

KEYWORD: Guideline F; Guideline J; Guideline E

DIGEST: There is a rebuttable presumption that the Judge considered all the record evidence. Applicant has not overcome that presumption. Adverse decision affirmed.

CASENO: 09-07105.a1

DATE: 11/12/2010

DATE: November 12, 2010

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In Re: )  
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 ---- ) ISCR Case No. 09-07105  
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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 23, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations),

Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On August 24, 2010, after considering the written record, Administrative Judge Noreen A. Lynch 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: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings: In March 1996, Applicant filed for Chapter 7 bankruptcy. He received a discharge the same year. After the bankruptcy, Applicant worked full time until October 2001, when he was unemployed until February 2002. He changed jobs but remained employed up to the present. Applicant reported having financial problems in April 2006, when he was forced to change positions resulting in a \$28,000 pay reduction. In 2008, his wife lost her job. At about the same time, the interest rates on Applicant's two adjustable rate mortgages increased from four to seven percent. Applicant defaulted on both. The accounts were charged off for an approximate total of \$222,000. In July 2010, Applicant agreed to pay \$200 and \$500 respectively until the two accounts were paid in full. Applicant has not provided any documentation to support his assertion that he started making payments in May 2010.

The Judge made the following additional findings: In 1989 Applicant stole property from passengers' baggage while employed as a baggage handler with an airline. After finding him guilty, the court sentenced Applicant to six months probation. Applicant's charges were dismissed in 1991. In August 2008, Applicant and his family sustained injuries in an automobile accident. Applicant forged the signature of his supervisor on an insurance company document to verify time and compensation for lost wages. Applicant was charged with giving false/misleading information, fraud and attempted theft. He pleaded guilty to one count of false/misleading information, received unsupervised probation before judgment and was ordered to pay a fine and court costs. On a set of interrogatories given to Applicant in 2009, he indicated that the case was "thrown out without any probation," and did not list any probation in his interrogatory answers.

The Judge reached the following conclusions: Applicant had a fresh start in 1996 after filing for Chapter 7 bankruptcy. He was steadily employed after that, other than several months of unemployment in 2001. Reduction in his salary, his wife's job loss, and the increase in mortgage rates may have exacerbated Applicant's ability to meet his obligations, but he provided no information about his efforts to otherwise meet his obligations. Mitigating conditions do not apply. Despite circumstances that impacted on his finances, Applicant did not act reasonably under the circumstances by allowing his delinquent debts to go unpaid. There is no record of any attempts to eliminate his debt until after he received the SOR. Applicant has not provided evidence of any consistent payment plans. He has not provided documentation to support his claim that he entered into a repayment plan in May 2010. Although there was a 20-year gap in time between Applicant's two crimes, he has not shown any insight into his behavior. He has not been successfully rehabilitated and shows a pattern of untrustworthy behavior. Applicant admitted that he deliberately

falsified material facts in his 2009 response to interrogatories. He did not disclose his guilty plea and one-day probation. His answer that the case “was thrown out” is misleading. In light of his later professed confusion and his past history of untrustworthy behavior, the Judge did not find his later explanations credible. The Judge expressed serious doubts about his good judgment and reliability. Applicant has not mitigated the security concerns under the three referenced guidelines.

Applicant asserts that he submitted documents describing his side of the case, and the Judge’s findings indicate that the matters he submitted were not considered. Applicant’s argument does not establish error on the part of the Judge. There is a rebuttable presumption that the Judge considered all the evidence. After a review of the record and the Judge’s decision, the Board concludes that Applicant has not overcome this presumption. The Judge specifically references several of the documents submitted by Applicant in response to the government’s File of Relevant Material and discusses Applicant’s version of some of the events covered by the SOR.

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 mitigating conditions. She adequately discussed why the disqualifying conduct established under Guidelines F, J and E was not mitigated.

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: Jeffrey D. Billett

Jeffrey D. Billett  
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