

KEYWORD: Guideline J; Guideline F

DIGEST: Applicant has not identified any harmful error. Adverse decision affirmed.

CASENO: 07-09048.a1

DATE: 12/15/2008

DATE: December 15, 2008

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 07-09048
-------------------------------------------------------------	---------------------------------	------------------------

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 March 10, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 29, 2008, after the hearing, Administrative Judge Darlene Lokey-Anderson 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 issue on appeal: whether the Judge’s adverse security clearance decision under Guideline J is arbitrary, capricious, or contrary to law.¹

Applicant requests that the Judge’s adverse decision be reversed. In support of that request, he gives a detailed explanation as to the circumstances surrounding his arrests and convictions for the incidents set forth in the SOR. He asserts that, to the extent there are variances between his explanations and the police reports, his version of the events is the correct one. He also notes that he has engaged in no other criminal conduct, other than the conduct alleged in the SOR. Applicant’s argument does not demonstrate that the Judge’s decision is arbitrary, capricious, or contrary to law.

The Board’s review of a Judge’s findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the same record. *See* Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966).

After reviewing the record, the Board concludes that the Judge’s findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable 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. 07-05632 at 2 (App. Bd. May 13, 2008).

¹The Judge’s favorable findings as to Guideline F are not at issue on appeal.

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness and recency of the disqualifying conduct and considered the possible application of relevant conditions and factors. Decision at 4-7. She reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Id.*² 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 3 (App. Bd. Sep. 4, 2007). The Judge examined the relevant data and articulated a satisfactory explanation for her 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). Accordingly, the Judge's adverse decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: Willaim S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

²In that regard, the Judge noted the following: "In May 2008, just three months before the hearing, he completed his three years of summary probation for his second offense. Given the serious nature of the offenses, and their recency, more time is needed in rehabilitation and without incident, to prove that he will not revert to his old criminal ways." Decision at 6.