

KEYWORD: Guideline F

DIGEST: Federal agencies are entitled to a presumption of good faith and regularity. The Judge’s findings of fact were supported by the record evidence. Even if a debt is not enforceable, a Judge may consider the underlying circumstances in evaluating an applicant’s case for mitigation. The record does not support Applicant’s contention that the Judge denied him the opportunity to present evidence. Adverse decision affirmed.

CASE NO: 10-11076

DATE: 02/09/2012

DATE: February 9, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-11076
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

David Hayes, Esq., Department Counsel

FOR APPLICANT

Vere O. Plummer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 8, 2011 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 4, 2011, after the hearing, Administrative Judge Francisco Mendez denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge's findings are supported by record evidence; (2) whether the Judge's conclusion that Applicant failed to substantiate his claim that he is not liable for the two second mortgage debts because he failed to produce corroborating evidence is arbitrary and capricious; (3) whether the Judge improperly prevented Applicant from presenting his case; and (4) whether the Judge's conclusions are arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 34 years old. He married in October 2008. He has held a security clearance for over eight years. Applicant started his current job in 2009. At the time his income from the job was \$145,000. Applicant purchased his first investment property in 2003. He established a real estate investment and residential leasing company in 2006. He purchased four additional investment properties between 2006 and 2007. These properties were financed by mortgages that were generally interest only loans. Some of the properties had first and second mortgages on them. By the end of 2007, Applicant's real estate holdings consisted of six separate properties and the combined amount of his mortgage obligations was in excess of two million dollars. Applicant's annual income at the time was roughly \$130,000. He remained current on the mortgages until his tenants stopped paying their rents in late 2008 and early 2009. Applicant testified that he attempted to resolve his mortgage debts with his creditors by either proposing a loan modification or short sale, but failed to submit any documentation to corroborate such efforts. Applicant secured legal representation to resolve his financial problem in May 2009. He was able to secure a short sale of one of his former investment properties with his counsel's assistance. He moved into another of his former investment properties, made it his primary residence, and is paying the mortgage on that property. The remaining four properties were foreclosed upon between October 2009 and May 2010.

On two of the foreclosed properties, Applicant claims a defense to the amount owed, but failed to submit any documentary proof regarding his claims. On a third foreclosure, Applicant has filed suit against the mortgagee for applying a higher interest rate than he qualified for when the loan was originated. Applicant feels that he was the victim of the housing bust and because of the changes in the banking industry, he was not able to get loan modifications and refinancing. His passion is real estate, and he wants to be credit worthy again to build his real estate business. He claims to have taken financial counseling in the past, but failed to submit documentary proof of such counseling. He is current on the mortgage on his home, pays about \$1,700 a month for a luxury car he owns, and he owes more than \$100,000 in credit card debt.

The Judge reached the following conclusions: Applicant had four separate properties foreclosed upon recently due to his failure to meet his substantial mortgage obligations. The primary mortgages were satisfied or cancelled on the foreclosed properties. He still owes \$207,000 on second mortgages for two of the properties. He provided no documentary proof that he has attempted to resolve these debts. One of the debts has been outstanding for over 2 years and the creditor has been forced to file a lawsuit to seek payment. Applicant claims he is not liable for the two second mortgages, but failed to submit documentary proof to substantiate his claim. Although Applicant's financial situation is partly attributable to the recent economic downturn, this alone does not mitigate the concern at issue as he has failed to address his debts in a responsible fashion. Applicant took on obligations that were well beyond his yearly income. He was wholly dependent

on receiving rent from his tenants in a timely fashion and being able to refinance his properties to pay his mortgage obligations. Applicant continues to see himself as a victim of circumstances and does not recognize that solely relying on rent or other outside factors to pay these mortgages placed him in a financially precarious position. He has not engaged in financial counseling or otherwise tailored his lifestyle to address his financial situation. He plans on returning to his real estate venture in the future without apparently having gained any insight from his current situation. Under the circumstances, none of the mitigating conditions apply. Applicant's financial problems continue to cast doubt on his current reliability and good judgment. Applicant has failed to address his debts in a responsible fashion while having the apparent means to do so, as evidenced by having the disposable income to afford a \$1,700 a month payment for a luxury vehicle. The recency and ongoing nature of Applicant's financial problems, as well as his failure to establish a permanent change in behavior and the likelihood of recurrence, undercuts any whole-person factors.

Applicant asserts that the Judge made errors in his findings of fact. Applicant states that the Judge found Applicant to be a "sophisticated investor" during the hearing, but omitted this finding from his Findings of Fact and Analysis. Applicant fails to demonstrate error on this point. First, an oral comment made by a Judge during a hearing does not constitute a finding of fact, and a Judge is not required as a matter of law to incorporate any statement made in that setting into his or her written decision. This is particularly true in the instant case, where the evidentiary portion of the hearing had concluded and the Judge made the comment in response to something Applicant's counsel stated during his closing argument. Second, Applicant does not establish that the statement made by the Judge at the hearing contradicted any finding of fact contained in the written decision, nor does he demonstrate prejudicial error with respect to the omission.

Applicant asserts that, the Judge's finding that Applicant stopped making the mortgage payments on his properties between February and May 2009, and the Judge's finding that Applicant testified that he attempted to resolve his mortgage debts by either proposing a loan modification or short sale, are unsupported by the record. Applicant asserts that he testified that when he stopped making mortgage payments to his creditors, he contemporaneously attempted to contact them looking for possible remedies, but he was unable to get a timely response. After a review of the record, the Board concludes that the Judge's findings are supported by substantial evidence. Moreover, Applicant does not explain how such alleged errors constituted prejudicial error. Even if the Judge's findings were not completely accurate in the precise details, the Board concludes that any errors did not involve significant facts that were material in determining the outcome of the case.¹

Applicant challenges the Judge's findings that Applicant felt he was a victim of the housing bust, wants to be credit worthy again to build his real estate business, and has a passion for real

¹This portion of Applicant's brief is not a model of clarity. Applicant also makes reference to the Judge's finding that Applicant undertook certain remedial steps toward the delinquent mortgages before securing legal representation. To the extent that Applicant is asserting that he did not take these remedial steps until after he consulted legal counsel, his contrary position regarding the precise timing of the involvement of legal counsel has some support in the record. However, Applicant does not articulate how this discrepancy between the Judge's finding and the record materially affected the Judge's ultimate conclusions, or the outcome of the case.

estate such that it is his current intention to return to the real estate business. Applicant's argument is based, in part, on his assertion that the first two findings were taken from the summary of an interview conducted by an investigator, were not quotations of the actual statements made by Applicant, and therefore cannot be reasonably relied upon for a determination of his current views or future intentions. Contrary to Applicant's position, there is no reason to question the Judge's reliance on the representations made in the investigator's summary of his interview with Applicant. Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See* ISCR Case No. 06-06496 at 3 (App. Bd. Jun. 25, 2009). Applicant has offered nothing to overcome this presumption. Additionally, Applicant was provided with an opportunity to comment in writing on any portions of the investigator's summary that he did not find accurate.² None of his comments concern the factual findings challenged on appeal. Applicant also did not dispute these findings during his hearing testimony. The Judge's finding that Applicant has a passion for real estate is based on Applicant's hearing testimony. Applicant acknowledges this, but then argues that this finding, coupled with the other challenged findings does not provide an adequate basis for the Judge's conclusion that Applicant intends to return to the real estate business. This argument is without merit. Applicant's statements, taken together, provide a reasonable basis for the Judge's conclusion.

Applicant argues that it was arbitrary and capricious for the Judge to cite the lack of corroborating evidence as a basis for his conclusions that: (a) Applicant produced insufficient evidence in mitigation to establish that he has addressed his debts in a responsible fashion, and (b) Applicant failed to establish that he is not liable for the two outstanding second mortgages. Applicant testified that he attempted to resolve his mortgage debts with his creditors by either proposing a loan modification or short sale, but failed to submit any documentation to corroborate such efforts. Similarly, Applicant testified that he had valid legal defenses to the legal actions brought against him by the holders of the second mortgages, but again failed to submit any documentation to substantiate his claim.

Other than his answer to the SOR, Applicant provided no evidence at the hearing other than his testimony. While Applicant's testimony is evidence that the Judge is required to consider, the Judge is not required to accept Applicant's testimony, in whole or in part, when making findings of fact and reaching conclusions. The decision as to whether corroborating evidence is required to support a given proposition or theory that is being asserted by a party is the particular province of the Judge, and will not be disturbed on appeal absent a demonstration that the Judge's decision was arbitrary or capricious. Here, after a review of the entire record, the Board concludes that the Judge's requirement for corroboration was reasonable. This is especially true of Applicant's assertions of legal defenses to the suits involving the second mortgages. Contrary to Applicant's assertions on appeal that the evidence was in sufficient detail for the Judge to determine whether Applicant's articulated basis for his defenses was reasonable, Applicant's testimony provided only general information about the nature of his defenses, and there was insufficient evidence to require the Judge to conclude, as a matter of law, that Applicant would ultimately be successful in the litigation. At the very least, documentary evidence such as detailed pleadings and a showing of the

²Government Exhibit 2.

applicable law governing the case would provide a starting point for establishing the validity of any defenses, but even their inclusion would not necessarily remove doubts as to the likelihood of Applicant's ultimate success.³ Applicant also failed to establish how the successful raising of technical defenses to these actions would relieve him of liability for the debts. Moreover, even if a delinquent debt is unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See, e.g.*, ISCR Case No. 07-09966 at 2-3 (Jun. 25, 2008). Applicant has failed to establish error.

Applicant argues that the manner in which he presented his case was prejudiced by certain representations made by the Judge, and that the Judge closed the record without giving Applicant the opportunity to submit any documentation. He states that, during the hearing, the Judge did not express any need or concern for documentation in addition to his testimony, and led Applicant's counsel to believe that Applicant's testimony regarding the facts and circumstances surrounding Applicant's defenses to the claims of the second mortgage holders would be sufficient without documentation. Applicant makes reference to the following statement by the Judge at the hearing:

Sir, before I give you the floor here. Just as far as applicant's claims of defenses are concerned. I will concern them and let you explore that and detail them out in great detail as far as the fact and circumstances leading to these claims and potential defenses. But I am not in a position nor do I think it is appropriate for me as an Administrative Judge at DOHA to basically adjudicate those claims. Tr. at 156-157.

The Judge's statement cannot be reasonably interpreted to mean that there was a possibility that the Judge would accept the validity of Applicant's defenses based solely on his testimony and without the presentation of additional evidence. Nor is it reasonable to interpret the Judge's statement to mean that the Judge was discouraging Applicant from providing evidence or that he was prohibiting Applicant from presenting evidence. In fact, the Judge made the statement during closing arguments and after the evidentiary portion of the hearing had concluded. Prior to that, the Judge gave no direction to Applicant as to how to present his case, nor was he under any obligation to do so. At no time during the evidentiary portion of the hearing did the Judge make any comment to Applicant suggesting the need, or lack thereof, for any evidence. During the taking of evidence, Applicant did not request that the record be held open for the receipt of additional evidence, nor did he request that the record be held open even after the Judge offered to do so during closing arguments.⁴ Applicant's claims that he was misled by the Judge into pursuing a certain course of action at the hearing, or that he was denied the opportunity to present additional evidence, are without merit.

³*See*, ISCR Case No. 10-01978 at 4-5, footnote 5 (App. Bd. Aug. 24, 2011) for a comment concerning the difficulty of evaluating and then resolving the factual issues surrounding pending outside civil litigation in the context of a DOHA security clearance hearing.

⁴Tr. at 161.

Applicant argues that various matters in mitigation established by the record mandated the Judge's favorable application of various Guideline F Mitigating Conditions. Applicant has failed to establish error on the part of the Judge.

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*. 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 reasonably concluded that the recency and ongoing nature of Applicant's financial problems, as well as his failure to establish a permanent change in behavior and the likelihood of recurrence, precluded the favorable application of any mitigating conditions.

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 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: William S. Fields _____

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody _____

James E. Moody

Administrative Judge

Member, Appeal Board