

KEYWORD: Guideline F

DIGEST: The challenged finding is based on substantial evidence. Furthermore there is no indication that the Judge drew any pejorative inferences from the finding. Adverse decision affirmed.

CASENO: 07-15804.a1

DATE: 12/29/2008

DATE: December 29, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-15804
)	
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 April 22, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 8, 2008, after the hearing, Administrative Judge Mark W. Harvey 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 factual findings are supported by substantial evidence; and whether the Judge’s adverse clearance decision under Guideline F is arbitrary, capricious or contrary to law.¹

Applicant contends that the Judge erred as to one of his findings of fact. He also contends that the Judge’s adverse decision should be reversed because the Judge did not give sufficient weight to his mitigating evidence, which indicated that his financial problems resulted from the operation of a business and were unlikely to recur. Applicant has not demonstrated the Judge erred in his findings or that his decision is arbitrary, capricious or contrary to law.

(1) Applicant argues that it was factual error for the Judge to find that: “Because he was passed over for promotion, the Army declined to accept him on active duty as a volunteer in 2001-2002.”² Applicant claims that the erroneous finding demonstrates that the Judge failed to understand the distinguished nature of his military service.³ The Board does not find this argument persuasive.

The finding at issue is based upon Applicant’s own testimony at the hearing: “. . . when I tried to get back in, the Army said no, you’re a lame duck. Because you’ve been passed over twice for major, we won’t take you back in.”⁴ The Judge did not appear to draw any pejorative inferences from that testimony insofar as the distinguished nature of Applicant’s military service was concerned. On the contrary, the Judge later noted in his decision that: “. . . he is an honest, hard-working employee, a good father, and patriot. He is an honorable former Army officer. I have no doubt that he is loyal and would give his life for the United States.”⁵ The Judge then went on to base his adverse decision on the security concerns raised by Applicant’s financial problems stating: “Notwithstanding these positive attributes, he has not established his financial responsibility . . .”⁶

¹The Judge’s favorable findings as to SOR paragraphs 1(d), (g)-(k), (m), and (n) are not at issue on appeal.

²Decision at 3.

³Applicant’s Brief at 1.

⁴Transcript at 23.

⁵Decision at 10.

⁶*Id.*

Accordingly, after reviewing the record, the Board concludes that the challenged finding is based on substantial evidence,⁷ or constitutes a reasonable characterization or inference that can be drawn from the record. There is no record evidence that convinces the Board that, as regards his military service, the Judge misconstrued Applicant's hearing testimony. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

(2) 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge found that Applicant had a serious history of not meeting financial obligations. At the time of the hearing, Applicant still had significant outstanding debts, and was still trying to resolve his financial problems.⁸ 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). The Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He found in favor of Applicant as to several of the SOR allegations. However, he reasonably explained why the mitigating evidence was insufficient to overcome all of the government's security concerns. 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 his 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

⁷Substantial evidence is 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 same 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).

⁸"Applicant learned of the security significance of his delinquent debt when he received the SOR, and did not use the next five months to address his six delinquent SOR debts. He made no real progress in resolving these six delinquent SOR debts." Decision at 11.

U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline F is sustainable.

Order

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

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board