

KEYWORD: Guideline F; Guideline E

DIGEST: Legal judgements provided substantial evidence of Guideline F security concerns. Evidence that Applicant committed an act of fraud provided substantial evidence of Guideline E security concern. Applicant failed to mitigate these concerns. Judge’s comments that suggested he found security concerns in Applicant’s choice of forum were harmless error. Adverse decision affirmed.

CASE NO: 09-05963.a1

DATE: 01/13/2011

DATE: January 13, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-05963
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Richard L. Moorhouse, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 25, 2010, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr. denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his application of the pertinent mitigating conditions and whether the Judge's whole-person analysis was erroneous. Consistent with the following discussion, we affirm the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a 55-year-old managing director of a defense contractor. He holds a bachelor's degree, as well as a master's degree in taxation from a nationally recognized business school.

The SOR alleges four debts. One arose from a lawsuit filed against Applicant and others for fraud, breach of fiduciary duty, and violations of general business law. Applicant had developed, promoted, sold, and implemented a tax shelter strategy, representing to the plaintiffs that it was a legitimate tax-saving tool. The Internal Revenue Service (IRS) disallowed the plaintiffs' deductions and imposed penalties on them. Applicant's agreement with the plaintiffs had included an arbitration clause. Accordingly, the dispute was referred to an arbitration panel. The panel concluded that representations made by the defendants in the case were false,¹ that the defendants knew that they were false, and that the plaintiffs relied on these representations to their detriment. The arbitration panel awarded the plaintiffs some \$5,000,000 including costs and expenses. Applicant negotiated a settlement of this debt, the plaintiffs agreeing to accept \$4,000,000. Applicant is paying off this debt in quarterly increments. As of the close of the record he was continuing to make payments.

Two of the debts alleged in the SOR were based on loans Applicant had received from two organizations falling within an umbrella corporation of which Applicant is managing director. These loans resulted in adverse judgments against him, in the amounts of approximately \$665,000 and \$885,000 respectively. In taking these loans he had signed confessions of judgment, upon the recommendation of his tax advisor. The debts were satisfied by the close of the record.

The final debt alleged in the SOR arose from a contract for a band to perform at an occasion for Applicant's son. The contract provided that Applicant would be responsible for the entire contract amount in the event he did not use the band. Applicant's son decided that he did not want the band after all. Applicant offered to settle with the band for its lost profits. However, the band insisted on payment of the full amount of liquidated damages, as set forth in the contract. Applicant took the case to court and lost, the band being granted a judgement of \$25,000. This debt was paid before the close of the record.

Discussion

¹As stated above, these representations concerned the legality of the tax shelter in question. Government Exhibit (GE) 3 contains the complaint filed by plaintiffs in the state court. The complaint alleges that Applicant and co-defendants represented to the plaintiffs that the tax shelter "was a legal and legitimate tax strategy that was fully supported by . . . an opinion of some prominent national law firm and . . . that there was no possibility of incurring IRS penalties . . ."

Applicant contends that the Judge's decision contains language favorable to Applicant, for example that Applicant lives within his means and meets his financial obligations. Decision at 8. Applicant also contends that the Judge erred in his treatment of the legal disputes in this case. For example, he states that the Judge erred in finding "worrisome" Applicant's having litigated the band contract rather than pay it and his having submitted the fraud case to arbitration rather than fight the fraud allegations in court. The Judge stated that Applicant's "legal approach to these cases . . . does little to spotlight those qualities the Government seeks in bestowing access to sensitive material." Decision at 9. Applicant argues that the Judge's findings and the record evidence support a conclusion that he has mitigated any security concerns arising from his debts.

We do not consider individual sentences in a decision in isolation. Rather, we look at each aspect of a decision in light of the whole and interpret individual portions in their proper context. *See, e.g.*, ISCR Case No. 08-06591 at 2 (App. Bd. Oct. 16, 2009). To the extent that the Judge appeared to hold it against Applicant that he decided to litigate a contract or that he submitted the fraud to arbitration rather than litigate it in court, the Judge erred. Mere recourse to the courts or to alternative dispute resolution (ADR), considered *per se*, may be of limited security significance. However, in this case, the extent to which Applicant's initial refusal to perform his duties under the band contract impugns his judgement and reliability is a proper matter for a Judge to consider under Guidelines F and E. We also note evidence that, even after the court held in favor of the band, the debt was not paid until Applicant's bank account had been the subject of a judicial attachment. Tr. at 87. Under the facts of this case, we conclude that the Judge did not err in his treatment of the band contract.

Concerning the fraud charge, the Judge appears to have examined Applicant's use of ADR in the context of evaluating Financial Considerations Mitigating Condition (FCMC) 20(b).² That is, the Judge appears to have concluded that Applicant's decision not to avail himself of the more stringent protections of a trial resulted in a finding of fraud by the arbitration panel, which was affirmed by the state court. The resulting judgement against him, therefore, was a consequence of his own decision rather than a circumstance outside of his control. While we conclude that the Judge's comments regarding Applicant's litigation tactics were error, we note record evidence concerning the circumstances that gave rise to the fraud lawsuit. Specifically, GE 3 includes the decision by the state court affirming the arbitration panel's decision. It reads in pertinent part: "The Panel found that Plaintiff's had 'proven by clear and convincing evidence that the claimed representations were made, that they were false, that [Applicant and his co-defendants] knew they were false, and that [Plaintiffs] reasonably relied on them . . .'" This evidence is consistent with the Judge's findings summarized above. Accordingly, the record evidence, viewed as a whole, supports the Judge's treatment of FCMC 20(b), in that the circumstances underlying the fraud charge were not outside Applicant's control. Thus, any error in the Judge's analysis of the decision to utilize ADR is harmless.

Applicant contends that the Judge ignored or mis-weighed evidence favorable to him, for example that the fraud case was not criminal in nature but civil, that a plaintiff in the fraud case had

²Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances[.]"

himself been arrested on fraud charges in another matter, and that Applicant had paid off three of the four debts alleged in the SOR. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). Applicant’s brief is not sufficient to rebut the presumption that the Judge considered the entire record. With the exception of the harmless error discussed above, neither is the brief sufficient to demonstrate that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

The record supports a conclusion 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

The Judge’s adverse security clearance decision 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board