

KEYWORD: Guideline F

DIGEST: Applicant claim that Judge did not consider his post-hearing submission is not persuasive in light of the Judge's multiple citations to documents from the submission. Adverse decision affirmed.

CASENO: 08-09251.a1

DATE: 02/03/2010

DATE: February 3, 2010

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| Applicant for Security Clearance |) | |
| _____ |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq. and Stephanie Mendez, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 27, 2009, DOHA 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 October 29, 2009, after the hearing, Administrative Judge Mary E. Henry 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 issues on appeal: (1) whether the Judge considered all the record evidence; and (2) whether the Judge’s decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge found that Applicant has experienced financial difficulties since 2003. He has accumulated significant delinquent debt which he has not paid. His financial problems appear to be worsening, despite the fact that he has returned to work after being laid off for a year. Applicant does not have a track record of debt repayment. Applicant knew about his financial problems when he completed his security clearance application, but was not forthright in his answers. The Judge concluded that neither Applicant’s financial problems nor his lack of candor were mitigated.

After the hearing, the Judge left the record open to allow Applicant to submit additional documentary evidence. Applicant subsequently made a large submission containing 16 documents. Applicant argues that the Judge did not consider this evidence when deciding the case. Applicant has failed to establish that the Judge erred.

Applicant cites various matters in the record that he asserts provide mitigation of the government’s concerns, and claims that the Judge could not have reached the conclusions she did given the state of the evidence contained in the post-hearing submission. There is a rebuttable presumption that a Judge has considered the entirety of the record evidence unless he or she indicates otherwise. That presumption is not overcome here. A review of the post-hearing submission and the Judge’s decision reveals that (a) the Judge specifically references substantive matters contained in documents included in the post-hearing submission; and (b) the Judge’s findings of fact contain footnoted references to specific portions of the record, a number of which are accurately identified as documents in the post-hearing submission. In addition to his contentions regarding the Judge’s failure to consider his post-hearing submission, Applicant also argues more broadly that the Judge did not consider favorable evidence submitted by Applicant prior to his post-hearing submission—essentially all the mitigating evidence submitted by Applicant in the case. This claim is not viable.

Applicant also argues that the evidence in mitigation mandates a favorable case outcome under both Guidelines F and E. Applicant has not established error. 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 mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. She discussed the applicability of Guideline F Mitigating Conditions and cogently explained why there was insufficient mitigation to overcome the government’s security concerns, stressing the facts that Applicant’s debts are of a longstanding nature and he has yet to take meaningful steps to address them. The Judge also discussed why the Guideline E mitigating conditions could not be applied in Applicant’s favor to overcome the concerns raised by his lack of truthfulness in completing his security clearance application.

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 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 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