

KEYWORD: Guideline F

DIGEST: Applicant cites to a Board decision in another case. The two cases are factually dissimilar. Adverse decision affirmed.

CASENO: 09-01970.a1

DATE: 10/29/2010

DATE: October 29, 2010

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 Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 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)

of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 17, 2010, after the hearing, Administrative Judge Roger C. Wesley denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues 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 findings: In 1997 Applicant and his wife purchased a residential home facility for senior citizens. They purchased the business with very limited due diligence examination of the records of the business and completed the purchase as individual sole proprietors, and not in corporate or partnership form. Applicant claimed they produced a profit from the business until 2006, although he provided no profit and loss statements or other business records covering their operations. Beginning in 2006, the operating costs of the business increased substantially. Applicant and his wife could no longer cover their operating costs. To make up their operating deficits, they used their personal and business credit cards. By June 2007, matters had worsened to the point where Applicant and his wife were forced to prioritize their debts, and they failed to pay their business payroll taxes as they were required to do. They also borrowed from their 401(k) retirement accounts. These actions did not satisfy the arrearages and shortfalls. In January 2008, the building owner did not renew the lease, and Applicant and his wife abandoned the business. By 2010, Applicant and his wife had accumulated arrearages of \$13,000 in state payroll taxes, \$160,000 in federal payroll taxes, \$5,538 in back state personal taxes and \$43,296 in back federal personal taxes. Besides their major tax accruals, Applicant and his wife accumulated almost \$500,000 in various consumer debts. The state of the evidence is such that their personal debts cannot be distinguished from their business-related debts. Applicant and his wife filed for Chapter 7 bankruptcy and received a discharge in September 2008. The discharged debts included unsecured portions of their home mortgage and the unsecured credit card and consumer debt. Not discharged were their local property taxes and their state and federal income and payroll taxes. In 2007 and 2009, Applicant and his wife entered into installment agreements with their state's franchise tax board to repay delinquent personal state taxes. They completed an installment agreement with the IRS in 2007 to repay personal federal taxes. They are in compliance with the state franchise tax board and the IRS and currently owe a little less than \$12,000 on the former and \$38,236 on the latter. They still owe the IRS \$160,000 and the state \$13,323 in withheld state payroll taxes. Before the hearing, Applicant and his wife had not made any voluntary attempts to resolve their back payroll taxes. The only tax debt that they have been able to document as paid to date is their local property tax. In March 2010, Applicant and his wife submitted an offer in compromise to the IRS for the outstanding payroll taxes. At this time, the IRS is still processing their offer and it is unknown when or how they will respond to Applicant's compromise offer.

The Judge reached the following conclusions: While Applicant's many unsecured personal and business debts were discharged in his Chapter 7 bankruptcy, his tax debts have not been discharged. Failure to escrow and remit withheld escrow taxes collected from employees represents a serious fiduciary breach and exposes the fiduciary to potential criminal liability. At this time,

Applicant awaits acceptance of his settlement proposal from the IRS, and there is no documentation to resolve the state payroll taxes. Applicant does not provide adequate explanations as to why he and his wife did not make earlier attempts to arrange payment with state and IRS tax authorities regarding the payroll taxes. Without more financial information, it is impossible to determine what portion of his Chapter 7 bankruptcy debts were business related and which debts were personal ones. Judging from the number of refinanced mortgages Applicant and his wife completed between 1999 and 2006 and the size of the accumulated debts they accrued before 2008, it is difficult to avoid the conclusion that they were making business and personal decisions that exceeded their earnings capabilities. Mitigation credit to Applicant is very limited based on the available record. He and his wife can be credited with making some documented efforts to resolve some of their debts and stabilize their finances. However, the remaining state and federal tax debts are collectively quite large and involve potentially serious breaches of state and federal fiduciary responsibilities. Applicant's efforts to compromise his payroll tax debts have not achieved fruition to date and preclude him from mitigating security concerns over his ability to restore his personal finances to acceptable levels of stability and surmount doubts about his ability to discharge his fiducial duties over accounts entrusted to his stewardship. While Applicant is to be commended and encouraged in his repayment efforts, more tangible proofs of success are necessary to satisfy minimum standards of security eligibility.

Applicant asserts that he has acted responsibly in terms of dealing with his debts, and that the Judge has not explained what was irresponsible about his "approach." Applicant states that the Judge's adverse conclusion appears to rest on the view that he has not demonstrated responsible behavior with regard to his IRS payroll tax debt. Applicant then argues that the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all of his debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment. Applicant argues that the Judge has not explained what he should have done under the circumstances that he has not already done to rectify his poor financial condition. Applicant's assertions do not establish error on the part of the Judge.

In making his argument, Applicant cites language contained in the Board's decision in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). That case is factually dissimilar from this one in that the cited case contained evidence that the applicant's financial situation arose out of circumstances beyond his control and the applicant had successfully resolved his two largest debts in addition to some smaller ones. The Judge reached no similar conclusions in this case and the evidence does not warrant such conclusions. Regarding actions taken by Applicant to address his considerable debt, the Judge concluded that Applicant was entitled to partial application of Mitigating Condition ¶ 20(d).<sup>1</sup> However, the Judge reasonably explained why this partial application was insufficient to overcome the government's security concerns, given the size of Applicant's debt delinquencies and the fact that, outside of the Chapter 7 bankruptcy discharge, there was little evidence to establish that Applicant was making meaningful progress toward the settlement and/or payment of his numerous tax delinquencies.

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<sup>1</sup> "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

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. He adequately discussed why the disqualifying conduct established under Guideline F was not mitigated. In particular, the Judge focused on Applicant's violation of his duty as an employer to tender payroll taxes to the government when discussing the larger issue of judgment and trust concerns implicit in financial cases.

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: 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