

KEYWORD: Guideline F

DIGEST: The Board cannot consider new evidence on appeal. Judge’s material findings of security concern were supported by substantial record evidence. Applicant is responsible for presenting evidence in rebuttal, extenuation, or mitigation. Adverse decision affirmed.

CASE NO: 09-07424.a1

DATE: 08/16/2011

DATE: August 16, 2011

)	
In Re:)	
)	
-----)	ISCR Case No. 09-07424
)	
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 July 20, 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 May 25, 2011, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 is arbitrary, capricious or contrary to law.

Applicant contends that the Judge's adverse decision should be reversed because the evidence presented at the hearing was sufficient to mitigate the government's security concerns. In support of this contention, he argues that the Judge mis-characterized some of the evidence and did not give sufficient weight to his repayment efforts, his favorable employment references, and the fact that he has been in his current job for more than two years without a security infraction. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

Applicant's disagreement with the Judge's characterizations is based in part on evidence which either postdates the hearing, or predates the hearing but ". . . was never brought up at the hearing as [Applicant] did not think it was applicable." Applicant's Brief at 1. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29. After reviewing the record that was before the Judge, the Board concludes that her material findings of security concern are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from that record. Applicant has not identified any harmful error likely to change the outcome of the case. Based on the record as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.,* ISCR Case No. 09-05554 at 3 (App. Bd. Mar. 14, 2011).

Applicant's brief raises the possibility of the Board or the Judge contacting outside parties to buttress Applicant's position. The Applicant is responsible for presenting witnesses and other evidence to rebut, extenuate or mitigate facts admitted by the Applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable 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*. 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. 10-01209 at 2 (App. Bd. Apr. 28, 2011).

In reaching her decision, the Judge considered the totality of Applicant's situation, including the origins of his indebtedness, his efforts to resolve his financial problems, and his favorable employment record. Decision at 2-7. She weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, considered the possible application of relevant conditions and factors, and reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. Decision at 8-12. 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. 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 unfavorable security clearance decision under Guideline F 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: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board