

KEYWORD: Guideline F

DIGEST: Decisions in other hearing level cases are not legally binding precedent even if an applicant can establish close factual similarities between cases. The Directive presumes a nexus between proven conduct under any Guideline and an applicant security eligibility. Adverse decision affirmed.

CASENO: 07-15590.a1

DATE: 11/18/2008

DATE: November 18, 2008

In Re:)
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 -----) ISCR Case No. 07-15590
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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

Terry E. Rector, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 12, 2008, 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 a hearing. On August 29, 2008, after the hearing, Administrative Judge Noreen A. Lynch 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 clearance decision is arbitrary, capricious or contrary to law.

Applicant contends that the Judge’s adverse decision should be reversed because the Judge did not give sufficient weight to Applicant’s mitigating evidence, which established that his problems were due to his own naivete, and his reliance on his wife, who had serious physical and emotional issues and was taking substantial prescription medications. In support of his contention, Applicant notes that he has never compromised classified information. He also cites to four hearing-level cases in which applicants in ostensibly similar circumstances were granted clearances. Applicant has not demonstrated the Judge erred.

The Board gives due consideration to the cases cited by Applicant. *See, e.g.*, ISCR Case No. 06-05903 at 3 (App. Bd. Oct. 15, 2007). However, the Board has previously noted that decisions in other hearing-level cases are not legally binding precedent, even if an applicant can establish close factual similarities between those cases and his case. *See, e.g.*, ISCR Case No. 04-04004 at 2 (App. Bd. Jul. 31, 2006). Accordingly, the Judge was not legally obligated to reconcile his decision in this case with decisions in other ostensibly similar cases. *See, e.g.*, ISCR Case No. 02-24752 at 3 (App. Bd. Jul. 31, 2006). “The adjudicative process is the careful weighing of a number of variables known as the whole-person concept.” Directive at ¶ E2.2(a). “Each case must be judged on its own merits . . .” *Id* at ¶ E2.2(b).

The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. *See, e.g.*, ISCR Case No. 02-22325 at 3-4 (App. Bd. Jul. 30, 2004). Security clearance determinations are not limited to consideration of work performance or conduct during duty hours. *See, e.g.*, ISCR Case No. 04-08623 at 5 (App. Bd. Jul. 29, 2005). The federal government need not wait until an applicant actually mishandles or fails to safeguard 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). The absence of security violations does not bar or preclude an adverse security clearance decision. *See* ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005).

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 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 history of not meeting financial obligations, including the failure to pay federal taxes. At the time the case was submitted for decision, Applicant still had significant outstanding debt, and was still trying to resolve his financial problems. In light of the foregoing, the Judge could reasonably conclude that those 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. She found in favor of Applicant as to several of the SOR allegations.¹ However, she reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. 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 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)). Therefore, the Judge's whole-person analysis and her ultimate unfavorable security clearance decision under Guideline F are sustainable.

Order

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

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed; William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

¹The Judge found in favor of Applicant as to SOR paragraphs 1(c), (e), (f), and (j). Those favorable findings are not at issue on appeal.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board