

KEYWORD: Guideline F; Guideline J; Guideline E

DIGEST: The Board’s review of a Judge’s finding is limited to determining if they are supported by substantial evidence—such evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record. Adverse decision affirmed.

CASENO: 05-1175.a1

DATE: 06/15/2007

DATE: June 15, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 05-11175
)	
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 June 12, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense

Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2006, after the hearing, Administrative Judge Carol G. Ricciardello 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's adverse credibility determination is sustainable; whether the Judge erred in concluding that Applicant's falsification of his security clearance application was deliberate; and whether the Judge's adverse clearance decision under Guidelines F, J and E is arbitrary, capricious or contrary to law.¹

(1) Applicant contends that the Judge's adverse credibility determination with respect to the Applicant is unsupported by the record evidence, and asks that the Board set it aside and substitute a favorable credibility determination in its place. In support of that contention, Applicant relies on a page from an unknown document. Applicant has not demonstrated error on the part of the Judge.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966). A Judge's credibility determination is entitled to deference on appeal. *See, e.g.*, ISCR Case No. 03-05072 at 5 (App. Bd. July 14, 2005). Although such determinations are not immune from review, the party challenging them has a heavy burden. *See* ISCR Case No. 04-00225 at 2 (App. Bd. Nov. 9, 2006). After reviewing the record, the Board concludes Applicant has not met that burden. In this case, the Judge's adverse credibility determination is based upon a permissible interpretation of the record evidence. It is supported by substantial evidence and is not arbitrary, capricious or contrary to law.

(2) Applicant also contends that he did not deliberately falsify his security clearance application by failing to disclose adverse information about his financial problems in response to two different questions. 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. 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 omissions were deliberate and intentional. On this record, the Judge's findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1; *See, e.g.*, ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

¹The Judge found in Applicant's favor with respect to SOR paragraphs 1.k, 1.l, and 1.m. Those favorable findings are not at issue on appeal. As part of his appeal, Applicant offers new evidence in the form of additional explanations about post hearing efforts to resolve his outstanding indebtedness. The Board cannot consider this 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. 05-03143 at 2 (App. Bd. Dec. 20, 2006).

(3) Finally, Applicant argues that the Judge erroneously weighed the evidence in this case and that her overall unfavorable decision under Guidelines F, J and E failed to consider the whole person concept and is arbitrary, capricious and contrary to law. The Board does not find this argument persuasive.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by his disqualifying conduct had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *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 weighed the mitigating evidence offered by Applicant against the nature and seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in favor of the Applicant with respect to several of the factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative 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 her, the Judge's ultimate unfavorable clearance decision under Guidelines F, J and E is sustainable.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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