

KEYWORD: Guideline C; Guideline B; Guideline F; Guideline E

DIGEST: At the time the case was submitted for decision, Applicant's debts were still substantially unpaid, and Applicant had offered no proof of any payments in the last two years. Applicant's admission regarding the falsification relieved the government of presenting evidence to establish the facts alleged therein. 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. Adverse decision affirmed.

CASENO: 08-00899.a1

DATE: 07/29/2008

DATE: July 29, 2008

In Re:)	
)	
-----)	ISCR Case No. 08-00899
)	
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 February 7, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence), Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On April 15, 2008, after considering the record, 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 adverse clearance decision under Guidelines F and E is sustainable. Finding no error, we affirm the Judge’s adverse clearance decision.

With respect to the Guideline E allegation, the Judge found that Applicant had deliberately falsified his security clearance application (SCA) when in response to the questions as to whether he had been over 90 days delinquent and over 180 days delinquent on any debts, he answered “no.” In his appeal, Applicant argues that the Judge’s adverse finding is not sustainable because the government did not produce evidence to establish that the unpaid debts were delinquent for more than 90 or 180 days. In the alternative, he argues that the Judge erred, as a matter of law, by not favorably applying any mitigating conditions and whole-person factors because his falsification was an isolated incident and he had subsequently provided the correct information.

With respect to the Guideline F allegations, the Judge found Applicant had two debts in the amount of \$6,542 and \$4,961 which had been placed for collection. In 2004, Applicant had made an agreement with a credit consolidation company (CCC) to resolve the debts, and had made monthly payments toward the agreement in 2004 and 2005. However, at the time the case was submitted for decision, the debts were still substantially unpaid, and Applicant had offered no proof of any payments to the CCC in the last two years. Additionally, there was no evidence that the CCC had negotiated with Applicant’s two creditors in good-faith or had in fact paid the creditors anything. In his appeal, Applicant argues that the Judge erred, as a matter of law, by not favorably applying any mitigating conditions and whole-person factors because his indebtedness was an isolated incident that had resulted from a loss of employment, and he had established a repayment plan sufficient to show that the problem is under control. Applicant’s arguments do not demonstrate that the Judge’s adverse decision under Guidelines F and E is arbitrary, capricious or contrary to law.¹

In his Answer, Applicant admitted without explanation to the falsification of his SCA as alleged in SOR paragraph 4(b). That admission relieved the government of presenting evidence to

¹Applicant also argues that loss of his clearance will adversely impact his personal and employment status. The adverse impact of a clearance decision on an applicant is not relevant or material to an applicant’s security eligibility. *See* ISCR Case No. 03-21012 at 4 (App. Bd. Aug. 31, 2005).

establish the facts alleged therein. *See* Directive ¶ E3.1.14. As a result, the burden shifted to Applicant to present evidence to rebut, explain, extenuate, or mitigate the facts he had admitted, and he had the ultimate burden of persuasion as to obtaining a favorable clearance decision. *See* Directive ¶ E3.1.15.

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).

Applicant elected to have his case decided on the written administrative record. As a result, the Judge did not have an opportunity to question him about the SOR allegations and evaluate his credibility in the context of a hearing. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge found in favor of Applicant under Guidelines C and B. However, the Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns under Guidelines F and E. The Board does not review a case *de novo*. 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. 06-11172 at 2 (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 U.S. 518, 528 (1988). Accordingly, the Judge's ultimate adverse decision under Guidelines F and E is sustainable.

Order

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

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