

KEYWORD: Guideline F

DIGEST: It was not error for the Judge to decline to leave the record open to accept documents from the Applicant, when the Judge accepted Applicant’s testimony on the issue to which the documents pertained and ultimately made findings consistent with Applicant’s representations about the documents. The Judge’s weighing of the mitigating evidence in the case was supported by the record evidence. Adverse decision affirmed.

CASENO: 11-03755.a1

DATE: 03/14/2012

DATE: March 14, 2012

In Re:	)	
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	)	
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 July 7, 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 December 29, 2011, after the hearing, Administrative Judge Mark Harvey

denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge erred by not considering written documents pertaining to Applicant's negotiations with creditors; and whether the Judge's adverse security decision is 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 35 years old. He married in 2001, was separated from his spouse in 2008, and was divorced in 2011. Applicant's SOR lists five debts totaling \$128,547. At that time, he had four delinquent credit card debts totaling \$25,547, and a home equity account in the amount of \$103,000. In 2008, the \$103,000 home equity debt was resolved through a short sale. After Applicant's separation from his wife, she stopped contributing to the mortgage payments. Applicant met with a divorce lawyer in February 2008, who told him to stop making payments on his credit card debts until after his divorce was final. Applicant's ex-wife discharged her debts through bankruptcy. The divorce was final in March 2011. Applicant entered into negotiations with two of the creditors, but the payments they were seeking were more than Applicant could afford. In May 2011, Applicant had a net income of \$2,988 per month, monthly expenses of \$2,570, debt payments of \$340 to a \$60,000 student loan, and a net remainder of \$78. He had no assets, and no debt payments were being made to SOR creditors. Applicant also had a child support obligation of \$300 per month. At the time of the hearing, Applicant indicated that he was attempting to negotiate payment of his delinquent debts, and that he had been in contact with several creditors. Although he did not provide written evidence of any negotiations such as offers and counter-offers, his statements about the ongoing negotiations are accepted as credible. He has not paid his four SOR listed creditors anything for at least a year.

The Judge reached the following conclusions: Applicant's four remaining SOR debts totaling \$25,547 are not resolved. Applicant's financial situation was damaged by insufficient income, a three-month period of unemployment, caring for his parents, and his divorce. However, Applicant's divorce was final in March 2011, and his financial circumstances have been relatively stable for more than eight months. He has not provided sufficient information about efforts to start paying his four SOR creditors and to fully establish any mitigating conditions. Applicant did not establish that he acted responsibly under the circumstances. Although he maintained contact with his creditors, and he attempted to negotiate some payment plans, there are no receipts or account statements from creditors, establishing any payments to the creditors. There is no track record of payments to support a conclusion that he will resolve his delinquent debts in the near future, even though Applicant has been receiving more income since he was hired by his current employer in September 2010.

Applicant asserts that during his hearing and appeal process he had "notes" and evidence showing that he was in the process of negotiation with credit card companies, including phone records and numbers. He states that he explained to the Judge about these "notes," but doesn't know why the Judge did not accept the notes. Applicant's assertion does not establish error on the part of the Judge.

Although Applicant does not precisely define what he means by the term "notes," the Board

construes his use of the term to mean documentary evidence that he referenced at the hearing. During the hearing, Applicant produced three documentary exhibits which were admitted into evidence. Later in the proceedings, when Applicant was testifying about communications he was having with creditors, the Judge asked him if he had any documentation concerning those communications. Applicant indicated that he thought he had some pertinent documentation, but indicated he did not have it with him at the hearing. Department Counsel asked Applicant that if the Judge left the record open at the conclusion of the hearing, would Applicant be able to submit certain documents, and Applicant answered in the affirmative.<sup>1</sup> There was no further discussion at the hearing about leaving the record open for receipt of additional evidence from Applicant. However, after the evidentiary portion of the hearing concluded, the Judge informed Applicant that he was accepting Applicant's testimony concerning the receipt of letters from his creditors and the contents of various settlement offers from the creditors included in the letters. The Judge then informed Applicant that he did not need to see the letters, since he was accepting Applicant's testimony as fact.<sup>2</sup>

In his decision, the Judge mentioned that Applicant did not provide written evidence of negotiations with his creditors, but went on to indicate that he was accepting as credible Applicant's statements about the ongoing negotiations. Inasmuch as Applicant's arguments on appeal are limited to evidence of negotiations with his creditors, he has not demonstrated how the Judge's actions at the hearing prejudiced his case in any way. The Judge's ultimate unfavorable security clearance decision is not based on Applicant's failure to negotiate with his creditors. Rather, it is principally based on Applicant's failure to make any payments to his creditors over a considerable length of time when the evidence indicated he had the means to make at least some payments.

A portion of Applicant's brief can be construed as an argument that post-hearing documentary evidence should be considered in evaluating Applicant's appeal. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

Applicant asserts that the evidence of his negotiations with his creditors is an indication of the fact that he is responsible and willing to pay his debts. 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). After a review of the record evidence, the Board concludes that the Judge appropriately weighed the mitigating evidence in the case against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guideline F was not 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.*,

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<sup>1</sup>Tr. at 40-41.

<sup>2</sup>Tr. at 63-64.

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: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board