

KEYWORD: Guideline F

DIGEST: The Board and the Judge are bound by the provisions of the Directive. The Board does not have authority to waive provisions of the Directive. Nor does it have authority to entertain challenges to the wisdom or legality of the Directive. Adverse decision affirmed.

CASENO: 09-01280.a1

DATE: 01/10/2011

DATE: January 10, 2011

In Re:)
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-----) ISCR Case No. 09-01280
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Applicant for Security Clearance)
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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 11, 2010, 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 September 7, 2010, after the hearing, Administrative Judge Jennifer I. Goldstein 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. Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following factual findings: Applicant is 47 years old and is currently married to his fifth wife. The SOR alleges 39 delinquent debts totaling \$42,919. Applicant admits all of the debts with some qualifications. Applicant has not made payments on 32 of the debts. Applicant is indebted to a state Attorney General for \$22,000 for delinquent child support. Applicant currently makes child support payments through payroll deductions and has disputed the amount of the arrearage with the state, but the state has not reduced the amount of his debt. Applicant attributes his financial situation to "bad spending habits," *i.e.*, buying things on the internet which he did not need. Decision at 3. Applicant's financial difficulties are ongoing, and his monthly expenses exceed his income. Applicant intends to file for Chapter 7 bankruptcy, but cannot do so until he pays his attorney's full retainer fee.

Applicant maintains that the Judge did not give adequate attention to his case and makes general comments about the fairness of the decision. To support his argument, Applicant points to the Judge's statement that she had not reviewed Applicant's case before the hearing. Applicant also contends that the Judge incorrectly stated the dates of his marriages and divorces. The fact that the Judge did not review Applicant's case before the hearing is not indicative of error, since Applicant's testimony and the parties' evidence submitted at the hearing and afterward were important parts of the record which were not available to the Judge prior to the hearing. Applicant's attribution of error with regard to the dates of his marriages and divorces is clearly without basis, since the Judge did not include any marriage or divorce dates in her decision. Likewise, Applicant's comments on the fairness of the decision, especially concerning the clearances granted to others who he says were later convicted of espionage, do not establish error, since the Board and the Judge are bound by the provisions of the Directive as they apply to Applicant's case. The Board does not have the authority to waive provisions of the Directive. *See, e.g.*, ISCR Case No. 08-08012 at 2 (App. Bd. Nov. 20, 2009). Nor does the Board have the authority to entertain challenges to the wisdom or legality of provisions of the Directive. *See, e.g.*, ISCR Case No. 09-03724 at 2 (App. Bd. Mar. 23, 2010); and ISCR Case No. 04-01961 at 3 (App. Bd. Jul. 12, 2007).

Applicant contends that he has mitigated any concerns that might exist under Guideline F and that the Judge either did not consider or did not give adequate weight to his evidence of mitigation. In his appeal, Applicant restates some of the mitigating evidence that is contained in the record. In particular, Applicant states that he submitted documentation (Applicant Exhibits (AE) B-D) after the hearing, according to the Judge's instructions; yet he does not believe that the Judge mentioned those materials in her decision. 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. 07-18303 at 2 (App. Bd. Nov. 13, 2008). Applicant submitted one exhibit at the hearing and three while the record was held open afterward. The Judge cited all four exhibits in her decision, specifically mentioning Applicant's dealings with his bankruptcy attorney (AE C) and his current child support payments (AE D).

Applicant admitted, with some qualifications, the SOR allegations against him. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or 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*. Here, the Judge did not give as much weight to Applicant's mitigating evidence as Applicant would have liked. However, 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. 08-01105 at 2 (App. Bd. Dec. 15, 2008).

Applicant points out that being denied a security clearance would have an adverse impact on his career and his continued ability to improve his financial situation. However, the effect that an unfavorable decision may have on an applicant is not a relevant or material consideration in evaluating his or her security eligibility. *See, e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against his financial history and considered the possible application of relevant mitigating conditions and whole person factors. Decision at 5-7. The Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. The Judge made favorable formal findings concerning two of the debts alleged in the SOR. *Id.* 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).

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, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines 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.'" *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). A history of financial problems is a circumstance that raises security concerns. *See, e.g.*, ISCR Case No. 03-09483 at 4

(App. Bd. Nov. 17, 2004). In light of the record here, the Board concludes that the Judge had a rational basis for concluding that Applicant's history of financial difficulties raised such concerns and that Applicant did not present evidence sufficient to extenuate or mitigate those concerns. Accordingly, the Judge's decision is sustainable.

Order

The Judge's decision 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