

KEYWORD: Guideline J; Guideline F

DIGEST: Applicant submitted new evidence which the Board cannot consider. Adverse decision affirmed

CASENO: 09-04748.a1

DATE: 11/12/2010

DATE: November 12, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-04748
)	
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 January 13, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and

Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 24, 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 raised the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues that the Judge should have found her criminal conduct and financial situation to be mitigated. Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following relevant factual findings: Applicant is married and has children aged 21 and 19. She is also raising her friend's children because the friend is unable to care for them. Those children are ages 12 and 13. Applicant has also helped support her mother. Applicant and her husband do not share their financial resources. At times, Applicant has experienced financial difficulties, having one car repossessed and paying several unpaid bills by involuntary wage garnishment. In 1992, Applicant was charged with two counts of issuing checks with insufficient funds. In February 2007, Applicant was charged with three counts of negotiating worthless checks. Although Applicant knew when she wrote the checks that she did not have funds in her account to cover them, she was not prosecuted after she made restitution. Applicant is able to cover her current expenses, but with very little left over.

Applicant was laid off in August 2003 and began receiving unemployment benefits. Applicant did not notify the state when she obtained another job, accruing a debt of \$1,693 to the state for eight weeks of benefits. The state notified Applicant that she was required to repay that amount, but she did not do so. When Applicant went to the courthouse in February 2007 to answer for the worthless check charges, she was arrested and charged with second degree theft of property, a felony, for receiving and not repaying the unemployment benefits. Applicant pleaded guilty and was sentenced to three years in jail, which was suspended. Applicant was placed on probation for two years and ordered to repay the unemployment benefits. Fines and costs raised the amount owed to \$3,175, which Applicant agreed to pay at \$20 per month. In March 2009, Applicant's probation was extended until 2012 because she had paid only four or five of the court-ordered payments. As of May 19, 2010, Applicant still owed \$2,142 of the debt. In November 2008, Applicant violated her probation when she was arrested for domestic violence assault when she got into a fight at a friend's house and hit the friend in the head with a shower rod. Applicant was not prosecuted because the fight was determined to be mutual, but she spent ten days in jail due to a probation violation.

Applicant's supervisor recently promoted her. She is known to be enthusiastic, reliable, dedicated, and willing to help others; and she is active in community volunteer projects and charitable fund-raising activities.

Applicant maintains that she has improved her financial situation since she obtained her current job and has paid off a significant portion of her court-ordered debt, including \$622 paid after the hearing. She also submitted additional information about her job performance. The job-related

information and the amount paid after the hearing constitute new evidence, which the Board cannot consider. *See* Directive ¶ E3.1.29.

Applicant argues that she has mitigated any security concerns that might exist under Guideline J and Guideline F and that the Judge either did not consider or did not give adequate weight to her evidence of mitigation. 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). Applicant admitted the SOR allegations against her. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised. 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. 07-18303 at 2-3 (App. Bd. Nov. 13, 2008).

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, 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