

KEYWORD: Guideline G; Guideline F; Guideline E

DIGEST: The challenged findings are either permissible characterizations or harmless error. An applicant's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error. The Judge's finding of deliberate falsification is sustainable. Adverse decision affirmed.

CASENO: 05-02593.a1

DATE: 03/09/2007

DATE: March 9, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-02593
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Kevin M. Sherlock, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 20, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption),

Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On June 21, 2006, after considering the record, Administrative Judge Charles D. Ablard 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 issues on appeal: whether the Judge erred with respect to his material findings; whether the Judge erred by concluding that the security concerns raised under Guidelines G and F had not been mitigated; whether the Judge erred in concluding Applicant's falsification of his security clearance application was deliberate.

(1) Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge made several errors with respect to his findings. Specifically, Applicant contends that the Judge erred in finding that one of Applicant's debts had not been discharged in bankruptcy. He also contends that the Judge erred in finding that Applicant's consumption of alcohol to the point of intoxication was anything other than "occasional." In support of the first contention, Applicant attaches new evidence in the form of bankruptcy records which indicate the debt in question was in fact discharged. The Board concludes that Applicant has not demonstrated harmful error on the part of the Judge.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005). The findings which Applicant challenges are either permissible characterizations by the Judge or harmless error, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Judge's material findings with respect Applicant's circumstances of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

(2) Applicant contends that the Judge erred in concluding that the security concerns raised under Guidelines G and F had not been mitigated. In support of that contention, Applicant essentially restates the facts of his case and argues that the Judge mis-weighed the evidence, by failing to give adequate consideration to the favorable evidence. Based upon the record as a whole, Applicant asserts that his conduct was not of sufficient seriousness to be of security concern. Applicant's arguments do not demonstrate error on the part of the Judge.

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. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, 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*. 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.

In this case, the Judge reasonably weighed the mitigating evidence against the seriousness

of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. He reasonably explained why there was insufficient mitigating evidence to overcome the government's other security concerns. The Board does not review a case *de novo*. The favorable evidence cited by the Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines G and F is sustainable.

(3) Finally, Applicant argues that he did not deliberately falsify his security clearance application by failing to disclose adverse information about his financial problems. The Board does not find this argument persuasive.

The Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question on his security clearance application. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omission was deliberate and intentional. On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1. Applicant has not demonstrated that the Judge's unfavorable clearance decision under Guideline E is arbitrary, capricious, or contrary to law.

Order

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

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