

KEYWORD: Guideline F

DIGEST: Promises to pay off delinquent debts are not a substitute for a track record of paying debts in a timely manner and acting in a financially responsible manner. Adverse decision affirmed.

CASENO: 09-05252.a1

DATE: 12/03/2010

DATE: December 3, 2010

In Re:)
)
)
-----) ISCR Case No. 09-05252
)
)
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 December 23, 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 September 8, 2010, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

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.

The Judge made the following findings: Applicant purchased House A in February 2006. He paid \$276,000 for the house by putting \$5,000 down and financing the remainder through a first and second mortgage. Applicant performed renovations on the house costing about \$50,000 which he paid for out of savings and income. Applicant entered into a rent-to-own agreement with a prospective buyer who would rent the property for a year and then purchase the property. Applicant took out another loan on House A in the amount of \$68,000, which covered the amount he had spent on renovations plus a remainder, which he kept. In March 2007, Applicant purchased House B for \$277,000. This would become his residence. He took out first and second mortgages on the property. He bought House C as an investment in March 2007. He paid \$350,000 for the house and financed the entire amount. The previous owner remained in the property as a renter with the agreement that she could repurchase the property in a year. Four or five months later, the tenant in House C became sick and was hospitalized for several months. She stopped paying the rent and moved out. Applicant was able to maintain the mortgage payments on House C, and he is current on the mortgages for the property. Applicant attempted to sell House A after the tenant vacated the property in August 2007, but the real estate market collapsed, making it impossible to cover the mortgages with a sale. He was also unable to rent House A. Applicant realized that he could not maintain the mortgages on all three properties. He went to the holders of his mortgages and attempted to modify the interest payments, but the banks were unwilling to change the terms. Applicant decided to concentrate on paying the mortgages on House B and House C. When an attempt at a short sale of House A fell through, Applicant let the property go to foreclosure. The first mortgage lender on House A acquired the property in August 2009. The balance of the principal on the first mortgage was \$272,168, and the fair market value was \$187,000, creating a deficiency of about \$85,000. Applicant misread an IRS document and thought the debt was cancelled when, in fact, it was not. The lender has not made any demands for payment of the deficiency owed. Applicant attempted to negotiate a settlement of the second mortgage on House A, which had an outstanding balance of \$68,000. Applicant made three monthly payments of \$200 in the spring of 2010 as agreed to with the second mortgage lender. Applicant testified that the lender told him that the debt could be settled for 10% of the amount owed. Applicant stated that he had the funds to pay that amount, and he planned on settling the debt once he received a written agreement. In July 2010, the lender agreed in writing to settle the \$72,717 past due amount for \$7,252. At the close of the record, there was no evidence that Applicant paid the settlement amount.

¹The Judge made favorable formal findings for Applicant under SOR subparagraphs 1.c and 1.d. These findings are not at issue in this appeal.

Applicant has not received formal financial counseling but has received financial advice. With the exception of his real estate purchases, his finances are otherwise in order and do not raise any security concerns.

The Judge concluded that: Applicant has not resolved the deficiencies owed on the mortgages on House A. His financial issues were recent and ongoing. Applicant bought three houses in a short period. Any investment carries an element of risk. Applicant invested in properties without the financial resources to handle a downturn in the market. Applicant refinanced House A and took out more than \$10,000 above the cost of renovating the property. Applicant testified that he had the funds to settle the second mortgage on House A. He submitted a copy of a settlement agreement, but no proof that he paid it. The Judge concluded that he could not make a determination that Applicant acted responsibly under the circumstances. The evidence did not support Applicant's contention that the first mortgage on House A was cancelled by the lender. The second mortgage on House A also remained unresolved. Because of the lingering issues related to these mortgages on Applicant's foreclosed property, the Judge concluded that his financial problems were not resolved and were not under control. Applicant had not made a good-faith effort to repay or otherwise resolve the debts resulting from his foreclosed property. Financial concerns remained despite the presence of some mitigation. Under the whole-person analysis, Applicant's favorable character evidence and superior job performance did not overcome questions and doubts about his eligibility and suitability for a security clearance.

Applicant contends that the Judge erred in not applying Guideline F mitigating conditions. He states that his submission into evidence of a settlement agreement with the lender on the second mortgage, coupled with his payment of the agreed amount, constituted a good faith effort to repay or otherwise resolve the debt. Applicant claims he is continuing to receive counseling. Applicant asserts that he provided evidence of a "balance sheet" insolvency which had the effect of wiping out his indebtedness on the first mortgage. He also asserts that any business venture involves risks and that he was not negligent in his financial dealings. Applicant's arguments do not establish error on the part of the Judge.

Applicant argues that the record evidence supports application of Guideline F Mitigating Condition ¶ 20(d).² He points to Applicant's Exhibit M, which evidences a settlement agreement between Applicant and the holder of his second mortgage for the payment of \$7,252.00. Applicant combines this agreement with evidence of the actual payment of the debt, which was submitted after the close of the record. The evidence of repayment is new evidence, which cannot be considered by the Board. Directive, ¶ E3.1.29. The Board has stated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. *See, e.g.*, ADP Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008); ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999). The Judge's conclusion that Guideline F, Mitigating Condition ¶ 20(d) is not applicable is supported by the record evidence.

² "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

In concluding that Guideline F Mitigating Condition ¶ 20(c)³ was partially applicable to the case, the Judge noted that Applicant may have received some financial counseling from the company he retained to dispute items in his credit report, that Applicant is current on the mortgages on his two remaining properties, and the rest of his finances do not raise any concerns. Applicant claims the Judge should have applied the mitigating condition in his favor, citing the fact that he continues to receive credit and debt counseling and the fact that his large first mortgage debt has been cancelled through a “balance sheet” insolvency. Applicant’s arguments do not establish error on the part of the Judge. Applicant’s assertion that he continues to receive counseling is a proffer of new evidence, which the Board cannot consider. Applicant’s insistence that he no longer owes the large first mortgage debt is also based in part on matters outside the record evidence and does not detract from the Judge’s supportable findings that the IRS Form 1099-A Applicant received is not evidence of a cancellation of the first mortgage debt. The Judge’s ultimate conclusion that Guideline F Mitigating Condition ¶ 20(c) was entitled to some consideration, but did not eliminate security concerns, is supported by the record.

In arguing for the favorable application of Guideline F Mitigating Condition ¶ 20(b),⁴ Applicant asserts that he took reasonable risks as an investor, was not negligent, was the victim of a market downturn and the loss of tenants, and has gotten out of the real estate business. Despite Applicant’s assertions, the Judge’s conclusions that he overextended himself, did not act responsibly under the circumstances, and he has yet to resolve his outstanding indebtedness are supported by the evidence.

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 completely mitigated.

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

³“[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[. . .]”

⁴“[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[.]”

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: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board