

KEYWORD: Guideline F

DIGEST: Applicant has not rebutted the following applicable presumptions: That the Judge acted with good faith and regularity, that the Judge considered all the applicable mitigating conditions. And that the Judge considered all the evidence. Adverse decision affirmed.

CASENO: 11-07666.a1

DATE: 06/07/2013

DATE: June 7, 2013

In Re:)
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 -----) ISCR Case No. 11-07666
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Paula W. Phinney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 13, 2012, DoD 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 March 20, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley 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 issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: In late 2006, Applicant left an industry where he had worked for 22 years. For a number of months following the departure, he experienced a large reduction in income and accumulated a number of delinquent debts. He identified \$21,305 in unsecured debt at the time he agreed to a repayment program with a debt consolidation firm in 2007. He ceased making payments to the debt consolidation firm in 2008 when he became convinced that the firm was not meeting its payment responsibilities with his creditors. Since 2008, Applicant has tried to address his old debts with the help of an attorney. Once he receives responses from creditors to his attorney's inquiries, Applicant will make every effort to arrange payment plans with them.

Applicant has had no financial counseling and has made no material progress in repaying any of his listed debts. Applicant is currently out of work and collecting unemployment insurance. He has no money left from his old 401(k) account to address his debts. He has incurred no new debts and is current with his mortgage. Applicant did not provide any endorsements, performance evaluations, or evidence of his contributions to his employer, family and community.

The Judge concluded: Most of Applicant's debts remain outstanding and unresolved. He still owes over \$20,000 in acknowledged delinquent debts. Extenuating circumstances are associated with some of Applicant's delinquent debts, but not all of them. He has made no documented material progress in addressing his still outstanding delinquent debts. Applicant has not pursued financial counseling and still has no organized budget or plan in effect to resolve his debts. Applicant has limited income sources. His corrective efforts taken to date, while encouraging, are insufficient to enable him to meet his evidentiary burden of mitigating the debts.

Applicant argues that the Judge did not properly weigh or even consider all the relevant evidence. He also argues that he has met the mitigating conditions arising under Guideline F as he presented proof of attempts to settle or repay, or valid reasons of dispute, for every debt listed in the SOR, including debts the Judge found unmitigated. Applicant acknowledges the rebuttable presumption that the Judge has considered all the evidence and also the maxim that a Judge need not mention or discuss every piece of record evidence, but goes on to assert that the presumption is effectively rebutted when the record clearly demonstrates that the Judge failed to consider all relevant and material information. In support of this argument, Applicant asserts that the Judge failed to note evidence submitted regarding his written contact with creditors in an attempt to verify the debts. He also states that the Judge failed to note that when Applicant was employed, he did not have the financial problems he now faces and his problems were due to lack of work and not a result of frivolous spending. Applicant also notes his retention of an attorney and his enrollment in a credit

counseling program in 2007 as evidence of a good-faith effort to get his finances in order almost immediately after encountering problems. Applicant also argues that the Judge erred in concluding that he has not pursued financial counseling and has made no documented material progress in addressing the debts that remain outstanding. Applicant's assertions do not establish error on the part of the Judge.

There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Thus, there is a presumption that the Judge properly considered those mitigating conditions in the Adjudicative Guidelines that were applicable to the case. Similarly, a Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome these presumptions. The matters cited by Applicant that he claims the Judge did not consider were, in fact, specifically mentioned by the Judge in his decision. For example, at page 3 of the Decision, the Judge finds, "with the help of an attorney, Applicant has made contact with these creditors in an effort to verify whether any or all of the debts are ones he is responsible for." Applicant's arguments appear to go more toward the weight that the Judge assigned to the evidence. While the record indicates that Applicant has pursued credit consolidation and has worked through an attorney to contact creditors, the Judge's conclusion that Applicant has not sought financial counseling is supported by the record, as the attorney was used to contact creditors, and the debt consolidation service was used to facilitate debt payment. Neither of these functions are necessarily encompassed by the term "counseling" in the Guideline F mitigating conditions. The record supports the Judge's conclusion that Applicant has not made significant progress in repaying his outstanding delinquent 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).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. A review of the Judge's decision reveals that, regarding Guideline F, the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in his analysis. The Judge offered a narrative explanation as to why the disqualifying conduct was not mitigated. The gravamen of the Judge's decision is the fact that Applicant's substantial debt remains outstanding despite Applicant's efforts, and he lacks a solid plan and resources for repayment. This conclusion is sustainable. The Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct.

Applicant cites several Hearing Office decisions as persuasive authority. The Board gives these cases due consideration. However, Hearing Office decisions are not binding on other Hearing

Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 10-05909 at 4 (App. Bd. Sep. 27, 2012). Moreover, one of the cases cited by Applicant was reversed on appeal.

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 the 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 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