

KEYWORD: Guideline F; Guideline J

DIGEST: The Board cannot consider Applicant's new evidence regarding his finances on appeal. Department Counsel's cross-appeal is persuasive that the Judge's favorable conclusions regarding Applicant's history of molesting two girls are not sustainable on this record. Adverse decision affirmed.

CASENO: 09-03233.a1

DATE: 08/12/2010

DATE: August 12, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-03233
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 9, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On April 23, 2010, after considering the record, Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge’s application of the Guideline F mitigating conditions was erroneous and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross-appeal: whether the Judge’s application of the Guideline J mitigating conditions was erroneous. For reasons set forth below, we affirm the Judge’s decision under Guideline F and reverse that part of the decision which concerns Guideline J.

Applicant’s Appeal under Guideline F

The Judge made the following pertinent findings of fact: Applicant is in debt to seven different creditors in a total amount of over \$75,000. All of the debts are unpaid. Applicant stated that he intended to file for Chapter 7 bankruptcy protection. He experienced two periods of unemployment, once during May to October 2002 and an earlier instance during November 1999 to June 2000. However, he has been steadily employed since October 2002. His SOR debts did not become delinquent until 2003 or later.

In the Analysis portion of the decision, the Judge stated:

Based upon the large amount of debt owed by the Applicant, his failure to provide sufficient documentary evidence as to why he became indebted in the first place, what he has done to resolve it, and how he has changed or reformed his past spending habits, the Applicant has failed to provide sufficient evidence of financial rehabilitation. Decision at 7.

Applicant contends that he successfully mitigated the security concerns raised by his financial problems. He has submitted a document showing that he had, in fact, been discharged in Chapter 7 bankruptcy before the Judge issued her decision.¹ However, we cannot consider this document. *See* Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board”). *See also* ISCR Case No. 08-06875 at 2 (App. Bd. Oct. 29, 2009). We have considered Applicant’s brief on appeal. We note the Judge’s conclusion that there is a paucity of record evidence concerning (1) the circumstances of his indebtedness; (2) his efforts to address his delinquent debts; and (3) his

¹The File of Relevant Material (FORM) was submitted to Applicant on November 13, 2009. Applicant submitted additional information in a reply dated December 16, 2009. The FORM and Applicant’s reply were the basis of the Judge’s decision. Applicant’s bankruptcy discharge did not occur until March 23, 2010, well after the close of the record in this case.

efforts to reform his past spending habits. The Judge's decision as to Applicant's Guideline F security concerns, viewed in light of the record as a whole, is sustainable.

Department Counsel's Cross-Appeal under Guideline J

The Judge made the following pertinent findings of fact: In June 1984, Applicant molested his then 10-year-old daughter (Daughter). Applicant made inconsistent statements about this incident. In 2009, during a security clearance interview, he stated that Daughter touched and masturbated him "without provocation." Decision at 3. He could not explain why she did that or why he allowed her to do it. He stated that she did it again on two further occasions. By contrast, in 2003 he stated that he had molested a twelve-year-old girl by touching her inappropriately. In this earlier statement, he did not disclose that the victim was his daughter and that she had been ten years old rather than twelve.

In resolving this security concern in Applicant's favor, the Judge stated that the misconduct had occurred in the distant past and that Applicant's sex offender registration makes knowledge of his misconduct publicly available, thereby diminishing any potential for coercion, exploitation, or duress. Accordingly, she extended favorable application to Directive, Enclosure 2 ¶ 32(a):

[S]o much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "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).

In deciding whether the Judge's rulings or conclusions are erroneous, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's analysis under Guideline J does not take into account significant contrary record evidence. She contends, for example, that Applicant's requirement to give public notice by means of the sex offender registry implies a real possibility of

recidivism in the state's view, which is inconsistent with the Judge's conclusion that his offense is not likely to recur. Furthermore, she argues that the Judge did not consider the extent to which Applicant's offense, even though it occurred long ago, impugns his trustworthiness and good judgment. These arguments are persuasive.

We also note the Judge's findings and the record evidence concerning Applicant's inconsistent statements. While the Judge acknowledged that Applicant's recollections "were not identical" (Decision at 6), she did not discuss the extent to which the inconsistencies undermined Applicant's credibility.² Neither did she discuss the significance of Applicant's 2009 claim that he had no explanation as to why his ten-year-old daughter masturbated him on three separate occasions. Accordingly, the Judge failed "to consider an important aspect of the case" (ISCR Case No. 03-22861, *supra*), thereby undercutting her conclusion that Applicant has met his burden of persuasion as to mitigation under the *Egan* standard. We conclude that the Judge's favorable decision under Guideline J is not sustainable. Accordingly, we affirm the Judge's adverse findings under Guideline F and reverse her favorable findings under Guideline J.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffery D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge

²Applicant decided to have his case decided on the written record. As a result, the Judge did not have an opportunity to question Applicant and observe his demeanor. In such circumstances, the Judge's favorable credibility determination is not entitled to the same deference on appeal that it would receive had it been made in the context of a hearing. *See, e.g.*, ISCR Case No. 04-04302 at 3-4 (App. Bd. Jun. 30, 2005).

Member, Appeal Board