

KEYWORD: Guideline F

DIGEST: Applicant failed to demonstrate that an error in the transcript resulted in a factual or legal error by the Judge. Adverse decision affirmed.

CASE NO: 10-01727.a1

DATE: 03/03/2011

DATE: March 3, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-01727
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 18, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 3, 2010, after the hearing, Administrative Judge Jennifer I. Goldstein denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether Applicant was given a fair and impartial hearing; and whether the Judge’s decision is arbitrary, capricious, or contrary to law and unsupported by the record evidence. Consistent with the following discussion, the Board affirms the Judge’s decision.

Applicant has held a security clearance for approximately 20 years, first as a civilian employee of the Air Force, and later as a government contractor. Applicant has held a real estate broker's license since July 2006. The SOR alleges one debt, a mortgage which is delinquent in the amount of \$32,602. Applicant purchased a home for \$625,000 with a five-year adjustable-rate first mortgage and an equity line of credit with an initial balance of \$70,000 (currently \$171,000). Applicant attempted to refinance the first mortgage in June 2009, but was unable to do so. Applicant missed a payment on the first mortgage in August 2009 and has not made a payment on the first mortgage since that time. In 2010, the payments on the first mortgage increased from \$2,500 to \$3,900 per month. Applicant was current on the equity line until July 2010, but has not made a payment on it since then. The mortgage is in foreclosure status. Applicant still lives in the home and is fighting the foreclosure in court. At the time Applicant purchased the house, her annual income was \$227,000. By 2009, it had decreased to \$119,149. Applicant has invested the money she would have spent on her mortgage in a property she holds jointly with her mother. Applicant's boyfriend and her manager testified to her trustworthiness. She provided eleven letters of recommendation from co-workers, supervisors, and friends, as well as excellent job performance evaluations.

Applicant contends that she did not receive a fair and impartial hearing. Applicant's contention is apparently based on the Judge's statement that she was once a colleague of the Department Counsel assigned to the case. The Judge fully explained her prior position and association with Department Counsel on the record. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 10-03656 at 2-3 (App. Bd. Jan. 19, 2011). An appealing party's personal belief that a Judge is biased is not sufficient to rebut the presumption of impartiality. Rather, the standard is whether the record below contains anything that would provide a basis for a disinterested person reasonably to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 09-06224 at 3 (App. Bd. Jan. 20, 2011). Applicant has not met that burden.

Applicant argues that the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Specifically, Applicant maintains that the Judge did not consider all the facts she presented and did not give proper weight to her mitigating evidence. Applicant also disagrees with the Judge's characterization of portions of her testimony and identifies factual error with regard to her real estate broker's license. Applicant also points out an error in the transcript.

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. 07-18303 at 2 (App. Bd. Nov. 13, 2008). In reaching her decision, the Judge discussed at length Applicant's testimony regarding her financial situation and her mortgage. Applicant has not overcome the presumption in this case.

Applicant alleges a transcript error involving her testimony. Specifically, she states that three words were omitted from her testimony. Applicant's Brief at 2; Transcript at 101-102. Since the Judge was present when Applicant testified and, as discussed above, is presumed to have considered all the record evidence, an appealing party must demonstrate that any transcript error resulted in factual or legal error by the Judge and that such error was harmful to the appealing party.

Without such a showing, the mere presence of error in a hearing transcript does not constitute error that warrants remand or reversal. *See, e.g.*, ISCR Case No. 01-15891 at 3 (App. Bd. May 16, 2003). In this case, the Judge asked Applicant what use she was making of the money that otherwise would have gone toward mortgage payments. Applicant replied that she was investing it. She later explained that she had invested \$40,000 “in the last couple of months.” Applicant testified that at least some of the money had gone into a family real estate investment. Even if we accept Applicant’s statement that the words “gold and silver” should have been included in her answer, she has not shown that the omission of a further example of her investments caused error that was harmful to her.

While Applicant contends that she presented sufficient evidence to mitigate her mortgage debt, 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*. *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 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. 08-05069 at 2-3 (App. Bd. Feb. 20, 2009).

After reviewing the record, the Board concludes that the Judge’s material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Although Applicant points out an error with regard to her possession of a real estate broker’s license,¹ she has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-01105 at 2 (App. Bd. Dec.15, 2008).

Applicant has filed a law suit contesting the validity of her mortgage. Applicant contends that she was unfairly denied a security clearance based on her filing of that suit. In her decision, the Judge explained that her decision was based on Applicant’s financial situation and her overall handling of her mortgage. Decision at 5-6. In her whole-person analysis, the Judge again stated concerns about Applicant’s finances and judgment. Decision at 6. It was not unreasonable for the Judge to conclude that the security concerns raised by Applicant’s financial situation outweighed other considerations.

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against her financial history and considered the possible application of relevant mitigating conditions and factors. Decision at 4-6. The Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government’s security concerns. *Id.* 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

¹The Judge stated that Applicant possessed a real estate broker’s license when she purchased her home. In fact, Applicant purchased her home in 2005 and obtained the license in 2006. However, the Judge elicited other testimony that Applicant had prior experience with real estate, having purchased two other homes before the 2005 purchase. Transcript at 61.

to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 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, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines 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.’” *Dep’t of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge’s adverse decision is sustainable.

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

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