

KEYWORD: Guideline J; Guideline F; Guideline E

DIGEST: The Judge discussed the mitigating conditions and why they did not apply to the facts of this case. Applicant's ability to argue for a different interpretation of the evidence is not sufficient to demonstrate error. Adverse decision affirmed.

CASENO: 07-13837.a1

DATE: 09/28/2010

DATE: September 28, 2010

In Re:)	
)	
-----)	ISCR Case No. 07-13837
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

James W. Green, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 17, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), 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 July 20, 2010, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law because she failed to apply pertinent mitigating conditions under Guideline F and Guideline E.¹ For the reasons discussed below, the Board affirms the Judge’s decision.

The Judge made the following relevant findings of fact: Applicant is 50 years old. Applicant served in the military from 1978 until 1998, during which time he held a security clearance. Applicant has worked for his current employer since April 2004 in a position which requires a clearance. Applicant was married to his first wife from 1985 until 1991. Applicant began a relationship with another woman in 1994, and they married in 1997. Applicant undertook court action to dissolve that marriage in 1998, although their financial relationship continued until 2002. Many of Applicant’s financial difficulties arose during that period. Applicant has now been married to his third wife for almost five years. Applicant is responsible for 14 unresolved delinquent debts. Among those, the SOR identifies eight worthless checks, for which judgments of restitution were ordered. Some of the other debts were reduced to judgments as well. After the hearing, the record was held open for Applicant to submit proof of payment of many of the debts, but Applicant did not submit documentation on most of the debts. Applicant is behind on his mortgage payments and failed to provide corroboration of a new mortgage payment plan. Applicant’s net monthly income remainder after expenses and debt payments is \$34. Applicant was served with final judgments in connection with his eviction from four apartments for failure to pay rent. Applicant failed to give correct answers to three questions on his security clearance application involving arrests, civil court actions, and unpaid judgments. As a result, the Judge concluded that Applicant deliberately falsified material facts.

Applicant argues that the Judge committed error when she failed to apply pertinent mitigating conditions under Guideline F and Guideline E. In effect, Applicant is arguing that the Judge either did not consider or did not give adequate weight to his evidence of mitigation. There is a rebuttable presumption that the Judge considered all the record evidence, unless the Judge specifically states otherwise; and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). Applicant admitted many of the SOR allegations against him with explanations. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge discussed the mitigating conditions that might apply in Applicant’s case and explained why she did not apply them. Moreover, the application of disqualifying and mitigating conditions does not turn simply on a finding that one or

¹The Judge found in Applicant’s favor as to the allegations under Guideline J. The Judge’s findings and conclusions under that Guideline are not at issue here.

more of them apply to the particular facts of a case. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. 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*. 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 that 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. 07-18303 at 2-3 (App. Bd. Nov. 13, 2008).

In support of his appeal, Applicant points to three decisions by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). In this case, we also note that one of the cited decisions was overturned by the Board on appeal.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 Judge's adverse security clearance decision is sustainable on this record. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: William S. Fields
William S. Fields

Administrative Judge
Member, Appeal Board