

KEYWORD: Guideline F

DIGEST: Applicant's reliance on the 2003 bankruptcy is not persuasive since the delinquent debts at issue post date the bankruptcy by years. Adverse decision affirmed.

CASENO: 12-01664.a1

DATE: 01/17/2014

DATE: January 17, 2014

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In Re:)	
)	
-----)	ISCR Case No. 12-01664
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Cory Williams, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 20, 2013, 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). On October 31, 2013, after considering the written record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant's request for a security clearance.¹ Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's findings and conclusions were arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 43 years old. He was married from 1989 to 2009 and he remarried in 2010. In 2003, Applicant had his delinquent debts discharged in a Chapter 7 bankruptcy. He and his first wife were struggling financially when they had their debts discharged. They had financial problems dating back to 1997. Applicant indicated that a \$452 debt alleged in the SOR was paid. He provided a copy of a statement from the creditor showing that he had established a payment agreement with the creditor in May, 2013. The letter shows that Applicant was delinquent on his \$100 installment payment and shows a balance owed of \$401. Applicant did not provide documents from the creditor confirming he made monthly payments or paid the debt in full. Applicant admitted a \$437 debt alleged in the SOR, and indicated he planned to satisfy the account. Applicant admitted a \$15,825 debt alleged in the SOR for the loan balance on a repossessed vehicle. He indicated he had contracted the creditor and was offered two payment options, but is waiting for the creditor to provide him with an amount he can afford to pay. Applicant did not provide any additional information to show he has started making monthly payments to resolve the debt. Applicant's personal financial statement shows he has a net monthly remainder of \$2,675. It does not show that he is making payments toward any of the delinquent debts.

The Judge concluded: Applicant has debts discharged in bankruptcy and has three delinquent debts totaling approximately \$16,600 that he is unable or unwilling to pay. His history of financial problems is likely to recur and casts doubt on his reliability, trustworthiness, and good judgment. Applicant's divorce was beyond his control. His poor financial decisions were within his control. It has been almost four years since Applicant's divorce. He has not had any periods of unemployment. He has a net monthly remainder of \$2,675 but is not making any payments toward his delinquent debts. Applicant did not provide any information regarding how he spends the remainder of his income. There is no evidence to show Applicant was acting responsibly under the circumstances. At this time, there are not clear indications his financial problems are being resolved or under control. Applicant failed to mitigate the security concerns arising under Guideline F.

Applicant's appeal brief contains factual assertions that go beyond the record below. Applicant attached a number of documents to the brief, some of which post date the Judge's decision and are not contained in the record below. The Board cannot consider new matters on appeal. *See* Directive ¶ E3.1.29.

¹Numerous documents prepared by the Government relate that Applicant elected to have the case decided on the written record. Applicant's actual election, however, is not contained in the record.

Applicant argues that the Judge failed to consider all the record evidence. He does not specify which parts of the record he asserts the Judge did not consider, stating only that the Judge erred in not considering “mitigating documentary evidence” and by not considering “the documents that were submitted.” A Judge is presumed to have considered all the evidence in the record unless she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome this presumption. A review of the Judge’s decision indicates that she specifically discusses several of the documents Applicant submitted for consideration, including one that resulted in a favorable finding from the Judge on one SOR allegation. Also, without a better description from Applicant as to what he thinks the Judge ignored, the Board is unable to ascertain the specific evidence Applicant claims the Judge ignored. An appealing party must provide specificity in its claims of error to allow the Board to engage in reasoned decision-making when carrying out its appellate responsibilities. *See, e.g.*, ISCR Case No. 00-0429 at 2 (App. Bd. Jul. 9, 2001).

Applicant argues that the Judge erred when she found that Applicant had a net remainder of \$2,675 per month after satisfying ongoing living expenses other than his delinquent debts. Applicant argues that the correct figure is approximately \$525, much of which went toward expenses related to his children. Applicant’s argument relies on matters outside the record. The Judge’s finding is supported by a financial statement prepared by Applicant that is included in the record. There is no other evidence in the record that refutes the representations made on the financial statement. Applicant has not established error.

Applicant points to his 2003 bankruptcy and argues that his filing of it is a mitigating condition under ¶ 20(d)² of Guideline F. This argument lacks merit. The Board has held that an applicant must do more than merely show that he or she relied on a legally available option, such as bankruptcy, in order to claim the benefit of ¶ 20(d). *See, e.g.*, ISCR Case No. 02-30304 at 4 (App. Bd. Apr. 20, 2004). Also, on the record in this case, the relevance of Applicant’s 2003 bankruptcy filing is attenuated for purposes of mitigation in that it has no bearing on the debts listed in the SOR, the delinquent status of which post dates the bankruptcy by many years.

Applicant argues that the relevant evidence mitigates the government’s concerns. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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.

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

In this case, the Judge made sustainable findings that Applicant has not taken steps to reasonably address three outstanding debts, despite the availability of a significant monthly income remainder. The Judge concluded that Applicant had not met his burden of proof of establishing his claims that he is responsibly addressing his debts.

In support of his appeal, Applicant points to decisions by the Hearing Office, which he argues support his request for a favorable determination. Hearing Office decisions are binding neither on other Hearing Office Judges nor the Board. *See* ISCR Case No. 11-04176 at 2 (App. Bd. Dec. 18, 2012). The Board finds nothing in the cited cases establishing that the Judge's decision is arbitrary, capricious, or contrary to law.

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