

KEYWORD: Guideline F; Guideline J; Guideline E

DIGEST: Upon receipt of the File of Relevant Material, Applicant had the burden of submitting a documentary response setting forth objections, rebuttal, extenuation, mitigation or explanation as appropriate. A whole-person analysis is not confined to the workplace. Adverse decision affirmed.

CASENO: 05-06913.a1

DATE: 09/18/2007

DATE: September 18, 2007

In Re:)	
)	
-----)	ISCR Case No. 05-06913
)	
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 January 9, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided upon the written record. On March 26, 2007, after considering the record, Administrative Judge Elizabeth M. Matchinski denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process; whether the Judge erred in concluding that Applicant had deliberately falsified his security clearance application; whether the Judge erred by concluding that the security concerns raised under Guidelines F, J and E had not been mitigated.¹

(1) On appeal, Applicant argues that the Judge’s adverse decision should be reversed because the credit report submitted by the government was dated and the favorable information in the evidentiary file was not considered by the Judge. The Board construes Applicant’s argument as raising the issue of whether he received due process.

After reviewing the record in this case, the Board concludes that Applicant was reasonably provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Judge evaluated his case in a professional manner, consistent with her role as an impartial presiding official. Applicant elected to have his case decided upon the written record. Upon receipt of the government’s File of Relevant Material (FORM), Applicant had the burden of “. . . submit[ting] a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.” Directive ¶ E3.1.7. He in fact submitted a response that included multiple documentary exhibits.

A close reading of the Judge’s decision indicates that the Judge read, considered and cited to the evidence Applicant relies on for his Appeal. The Judge specifically cited to the January 2007 credit report.

(2) Applicant contends that he did not deliberately falsify his 2004 security clearance application by failing to disclose nine debts that were delinquent for over 90 or 180 days and a prior criminal charge. In support of this contention, he argues that the government was aware of the information in question from record checks, previous background investigations, or because it had been provided at some point during the current investigation. Applicant’s argument does not demonstrate that the Judge erred.

The Judge had the opportunity to consider Applicant’s explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant’s explanation. The Judge considered Applicant’s explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omissions were deliberate and intentional. Given the record in this case, the Judge’s findings of deliberate

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.b, 1.c, 1.f, 1.j, and 3.a. Those favorable findings are not at issue on appeal.

falsification are sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

(3) Applicant argues that the Judge erred in concluding that the security concerns raised under Guidelines F, J and E had not been mitigated, in that she gave insufficient weight to the favorable evidence in the record, including the facts that his debts had resulted from a previous

divorce and he had retained a credit counselor, and his excellent job performance and military service.² Applicant's argument does not demonstrate that the Judge erred.

The federal government need not wait until an applicant actually mishandles or fails to properly handle classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole-person analysis to determine an applicant's clearance eligibility. A whole-person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (App. Bd. Jun. 4, 2004).

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. An applicant'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. 02-01181 at 3-4 (App. Bd. Jan. 30, 2004).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. She found in favor of the Applicant with respect to a number of the factual allegations. However, she reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary,

²Along with his brief, Applicant attaches some items of documentary evidence. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29.

capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines F, J and E is sustainable.

Order

The decision of the Judge denying Applicant access to classified information is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board