KEYWORD: Guideline F; Guideline

DIGEST: Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Appeal Board. Adverse decision affirmed.

CASENO: 05-11134.a1

DATE: 11/16/2007

DATE: November 16, 2007

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 4, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 13, 2007, after the hearing, Administrative Judge Edward W. Loughran 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 issue on appeal: whether the Judge's adverse security clearance decision under Guideline F is arbitrary, capricious, or contrary to law.[1]

Applicant argues that the Judge should have concluded that the security concerns raised under Guideline F had been mitigated, as a matter of law, because Applicant has received counseling for his financial problems, he initiated a good faith effort to resolve those problems, and there are clear indications that his problems are under control. In support of his argument, he cites to several DOHA Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances. Given the totality of the record evidence, Applicant's arguments do not demonstrate that the Judge's decision is arbitrary, capricious, or contrary to law.

The Board gives due consideration to the Hearing Office cases which Applicant has submitted in his appeal brief. However, such decisions are binding neither on Hearing Office Judges nor on the Board. *See* ISCR Case No. 05-14853 at 3 (App. Bd. Sep. 24, 2007).

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown,* 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. *See* 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." *See* ISCR Case No. 05-02833 (App. Bd. Mar. 19, 2007). "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." *See* ISCR Case No. 05-03143 at 3 (App. Bd. Dec. 20, 2006).

A review of the decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the record evidence relating to the length, seriousness and recency of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge found in favor of the Applicant with respect to most of the factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all the government's security concerns. The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline F is not arbitrary, capricious or contrary to law. *See, e.g.,* ISCR Case No. 05-06913 at 2-4 (App. Bd. Sep. 18, 2007).

[1]The Judge found in favor of Applicant under Guideline E and with respect to SOR paragraphs 1.b through 1.j, and 1.l and 1.m. Those favorable findings are not at issue on appeal.

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