

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the evidence. Applicant failed to demonstrate that the Judge mis-weighed the evidence in his analysis of the mitigating conditions. Hearing Office decisions are not binding on other Hearing Office Judges or on the Board. Adverse decision affirmed.

CASE NO: 12-07735.a1

DATE: 06/12/2013

DATE: June 12, 2013

In Re:)	
)	
-----)	ISCR Case No. 12-07735
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Gabriel Pene, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 3, 2012, DoD 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 March 29, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant petitioned for Chapter 7 bankruptcy relief in May 1996 and received a discharge of \$188,000 of unsecured debts in August of that year. He accumulated 15 delinquent debts totaling more than \$27,000 since 1996. Applicant owned a plumbing business that was not successful, and his daughter misused his credit cards. Applicant has satisfied some of the debts with accumulated payments of \$3,000. He has received no financial counseling. He has a net monthly remainder after expenses of about \$1,400. He has no money left from his 401(k) to address his debts. He has satisfied all of his old federal and state tax debts, is current with his mortgage, and has acquired no new credit cards.

Applicant failed to disclose his failures to pay taxes for tax years 2008 and 2009 on his security clearance application (SCA). On the same form he omitted his wage garnishments from 2004 through 2010, and his various delinquent debts. The omissions were made knowingly and wilfully. Applicant volunteered the omitted information during his interview, except some liens for back taxes dating to 1986.

The Judge concluded: Under Guideline F, Applicant still owes in excess of \$13,000 in delinquent debts and he has not pursued financial counseling nor explored debt repayment programs. He has no organized budget or plan in effect to resolve his remaining debts. The evidence is insufficient to demonstrate that Applicant has mounted good-faith efforts over the 15 years since his bankruptcy discharge to satisfy his outstanding debts. Regarding Guideline E, Applicant's withholding of material information about his finances and the timing of his corrections are insufficient to enable him to refute or mitigate the falsification allegations.

Applicant argues that the Judge did not take into consideration the evidence presented and that Applicant did, in fact, testify honestly and voluntarily regarding his financial circumstances, and he produced evidence mitigating the Department's concerns. Regarding Guideline F, the incidents causing the outstanding debts were based on circumstances that are unlikely to occur again (sole proprietor, student loan debt); he had demonstrated a good-faith effort to repay overdue debts; and he now lives well within his means. Regarding Guideline E, he states that the omissions from his SCA were the result of inattention in completing the form and his complicated financial history. He argues that a conclusion that some facts were mistaken or forgotten in the moment is a more reasonable conclusion than Applicant admitting a large portion of his delinquencies but intentionally concealing a small fraction of them. Applicant's assertions do not establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.,* ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome these presumptions. Applicant's arguments appear to go more toward the weight that the Judge assigned to the evidence. Applicant cites to numerous facts that he asserts work in his favor, including the length of time since his bankruptcy, the circumstances of the failed

business that prompted the bankruptcy, and actions Applicant undertook recently to address his outstanding debt. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence.

In this case, the Judge made sustainable findings that Applicant had a lengthy and serious history of not meeting financial obligations. He noted that despite some progress, at the time of the hearing, Applicant still had a significant amount of overdue indebtedness. Applicant was still without a plan to pay off major student loans and two remaining consumer debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. *See, e.g.*, ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007). A review of the Judge's decision reveals that, regarding Guideline F, the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in his analysis. The Judge found in favor of Applicant as to a number of the Guideline F allegations. However, the Judge offered a narrative explanation as to why the disqualifying conduct under Guideline F was not fully mitigated. The Board concludes that the Judge appropriately weighed the Guideline F mitigating evidence against the seriousness of the disqualifying conduct.

Regarding Guideline E, Applicant's arguments on appeal focus on the disclosures Applicant made to an interviewing agent after submission of the SCA, and the complicated nature of Applicant's finances. The SOR alleged three falsifications of Applicant's SCA, wherein Applicant answered all questions in the financial section in the negative, and he did not disclose any part of his delinquent debt history. Applicant's later disclosures, though relevant, were not of a nature to compel the Judge to conclude that Applicant's SCA omissions were the product of carelessness or inadvertence, nor were the disclosures of sufficient strength in terms of mitigation so as to require a favorable outcome from the Judge. The Judge found omissions regarding tax delinquencies (SOR allegation 2.a.) against Applicant, but resolved the other two falsification allegations in his favor.

In support of his appeal, Applicant points to decisions by the Hearing Office which he argues support his request for a favorable determination. The Board gives due consideration to those cases. However, each case "must be decided upon its own merits." Directive, Enclosure 2 ¶2(b). Nothing in the decisions cited by Applicant demonstrate error on the part of the Judge in this case.

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 to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for

the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. 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.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Jeffrey D. Billett _____
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

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