

KEYWORD: Guideline B, Guideline F

DIGEST: The record contains no documentary evidence which would corroborate Applicant claim that he had erected a corporate structure which shielded from liability for the debts. Furthermore, Applicant's witness (who was not a lawyer) was not definitive on this point. The Judge was obliged to consider Applicant's assertions, but he was not required to accept them. Adverse decision affirmed

CASENO: 09-02220.a2

DATE: 09/28/2010

DATE: September 28, 2010

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In Re:)	
)	
-----)	ISCR Case No. 09-02220
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 5, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 11, 2010, after the hearing, Administrative Judge Matthew E. Malone denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. In response, the Board remanded the case to the Judge because of an incomplete record. That matter has been corrected and the case is again before the Board.

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.¹

The Judge made the following pertinent findings of fact: In 1997 Applicant entered into a long term lease of a gas station from an oil distribution company. Between 1997 and 2002, Applicant operated this and two other gas stations as a Subchapter S corporation. By doing business this way, Applicant limited his personal liability and obtained a tax advantage through the way his income was reported. It was also possible for him to limit his debt liability to the amount he invested in the company. However, to do so, he would have had to properly structure his finances to comply with IRS requirements. Applicant did not present any information that showed he had done so. To incorporate his business, Applicant used the services of a person whose business it was to file the appropriate paperwork with the state. Applicant claimed that he thought this person was also responsible for handling his debts, but he failed to establish that this was, in fact, part of this person’s duties. In February 2002, Applicant drafted an agreement wherein he, in essence, sublet his position with his business lessor to another company. This company agreed to run the gas station business, to pay Applicant a monthly amount for a sublease, and to make required payments to third parties such as tax authorities, insurance companies and so on. Applicant claimed that the 2002 agreement was, in fact, a sale of his interest in the gas station, but it is clear from a reading of the agreement that Applicant intended to retain an interest in the business. The business was repossessed by the oil company in May 2005 because either Applicant or the company he leased the business to had stopped making the necessary payments on oil and gas inventories. Applicant claimed that \$167,000 in unpaid state taxes were due for periods after he “sold” the business and as such, were the responsibility of the company with whom he made the 2002 agreement. Applicant has tried to no avail to negotiate this debt with the state tax authorities. The credit reports obtained during his background investigation revealed 27 other debts attributable to Applicant totaling approximately \$158,016. Applicant identified these debts as corporate accounts he opened to pay expenses of his business. He claimed that these debts should have been paid by the other company after 2002. However, each of the credit reports in evidence lists these debts as either individual accounts or joint accounts. Additionally, several of the accounts were opened after Applicant

¹The Judge made formal findings in favor of Applicant under Guideline B. Those favorable finding are not at issue on appeal.

executed the 2002 agreement. Applicant has made no payments on any of the debts listed in the SOR.

The Judge concluded that Applicant did not present sufficient information to support his claims that all but two of the debts should not be attributed to him because they are related to his business, and that business's status as a Subchapter S corporation protected him from liability for the debts alleged. The credit reports shows the debts alleged are individual or joint accounts, and not corporate accounts, and that many of them were opened after Applicant claimed he had sold his business. Available information shows that Applicant did not and could not sell the business, but instead he subleased the business and tried to retain a level of income from it. The fact that the business ultimately failed did not relieve Applicant of his responsibilities as the primary lessor from the oil distribution company. Applicant did not establish the nature of the taxes owed nor did he provide any support for his claims that the other company should have paid them. Applicant has not established that he has paid or otherwise resolved any of his debts. Applicant did not present any information that would show his finances will not continue to be a security concern in the future. In light of this, none of the Guideline F mitigating conditions apply. On balance, he has failed to carry his burden of persuasion to mitigate, refute, or extenuate the security concerns raised by his financial problems.

Applicant argues that he demonstrated that he is a reliable and trustworthy individual who suffered financial problems arising from one transaction, the sale of his business. He claims that the Judge's decision is arbitrary and capricious because it does not take into consideration the evidence presented, namely evidence Applicant alleges establishes that he is not responsible for the debts listed in the SOR, but rather the debts are the responsibility of the corporation and/or the company that took over the business in 2002. Applicant also argues that even assuming the debts incurred by the corporation are Applicant's responsibility, the accumulation of debt was largely out of his control. He states that he intended to set up the corporation so that there was no personal liability and he continues to believe that there was a sale of the corporation in 2002 and that all debt incurred after that time is not his responsibility. Lastly, Applicant asserts that the case against him is mitigated since the debts were incurred under circumstances unlikely to occur again and which were largely beyond his control. Applicant's arguments do not establish error on the part of the Judge.

There is a rebuttable presumption that the Judge has considered all the record evidence. *See, e.g.*, ISCR Case No. 07-18303 at 2 (App. Bd. Nov. 13, 2008). Applicant has not overcome that presumption in this case. The Judge's basic conclusion that the evidence did not support Applicant's theory that the debts were not his responsibility is sustainable. Regarding Applicant's basic premise that he had successfully erected a corporate structure that shielded him from debt, the Board notes that the record does not contain any documentary evidence on point, such as articles of incorporation, that would explain the legal status of the business. Thus, there was no meaningful way for the Judge to evaluate the accuracy of Applicant's claims. Also, the testimony of the witness who filed incorporation papers for Applicant (who was not a lawyer) was less than definitive on the issues of whether the corporation was, in fact, a Subchapter S corporation, on what liability for debts exists under a Subchapter S corporation, and on what the status of Applicant's debts are in this

particular case.² The evidence that Applicant is not liable for the debts of his business comes exclusively from Applicant's written responses and his hearing testimony. While Applicant's assertions are evidence that the Judge was required to consider, the Judge was not obligated to accept such assertions. The Judge discussed in detail evidence that contravenes Applicant's assertions, including the fact that the debts are listed as Applicant's personal debts on various credit reports, the fact that Applicant retained an interest in the business after 2002, and the fact that a number of the debts listed on the credit reports post date the 2002 agreement wherein Applicant transferred the authority to operate the business to a third party.³ The Judge also noted that Applicant's debts remain, for the most part, outstanding and Applicant has not addressed them other than to make preliminary consultations with tax advisors and bankruptcy attorneys. He concluded that Applicant did not present any information that would show his finances will not continue to be a security concern in the future. The numerous debts listed on the credit reports suffice in this case to establish the Government's case. The burden thus shifted to Applicant to establish matters in mitigation. The Judge's conclusion that Applicant did not establish a case in mitigation is sustainable on this record

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 arguments are essentially objections to the Judge's rejection of his theory that a corporate mechanism shielded him from liability regarding his substantial business debt. These objections do not establish error.

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. 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

²See Transcript, pp. 46-55.

³Applicant's continued insistence that he sold the business in 2002 (or at least that he thought at the time that he had sold the business) despite clear evidence to the contrary raises questions concerning how well he understands his business dealings and the state of his finances.

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: Jmaes E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board