

KEYWORD: Guideline F; Guideline J

DIGEST: The Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Adverse decision affirmed.

CASENO: 08-08373.a1

DATE: 12/03/2010

DATE: December 3, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-08373
)	
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 July 6, 2009, 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 J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as

amended) (Directive). Applicant requested a hearing. On September 21, 2010, after the hearing, Administrative Judge Matthew E. Malone denied Applicant's request for a security clearance. Applicant appealed pursuant to 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. Specifically, Applicant points out his excellent job performance, work ethic, and military record. He contends that the Judge should have accorded greater weight to his evidence of mitigation, and he argues that loss of his job will hinder his efforts to improve his financial situation.

The Judge made the following findings of fact: Applicant is 37 years old and is employed as a security officer. Applicant has an excellent job performance record and is highly thought of by his coworkers and his supervisor.

In its SOR, the government alleged under Guideline F that Applicant owed about \$26,139 for 14 delinquent debts more than 90 days past due. Applicant admitted all of the debts, but asserted that three of the 14 had been paid or otherwise satisfied. Applicant has used debt consolidation and debt counseling firms within the last two years, but there is no record of payments being made under those services. Applicant attributes his financial difficulties to the legal fees he accrued in defending himself against the criminal charges listed below.

The five SOR allegations under Guideline J relate to domestic violence, all but one involving his relationships with two women. Girlfriend 1 called the police after an argument in May 2007, and Applicant was charged with domestic violence/harassment and convicted. Applicant was ordered to pay a fine of \$300 and attend a domestic violence intervention program, and he received a 60-day suspended sentence and was placed on probation for 24 months. When Applicant appealed to the circuit court, the case was dismissed because Girlfriend 1 did not cooperate with the prosecutors. Later in May 2007, Applicant was investigated for harassing communications toward Girlfriend 1, and a protective order was issued. In September 2007, Applicant was charged with and convicted of violating the protective order. Applicant was sentenced to 60 days in jail (suspended), placed on probation for 12 months, fined, and assessed court costs. Applicant listed the above offenses on his security clearance application, but denied that he was guilty of the charges. Applicant admitted a domestic violence charge by Girlfriend 2 in December 2006. Applicant was not prosecuted, but he agreed to attend an eight-week violence intervention program. When Applicant completed his security clearance application in February 2008, he was awaiting trial on two charges—violation of a protective order and domestic violence/harassment. At the time of the hearing, Applicant was still awaiting trial on another domestic violence charge dating from December 2009.

In support of his appeal, Applicant submitted a letter of recommendation from Girlfriend 1. The Board cannot consider that letter, since it constitutes new evidence. *See* Directive, ¶ E3.1.29. *See also* ISCR Case No. 08-06875 at 2 (App. Bd. Oct. 29, 2009). Applicant submitted a second set of new documents after his brief was accepted. The Board cannot consider these either.

Applicant contends that the Judge's decision is arbitrary, capricious, or contrary to law, arguing that the Judge did not consider or did not give adequate weight to his excellent job performance, work ethic, and military record. Applicant also maintains that the Judge should have accorded greater weight to his attempts to settle his debts and his explanations for his criminal record. There is a rebuttable presumption that the Judge considered all the record evidence, unless the Judge specifically states otherwise; and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). In this case, the Judge mentioned Applicant's excellent performance and reputation at work, as well as his military record. The Judge also discussed Applicant's attempts to improve his financial situation and found in Applicant's favor as to eight of the fourteen Guideline F allegations. However, the application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. 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*. 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 that 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. 06-23384 at 3 (App. Bd. Nov. 23, 2007).

Applicant states that loss of his job due to denial of a security clearance will have an adverse impact on his ability to improve his financial situation. However, the effect that an adverse decision may have on an applicant is not a relevant or material consideration in evaluating his or her security eligibility. *See, e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

After reviewing the record as a whole, 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). Accordingly, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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