

KEYWORD: Guideline F; Guideline J

DIGEST: Although Applicant was acquitted at trial, a DOHA administrative Judge is not bound by the same presumptions and burden of proof applicable to criminal prosecutions. Adverse decision affirmed.

CASENO: 08-09337.a1

DATE: 10/16/2009

DATE: October 16, 2009

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In Re:)	
)	
-----)	ISCR Case No. 08-09337
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Eric F. Adams, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 22, 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 J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 23, 2009, after the hearing, Administrative Judge Thomas M. Crean denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge failed to consider properly various matters in mitigation under Guideline J; (b) whether the Judge expanded the scope of the sole allegation under Guideline J; and (c) whether certain of the Judge’s factual findings are supported by substantial record evidence. For the following reasons, the Board affirms the Judge’s adverse security clearance decision.

The Judge found that, in 2001, Applicant was indicted, tried, and acquitted for participating personally and substantially as a government employee in a contract in which she had a financial interest (18 U.S.C. 208 (a) and 2). The Judge made extensive findings regarding the underlying conduct in 2000 and 2001 that led to the charge. Specifically, he found she violated federal “conflict of interest rules” by informing a government contractor that, through her private side-business, she could write documents for proper performance of the contract. She had, in her government capacity, informed the contractor of the deficiencies she proposed to correct. The Judge also made findings and conclusions regarding Applicant’s actions in seeking permission to engage in an outside activity. He found that Applicant gave limited information in response to repeated requests for more information. The ethics counselor told her that she did not have sufficient information to advise the supervisor. Applicant went ahead and entered into the business arrangement and accepted funds for activities. “Applicant clearly violated the ethical rules concerning outside employment.” (Decision at p. 12.) The Judge found for Applicant under Guideline F which is not at issue on appeal. The Judge’s findings are supported by substantial evidence and are sustainable.

The Judge concluded that Applicant failed to demonstrate mitigation. Although the Judge considered the passage of time, the favorable testimony of her witnesses, and the acquittal, he concluded that the nature and gravity of the conduct was not outweighed by the evidence in mitigation.

To the extent that Applicant relies on the fact that she was acquitted of criminal charges, such reliance is misplaced. “Although Applicant was acquitted at trial, a DOHA administrative hearing is not bound by the same presumptions and burden of proof applicable to criminal prosecutions [citations omitted]” *See* ISCR Case No.08-02404 at 3-4 (App. Bd. Jun. 5, 2009). Applicant asserts that the Judge did not consider important matters in mitigation under Guideline J. There is a rebuttable presumption that the Judge considered all the record evidence. Applicant has not overcome this presumption. 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 under Guideline J and considered the possible application of relevant conditions and factors. However, the Judge concluded that there was insufficient evidence to mitigate the Guideline J allegation. This conclusion is reasonably supported by the record.

Regarding Applicant's claim that the Judge expanded the scope of the SOR without amending it, the Board is not persuaded. In the first place, the claim is vague and does not specify what portion of the facts or issues were outside the scope of the allegation. Applicant was on fair notice that the 2001 issues were of security concern. Applicant was represented by counsel at the hearing. Applicant does not allege nor does the Board find evidence that her previous counsel ever challenged either the scope of the SOR or the scope of the hearing. Indeed, her counsel's opening statement refers to various aspects of the 2000-2001 events. Applicant has failed to demonstrate error on this claim.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, 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