

KEYWORD: Guideline F; Guideline E

DIGEST: A Judge is presumed to have considered all the evidence in the record. Applicant's evidence in mitigation was not sufficient to meet his burden of persuasion. Adverse decision affirmed.

CASENO: 08-00613.a1

DATE: 11/17/2009

DATE: November 17, 2009

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 08-00613
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 31, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 10, 2009, after the hearing, Administrative Judge Robert J. Tuider denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found that Applicant's indebtedness began in approximately 2001 and continued until 2008. Applicant had 16 debts totaling \$55,582. Applicant stated that his financial problems began when he invested in an unsuccessful pyramid scheme and when he incurred expenses to help out family members. These events began a "financial tailspin" that did not end until Applicant filed for bankruptcy in 2008. An initial Chapter 13 bankruptcy was converted to a Chapter 7 two months prior to the hearing. Applicant failed to list two judgments and debts over 180 days delinquent during the last seven years on a 2007 security clearance application. He also failed to list debts currently over 90 days delinquent. Applicant's pride got the better of him when he completed the application and he was too embarrassed to put the information down.

The Judge concluded that while some mitigation was established owing to the fact that Applicant had to deal with a death in the family and received some mandatory counseling connected to the bankruptcy, not enough time had elapsed to show that his financial problems are resolved or under control. The Judge concluded that Applicant's financial problems are recent, not isolated, and potentially a concern in the future. The Judge also concluded that Applicant had failed to mitigate his admitted falsifications on his security clearance application.

Applicant argues that he produced sufficient evidence in mitigation, that the indebtedness was a result of circumstances beyond his control, and that his omissions from the security clearance application were the result of negligence. He also stated that he was embarrassed about his debts. Applicant asserts that the Judge's decision is arbitrary and capricious because it does not take into consideration the evidence presented. Applicant's claims do not establish error on the part of the Judge.

Concerning Applicant's assertion that the Judge failed to take into consideration record evidence, there is a rebuttable presumption that a Judge has considered all the record evidence unless he or she specifically indicates otherwise. Applicant's brief sheds no light on precisely which portions of the record he believes the Judge failed to take into account. Applicant has failed to rebut the presumption.

Applicant's arguments concerning mitigation do not establish error on the part of the Judge. 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). 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).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of Guideline F mitigating conditions and cogently explained why there was insufficient mitigation to overcome the government's security concerns. He also discussed the inapplicability of Guideline E mitigating conditions. His

conclusions are reasonably supported by the record evidence.

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 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)). "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 denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board