

KEYWORD: Guideline F

DIGEST: The Board does not have the authority to determine whether an individual's position requires a security clearance. Adverse decision affirmed.

CASENO: 07-05632.a1

DATE: 05/13/2008

DATE: May 13, 2008

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| In Re: )                           |                        |
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| ----- )                            | ISCR Case No. 07-05632 |
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| Applicant for Security Clearance ) |                        |
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**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 13, 2007, 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 that the case be decided on the written record. On January 31, 2008, after considering the record, Administrative Judge David M. White 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 the Judge erred by adjudicating Applicant's case; whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law.

(1) On appeal, Applicant states that after Department Counsel submitted a file of relevant material to her, she and her security officer verbally informed Department Counsel that Applicant did not need a security clearance for her position and later faxed him a letter to that effect. Therefore, the Appeal Board construes Applicant's brief as contending that the Judge should not have issued a decision in her case.

The Board does not have authority to determine whether a position does or does not require a security clearance. Of course, a claim that a case should not go forward because of lack of subject matter jurisdiction can be raised at any time during the proceedings, including for the first time on appeal. Here, however, Applicant stops short of asserting that her security clearance application had been withdrawn. She merely asserts that a communication was made to DOHA Department Counsel indicating that she did not need a clearance for the position that she was performing at the time. Such a representation does not equate to a claim that the security clearance application has been withdrawn, since such applications are sometimes filed in anticipation of a prospective need. There is nothing in the case file to indicate that Applicant's company had withdrawn its request for a security clearance for Applicant. Nor did Applicant attach a copy of any such documentation with her appeal.<sup>1</sup> Therefore, even after making allowances for her *pro se* status, Applicant has not met her burden of demonstrating that the Judge erred in continuing to process her case.

(2) Applicant also argues that the Judge's adverse decision should be reversed because the Judge did not give sufficient weight to Applicant's mitigating evidence which showed that her indebtedness had resulted from circumstances beyond her control (underemployment and the lack of health insurance), that she had acted responsibly under the circumstances and made a good faith effort to repay her overdue creditors, and that there are now clear indications that her financial problems are under control. Applicant's arguments do not demonstrate that the Judge erred.

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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). An applicant's disagreement with

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<sup>1</sup>Applicant states that she and her security officer faxed a letter to Department Counsel on November 16, 2007; but the contents of that letter are unknown. The letter is not part of the case file and Applicant did not attach a copy of it with her appeal brief. Moreover, there is nothing in the record or Applicant's representations on appeal which state that Applicant's company filed DoD Form 562 (Clearance Change Notification) on her behalf.

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 found that Applicant had a lengthy and serious history of not meeting financial obligations. At the time of the hearing, Applicant still owed approximately \$13,359 on 28 delinquent debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. *See, e.g.*, ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007). 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 conditions and factors. He found in favor of Applicant as to some of the SOR allegations.<sup>2</sup> However, he reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome 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, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 2 (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)). Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline F 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

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<sup>2</sup>The Judge found in favor of Applicant as to SOR paragraphs 1(c), 1(l), 1(ae), and 1(af). Those favorable findings are not at issue on appeal.

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