

KEYWORD: Guideline F

DIGEST: A Judge is presumed to have considered all of the record evidence. Applicant has failed to demonstrate error in the manner in which the Judge weighed the record evidence. Adverse decision affirmed.

CASE NO: 08-11258.a1

DATE: 10/04/2011

DATE: October 4, 2011

In Re:)	
)	
-----)	ISCR Case No. 08-11258
)	
Applicant for Security Clearance)	
)	

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 December 21, 2010, 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 July 13, 2011, after the hearing, Administrative Judge Edward W. Loughran 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 adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 27 years old and he has a bachelor's degree and a master's degree. He has never been married and has no children. In 2003, when he was 19 years old and in college, Applicant and his father decided to enter the real estate business. His father is an attorney. Their plan was to buy "intercity" houses, renovate the properties, and then quickly sell or "flip" the properties. Between 2003 and 2005, Applicant bought nine houses in his individual name, all financed through first and second mortgages. His father also bought a number of properties. Applicant and his father had a joint line of credit that they used to fund the renovation of the properties. Applicant quickly learned that he was unable to sell the properties at a profit, so he started renting the properties. He had problems with the properties and the renters, and he was unable to maintain the mortgage payments. He stopped paying the mortgages in about 2007. Attempts to "short sale" the properties were unsuccessful. His nine properties were all foreclosed upon. His father experienced similar problems with his properties. His father filed for bankruptcy in 2008, and his debts were discharged the same year.

When applying for his security clearance in October 2007, Applicant indicated that he planned to address his debts through bankruptcy. He submitted a security clearance application in January 2008 and stated that he would be filing for bankruptcy within a month. Applicant was variously interviewed or provided answers to interrogatories during his background investigation in April 2008, October 2008, February 2009, June 2009, and October 2009. On each occasion, Applicant indicated his intention to file for bankruptcy, but gave numerous reasons for why he could not file immediately. These reasons generally involved advice from his attorneys to forestall filing until he filed tax returns and got information from the IRS. In October 2009, Applicant indicated that, based on his 2008 tax refunds, he once again found himself with "too much money to file [for bankruptcy]." He anticipated filing for bankruptcy in January 2010, or shortly thereafter. Applicant responded to the last set of DOHA interrogatories in July 2010. At that time he wrote that he had not yet filed for bankruptcy because he realized he might not owe any taxes on the mortgage debts forgiven by the mortgage holders. In addition to the outstanding mortgages, Applicant admits to owing \$81,000 to the line of credit established by him and his father. He also admitted owing about \$3,000 to a credit card company. He stated that his attorney advised him to stop making payments on the credit card, as the card balance would be included in his bankruptcy. As of the hearing date, Applicant had not filed for bankruptcy nor paid any of his delinquent debts.

Applicant indicated post-hearing that he has decided not to file for bankruptcy and that he would pay his delinquent debts. He is solely liable for the \$82,254 line of credit, but claims that the debt is "closed" because the bank issued a 1099-C cancelling the debt in 2010. No copy of the 1099-C was submitted by Applicant. Applicant stated that he established a payment plan on a \$2,940 mortgage delinquency, and made his first payment of \$122 in June 2011. Applicant settled the \$2,604 credit card debt for \$651 in May 2011. Two delinquent mortgage accounts were cancelled via 1099-Cs in 2008. A third delinquent mortgage in excess of \$13,000 remains outstanding, although the financial institution is prepared to settle the debt for \$8,000. Applicant has not made any payments toward this debt because the financial institution is demanding a lump sum payment. Applicant is saving and hopes to pay this off in a few more months. Applicant paid

a \$519 delinquent utility debt in June 2011. Applicant is convinced that he has taken the correct steps to address his financial problems. Applicant's performance evaluations reflect superior job performance and show that Applicant is a valued and trusted employee.

The Judge reached the following conclusions: The events surrounding the downturn in the real estate market were outside Applicant's control. His decision to invest in the real estate market was completely within his control. Mitigation required that individuals act responsibly under the circumstances. In 2007, Applicant stated he planned to file for bankruptcy. Applicant took actions to ensure that he would be in the best possible economic position once he filed for bankruptcy. He stopped paying debts that were unrelated to his mortgages, he maximized his retirement accounts, and he accelerated his student loan and car payments. He did not file for bankruptcy and paid none of the debts by his hearing date. Applicant did not act reasonably under the circumstances. Post-hearing, Applicant paid a total of about \$1,292 to pay one debt, settled another debt, and made the first payment on a third debt. He has about \$125,000 in retirement accounts and about \$12,000 in the bank. His payments are insufficient to constitute a good-faith effort to pay his debts. Applicant received 1099-Cs on several of his debts. A creditor's cancellation of a debt does not equate to a good-faith effort on Applicant's part to pay or otherwise resolve his debts. What is missing is a track record of financial responsibility, in other words, sufficient actions to implement his repayment plan. Applicant's finances are not yet under control. His financial issues are recent and ongoing. They continue to cast doubt on his current reliability, trustworthiness and good judgment. Financial concerns remain despite the presence of some mitigation.

Applicant asserts that the logic the Judge used was unsound and that he disregarded and misused certain facts in the case. He states that he is not irresponsible, and, in any event, irresponsibility does not equate to unreliability. Applicant argues that the Judge could not logically arrive at the conclusion that he cannot protect classified information. Applicant states that his actions regarding his debts have been the result of careful planning, albeit while motivated by self-interest. He argues that it was improper for the Judge to hold these matters against him. Applicant states that the Judge did not give due consideration to the efforts he has made regarding his finances and does not appreciate how far Applicant has come in improving his debt profile. Applicant asserts that he will make good his promise to repay his debts. Applicant's assertions do not establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Notwithstanding his assertion that the Judge disregarded certain facts, Applicant has not overcome this presumption.

Most of Applicant's appeal brief essentially argues for an alternative view of the record 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*. 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. He discussed in some detail the applicability of the mitigating factors listed under Guidelines F and indicated why the mitigating conditions did not apply, or if partially applicable, did not apply in sufficient strength to justify an ultimate favorable outcome. These conclusions were reasonable given the Judge's findings about the nature of Applicant's indebtedness, the circumstances under which it arose, Applicant's failure to file for bankruptcy after numerous representations that he would, the failure of Applicant to address meaningfully his debt delinquencies despite his knowledge since 2007 that his finances were of concern to the Department of Defense, and Applicant's failure to resolve debts because of a desire to preserve certain assets for the future, despite the monetary resources he had at his disposal.

Applicant states that the Judge concluded that two of the disqualifying conditions under Guideline F were potentially applicable to the case. Applicant asserts that the Judge then erroneously proceeded to rule against him under two additional disqualifying conditions in his "formal findings" section. Applicant has confused the letter designation of the individual allegations in the SOR with the letter designation of the various disqualifying conditions listed under Guideline F in the Directive. The formal findings at the end of the Judge's decision refer to the SOR allegations and not the disqualifying conditions applicable to the case under Guideline F. The Judge did not commit error.

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 his 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: 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