

KEYWORD: Guideline F; Guideline E

DIGEST: After the government presents evidence raising security concerns the burden shifts to the Applicant to establish mitigation. Adverse decision affirmed.

CASENO: 06-16159.a1

DATE: 01/10/2008

DATE: January 10, 2008,

| | |
|------------------------------------|------------------------|
| _____) | |
| In Re:) | |
|) | |
| -----) | ISCR Case No. 06-16159 |
|) | |
|) | |
| 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 October 16, 2006, DOHA issued a statement of reasons (SOR) 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 August 23, 2007, after the hearing, Administrative Judge LeRoy F. Foreman 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 in concluding Applicant's falsification of his security clearance application was deliberate; whether the Judge's unfavorable clearance decision under Guideline F is arbitrary, capricious, or contrary to law.

(1) Applicant argues that he did not deliberately falsify his response to two questions on his security clearance application by failing to disclose multiple debts that had been delinquent for more than 90 or 180 days. In support of that argument, Applicant contends that he failed to disclose the information because he misunderstood the scope of the questions. Applicant's argument does not demonstrate that the Judge erred.

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 finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1. His ultimate unfavorable clearance decision under Guideline E is sustainable.

(2) Applicant also argues that the Judge should have concluded that the security concerns raised by his history of financial difficulties had been mitigated because his indebtedness had resulted from a failed business venture approximately six years ago, and the circumstances which led to his financial problems were not likely to recur. In support of this argument, Applicant submits additional documentary evidence which was not submitted at the hearing. He also cites to several DOHA Hearing Office decisions in which an applicant in ostensibly similar circumstances was granted a clearance. 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 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 Board gives due consideration to the Hearing Office cases which Applicant has cited in his appeal brief. However, such decisions are not binding on Hearing Office Judges or on the Board. *See* ISCR Case No. 05-14853 at 3 (App. Bd. Sep. 24, 2007). They do not demonstrate error in this case. *See* ISCR Case No. 06-18340 at 2 (App. Bd. Oct. 3, 2007).

Once there has been a concern articulated regarding an applicant's security eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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 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 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).

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the Guideline F allegations had not been mitigated. Although the 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.

In this case, the Judge found that Applicant had a history of not meeting financial obligations which extended over many years. At the time the case was submitted for decision he still had approximately \$96,000 in outstanding debts and “. . . had made no effort to pay any of the debts alleged, even though he had the means to do so.”¹ In light of the foregoing, the Judge could reasonably conclude that Applicant’s financial problems were recent and still ongoing. The favorable record evidence cited by 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. Jun. 29, 2005). 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 sustainable.

Order

The decision of the Judge denying Applicant a security 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

¹Decision at 6.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board