitution of the judgment debts a priority. While one creditor may have received some funds from the equity in Applicant's house in 2000 or 2001, no payments on the debt have been made since then, and the other creditor has gone uncompensated. Applicant made no attempt to address the second judgment until 2006 or 2007, after he applied for his security clearance. Despite having \$20,000 to \$30,000 cash on hand, there is some question as to whether Applicant has the means to satisfy the approximately \$200,000 in outstanding judgments, given the

fact that he has outstanding credit card balances totaling about \$29,000.

The Judge concluded that the passage of eight years since the false swearing convictions is a significant mitigating condition. She also mentioned Applicant's character references and good employment record. However, this evidence in reform must be weighed against the seriousness of the offense. Although a misdemeanor under applicable state criminal statutes, a knowing false statement made under oath raises very serious concerns about a person's judgment, reliability, and trustworthiness. Concerns persist about Applicant's reform, given his inability to provide a consistent, credible account of his conduct in June 2001. Applicant also told one of the witnesses testifying on his behalf at the hearing that the judgment debts had been repaid. Under a whole-person analysis, the Judge concluded that it would be premature to conclude that the government's security concerns are fully mitigated at this time.

Applicant argues that the Judge's conclusions regarding the unpaid judgments are not a satisfactory articulation of financial responsibility. Applicant argues that the Judge focuses too much on the timeliness aspect of Applicant's debt resolution and has failed to articulate precisely how Applicant's behavior was deficient. Applicant's claims do not establish harmful error on the part of the Judge. The Board has reviewed the Judge's conclusions and finds that they are sufficiently detailed and consistent with her findings of fact to support her adverse decision. The Judge appropriately considered the length of time that passed before Applicant took any meaningful action toward resolution of the outstanding judgments, as well as the fact that, as of the close of the hearing, most of the debt was still outstanding. The Judge also considered the amount of the unresolved debt.

Applicant cites the Board's ruling in ISCR Case No. 08-06567 (App. Bd. Oct. 29, 2009) for the proposition that the Judge erroneously concluded that he did not act reasonably under the circumstances of this case, and did not do all he reasonably could to address his indebtedness. After review, the Board concludes that the case cited by Applicant is distinguishable from the instant case on its facts, and does not contain any analysis or statement of law that renders the Judge's conclusions unsustainable.

Applicant argues that the case against him under Guideline J has been mitigated, principally through the passing of eight years since the offenses. Applicant's arguments do not establish error on the part of the Judge.

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).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant

conditions and factors. She discussed the applicability of Guideline J Mitigating Conditions and cogently explained why there was insufficient mitigation to overcome the government's security concerns, stressing the fact that the nature of Applicant's criminal activity (lying under oath) relates directly to concerns about his judgment, trustworthiness and reliability.

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 denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board