

KEYWORD: Guideline F

DIGEST: When an applicant admits the SOR allegations against him or the Government presents substantial evidence for the allegations, the burden shifts to the applicant to provide evidence in mitigation. Accordingly, the Judge did not err in his treatment of the burden of persuasion. Adverse decision affirmed.

CASE NO: 09-03760.a2

DATE: 09/21/2010

DATE: September 21, 2010

)	
In Re:)	
)	
-----)	ISCR Case No. 09-03760
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Barry W. Rorex, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 3, 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 May 18, 2010, after the hearing, Administrative Judge Robert Robinson

Gales denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. By decision dated July 16, 2010, we remanded the case to the Judge for him to reconstruct evidence missing from the file. On August 16, 2010, the Judge issued a remand decision that incorporated his previous decision.

Applicant raised the following issues on appeal: whether the Judge failed to consider all of the record evidence; whether the Judge mis-weighed the record evidence; whether the Judge mis-applied the burden of persuasion; and whether the Judge failed properly to apply the pertinent mitigating conditions. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is a supply technician for a Defense contractor. He served in the U.S. Army for twenty years. Following his retirement, he held a number of jobs and also experienced periods of unemployment.

Applicant and his wife filed for Chapter 13 bankruptcy, which was subsequently converted to Chapter 7. Applicant was discharged in bankruptcy in 1997. In 2000, they filed again for Chapter 13 bankruptcy protection. The petition was eventually dismissed. In April, 2010, Applicant and his wife again filed for Chapter 13 bankruptcy protection.

Applicant had numerous delinquent debts alleged in his SOR, for such things as a state income tax lien, credit cards, etc.¹ Although the Judge found in his favor regarding some of the alleged debts, for others he concluded that Applicant had failed to demonstrate payment or any mitigating factor. The Judge gave him credit for circumstances beyond his control that affected his financial situation, such as his periods of unemployment, family health problems, and loss of a granddaughter. However, the Judge concluded that Applicant's financial problems were primarily his own responsibility. He noted that, during 2007 and 2008, Applicant received a substantial salary, virtually tax free, while working in a war zone, and that he has received a pension since his retirement from the Army. The Judge concluded that these emoluments should have permitted greater efforts at debt reduction than Applicant demonstrated in his case for mitigation.

Applicant contends that the Judge failed to consider record evidence favorable to him. For example, he contends that the official who performed Applicant's personal interview found Applicant to be free of security concerns. He quotes the official as follows: "There is nothing in the subject's background or lifestyle . . . that leaves him susceptible to blackmail or coercion." Summary of Interview, contained in Government Exhibit 2, Interrogatories, dated June 8, 2009. However, the quoted language is merely the interviewer's summary of Applicant's answers during the interview. These words do not constitute an opinion by the interviewer concerning Applicant's eligibility for a security clearance.

¹The Judge found that Applicant had another tax lien, for \$1,588, which was not alleged in the SOR. This evidence was relevant to an understanding of, among other things, the nature, extent, and seriousness of Applicant's financial problems; the circumstances underlying those problems; the frequency and recency of those problems, and the presence of rehabilitation. See Directive, Enclosure 2 ¶ 2(a).

Applicant also argues that the Judge failed to consider evidence that necessary expenses such as transportation costs diminished the amount of disposable income available to Applicant for debt repayment. Moreover, he argues that the Judge failed properly to weigh the record evidence, for example, his efforts to pay off his debts, the age of his debts, and the effect of unemployment on his financial situation. However, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 08-11645 at 3 (App. Bd. Jun. 8, 2010). Applicant’s presentation on appeal is not sufficient to demonstrate that the Judge failed to consider the entire record. Neither is it sufficient to demonstrate that he weighed the evidence in an arbitrary or capricious manner. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009).

Applicant notes the Judge’s statements to the effect that Applicant had not corroborated his claims to have paid off his tax liens.² “Applicant believes that this incorrectly places the burden on him to prove the debt has been paid rather than on the government to prove that it has not been paid.” Applicant Brief at 6. However, once an applicant admits the SOR allegations against him, or the Government produces substantial evidence of controverted allegations, the burden shifts to Applicant to present evidence “to rebut, explain, extenuate, or mitigate” the security concerns raised by the admissions and/or evidence. *See* Directive ¶ E3.1.15. In this case Applicant admitted the one tax lien alleged in the SOR. Furthermore, the Government, in its case-in-chief, presented substantial evidence of Guideline F security concerns. Accordingly, Applicant bore the burden of persuasion as to mitigation. The Judge properly evaluated Applicant’s case in light of that burden of persuasion. The challenged statements are not erroneous.

After reviewing the record, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made’” both as to the mitigating conditions and the whole person factors. *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 Judge’s adverse decision is sustainable on this record. “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).

Order

²See Note 1 above.

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, 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