

DATE: October 9, 2009

| | | |
|----------------------------------|---|------------------------|
| In Re: |) | |
| |) | |
| |) | |
| |) | ISCR Case No. 08-05020 |
| |) | |
| 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 March 30, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On July 30, 2009, after considering the record, Administrative Judge David M. White denied Applicant’s request for a security clearance. Applicant 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 is arbitrary, capricious or contrary to law.

Applicant argues that the Judge's adverse decision is unfair because the Judge relied on an investigative file prepared by persons who did not believe Applicant. Applicant contends that mitigating evidence was not considered, and questions were not posed of the investigative body regarding possible weaknesses in the (unfavorable) theory of the case. Applicant has not demonstrated that the Judge's decision is arbitrary, capricious or contrary to law.

The Judge found that Applicant participated in a scheme to exploit her status at a military exchange overseas to purchase exchange merchandise for foreign nationals ineligible to make such purchases. He further found that her denials were not credible and constituted the deliberate provision of false information to her employers and the investigators. The Judge's adverse findings were based on substantial evidence and are sustainable. (See Directive ¶E3.1.14 and ¶E3.1.32.1.)

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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). 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).

In this case, the Judge weighed the evidence and the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. The Judge reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Furthermore, Applicant has not provided a cogent reason on appeal to disturb the Judge's credibility determination. Applicant's argument on appeal about questions the Judge could have asked is unpersuasive. Applicant elected to have her decision on the written record. Thus, there was no mechanism for the Judge to ask questions. Also, the burden is on Applicant to make her case in mitigation, rebuttal or extenuation, not on the Judge who is an impartial adjudicator. (See Directive ¶E3.1.10, ¶E3.1.15 and ¶E3.1.25.)

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 denying Applicant a security clearance is AFFIRMED.

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

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

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