

KEYWORD: Guideline F

DIGEST: The Judge is not obligated to make inquiries of Applicant or otherwise assist Applicant in presenting his case for mitigation. Furthermore, although there is reason to believe that Applicant submitted evidence that was not made part of the record, this error is harmless. Adverse decision affirmed.

CASE NO: 09-02646.a1

DATE: 03/08/2011

DATE: March 8, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-02646
)	
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 July 17, 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 November 30, 2010, after the hearing, Administrative Judge Wilford H. Ross 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 issues on appeal: whether the Judge considered all the record evidence; whether the Judge properly applied the Guideline F mitigating conditions to the facts of the case; and whether the Judge conducted an adequate whole-person analysis. Consistent with the following discussion, the Board affirms the Judge's adverse security clearance decision.

The Judge made the following findings of fact: Applicant is 54 years old and married. Applicant admits, or the evidence substantiates, 29 delinquent debts totaling \$39,217. Applicant's financial problems have been exacerbated by the deaths of his parents in 2003 and 2007, periods of unemployment and his assistance to his sister.

The Judge reached the following conclusions in the case: Financial Considerations Mitigating Condition ¶ 20(a)¹ does not apply because his financial problems are current. Financial Considerations Mitigating Condition ¶ 20(b)² applies only in part because Applicant has not provided adequate evidence to demonstrate the extent that circumstances beyond his control affected his indebtedness. Financial Considerations Mitigating Condition 20(d)³ applies in part because Applicant has made good faith efforts to pay his creditors but he has not yet established a track record. Financial Considerations Mitigating Condition 20(c)⁴ does not apply because it cannot be said that Applicant's financial problems are resolved or under control.

Applicant argues that the Judge failed to consider all the record evidence. With the exception of one ambiguity in the record, Applicant is not persuasive. The Judge is permitted to rely as he did, on Applicant's admissions and the credit reports in the record to find that the government had met its burden of establishing the alleged debts. *See, e.g.*, ISCR Case No. 09-05398 at 2 (App. Bd. Jan. 13, 2011) and 08-12184 at 7 (App. Bd. Jan. 7, 2010). In ISCR proceedings, the applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. Directive, ¶ E3.1.15. The Judge was under no obligation to make inquiries of Applicant or on his behalf that would have had the effect of further developing the record, nor was the Judge obligated to assist Applicant with the presentation of his case in any other way. *See, e.g.*, ISCR Case No. 09-08533 at 5 (App Bd Oct. 6, 2010). Furthermore, there is a rebuttable presumption that the Judge considered all the evidence. *See, e.g.*, ISCR Case No. 09-03983 at 2 (Dec. 21, 2010). That said, there is reason to believe that Applicant submitted evidence after the hearing which was not considered and would have demonstrated that two debts were resolved. However, there is no point in remanding the case for

¹Directive, Enclosure 2 ¶ 20(a), "[T]he behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

²Directive, Enclosure 2 ¶ 20(b), "[T]he conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]"

³Directive, Enclosure 2 ¶ 20(d), "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

⁴Directive, Enclosure 2 ¶ 20(c), "[T]he person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

further processing on this issue. Each of the debts (identified in SOR paragraphs 1.h and 1.i) is under \$50 in value. It is unlikely that favorable findings and conclusions as to those debts would have affected the ultimate outcome of the case. Therefore, any error is harmless. *See, e.g.*, ISCR Case No. 08-01980 at 3 (App. Bd. Oct. 29, 2009).

Applicant argues that the Judge erred in his application of the various Guideline F mitigating conditions and in his application of the whole-person factors. Applicant's arguments are not persuasive. The Judge gave favorable consideration to the adverse circumstance under which some of Applicant's indebtedness arose and to the progress Applicant has made. However, in light of the Judge's sustainable finding regarding the current state of Applicant's finances at the close of the record, the Judge could reasonably conclude that his financial problems were still ongoing and that he had not met his burden of persuasion as to mitigation. *See, e.g.*, ISCR Case No. 08-11983 at 2 (App. Bd. Jan. 28, 2011).

The Board does not review a case *de novo*. 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 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

