

KEYWORD: Guideline F; Guideline E

DIGEST: A Judge’s weighing of the evidence will not be overturned unless it is arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 08-03479.a1

DATE: 02/17/2009

DATE: February 17, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-03479
)	
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 June 23, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 8, 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 erred in concluding that

Applicant's falsification of his security clearance application was deliberate.¹

Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose information of security concern in response to four different questions. Applicant has not demonstrated that the Judge erred.

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 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. 06-17691 at 3 (App. Bd. Jul. 19, 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.

A review of the decision indicates that the Judge reasonably considered Applicant's explanation for why he failed to disclose the information in question in light of the record evidence as a whole. Given the record that was before her, the Judge's finding of deliberate falsification is sustainable. See Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 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 under Guideline E is not arbitrary, capricious or contrary to law.²

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

¹The Judge's favorable finding under Guideline F is not at issue on appeal.

²Applicant requests a "compromise" in which he would be allowed to retain a security clearance so that he can continue to be employed, even if he is not allowed the same level of access (or any access) that he had previously held. Under Directive ¶ 3.2, there is no authority to deny a clearance at one level but grant a clearance at a lower one. "An unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance." *Id.*; See ISCR Case No. 94-0947 at 5 (App. Bd. Oct. 12, 1995).

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board