

KEYWORD: Guideline B; Guideline E; Guideline F; Guideline C

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Debt payment is not the only factor in evaluating Guideline F concerns. The manner and timing of repayment is also relevant. Hearing Office decisions are not mandatory authority, either for other Hearing Office Judges or the Appeal Board.

CASE NO: 10-05909.a1

DATE: 09/27/2012

DATE: September 27, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-05909
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 20, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 13, 2012, after the hearing, Administrative Judge Rita C. O’Brien denied Applicant’s request for a security clearance. Applicant timely appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge failed to consider all the relevant evidence and whether the Judge's adverse conclusions under Guidelines E and F were arbitrary, capricious, or contrary to law.¹ For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following pertinent findings of fact: Applicant is 56 years old. From 1992 to 2004, he and a partner owned a pizza restaurant. The business declined and in 2002, Applicant filed for bankruptcy protection under Chapter 13. He successfully completed the plan and the bankruptcy was discharged in 2005. He sold the restaurant in 2004 and was unemployed thereafter until 2006. He worked from May until December of 2006 and was subsequently unemployed until November 2007. He was unemployed again from February to May 2008. He started his current job in August 2008.

The IRS filed three tax liens totaling \$12,981 against Applicant for unpaid taxes in 2002, 2003, and 2006. The liens for 2002 and 2003 related to his pizza business while the 2006 lien was for his personal income taxes. He contacted the IRS starting in 2009 and visited his local IRS office when he was in the United States. Applicant paid \$21,831 in December, 2011 to satisfy the liens, using funds from his current employment. He waited until December 2011 to pay the debts because he did not know how to pay online. The evidence is unclear on whether Applicant has paid all of the taxes he owed.

From May until December 2006, Applicant worked for Company W (W), where he was under contract to work for X in a forward area. Applicant had difficult relations during his work with X, and his supervisors were not satisfied with his performance. Applicant frequently complained about work assignments, working conditions, and long hours. Applicant was counseled about the way to resolve grievances, but did not follow the guidelines given him. He was removed from three work areas because of personal issues. Applicant was described as unsuitable for work in the particular environment in which he was assigned. One manager was concerned that Applicant was exposed to sensitive and classified aspects of operations and that some of Applicant's complaints were made without regard to operational security. In one incident, Applicant acted in a belligerent manner toward a female worker.

After the incident with the female, Applicant was informed that he was no longer required for duty and should stand down. He was told that he would be flown out of his duty station at X and paid until the end of his contract, which ended approximately two weeks later. Applicant was instructed to return to his work station prior to departure to be debriefed and to discuss security obligations. Applicant left without notice and without signing a required non-disclosure agreement and without being debriefed. Subsequent to his departure from the X work site, Applicant met with W's regional manager about the events at X. He was told he would be flown home and to surrender his CAC card because he was no longer a W employee. Subsequent statements by Applicant support the manager's version of events, and Applicant indicated in those statements that he had been fired.

¹The Judge made formal findings in favor of Applicant with regard to the allegations under Guidelines B and C. Those favorable findings are not at issue on appeal.

Applicant's last interactions with W became acrimonious, and involved yelling and exchanging insults over the phone.

Applicant completed a security clearance application in July 2009. On that application, he answered "no" when asked if, within the previous seven years, he had been fired, quit, left under unfavorable circumstances, or was laid off from a job. In an affidavit dated October 2009, Applicant stated that he had not been released from duty by X, or terminated by W. He stated during a security interview that same month that he had never been involuntarily terminated from his employment. In a February 2012 statement, Applicant categorically denied that he had been informed that he was fired from any job. At his hearing, he testified that he was not terminated by either X or W, and that he left the job only because his contract with W had ended.

The Judge reached the following conclusions: Regarding financial delinquencies, for full mitigation, Applicant is required to act reasonably under the circumstances. He acted reasonably by keeping the IRS informed of his status regarding the three liens. However, Applicant has been employed full-time since 2008. His salary increased from \$20,000 to \$ 80,000 and he amassed substantial savings in that time. He was aware since mid-2009 that the tax debts were a security concern, yet he did not pay them until December 2011. He paid the debts in a lump sum about three months before his security clearance hearing. Despite the payment, Applicant did not make a good-faith effort to pay the legitimate debt because he waited to do so until he was forced by the security clearance process. His statement that he waited to pay the debt because he did not know how to pay online is not credible.

Applicant failed to inform the government that he had been terminated from his position with X and W when he completed his security clearance application. Even if Applicant did not realize he had been terminated, he knew the circumstances were unfavorable when he left W's employment. The record contains no evidence that Applicant made an effort to correct his failure to disclose his termination. He continued to state that he was never terminated when he completed his affidavit, during his security interview, and at the hearing. His falsification is not mitigated. Applicant's conduct at times while he worked with X was inappropriate. Some of his actions raised security concerns as well. His actions cast doubt on his judgment and reliability.

Applicant asserts that the Judge failed to consider properly all available evidence submitted by Applicant, including mitigating documentary evidence, and that the Judge failed to properly apply applicable mitigating conditions. There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 11-03433 at 2 (App. Bd. Mar. 13, 2012). Thus, there is a presumption that the Judge properly considered those mitigating conditions in the Adjudicative Guidelines that were applicable to the case. Similarly, a Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome these presumptions.

Applicant contends that the Judge ignored the fact that he paid off the three tax liens. A reading of the Judge's decision indicates that it was her clear understanding that the tax lien debt had

been retired. To the extent that Applicant argues that the Judge was obligated to mitigate the financial considerations issues based on the mere fact of repayment, such argument is unpersuasive. The manner and timing of debt repayment were matters that the Judge was entitled to consider. The Judge rejected as not credible Applicant's assertion that his lack of knowledge about online payments was responsible for the delay in retiring the debt. The Judge concluded that the impending security clearance process was the major factor in prompting Applicant to act. This conclusion is reasonably supported by the record evidence as is the Judge's conclusion that Applicant had sufficient funds to retire the debt a year or two before he actually did so, and thus had not acted in good faith.

Regarding the issues under Guideline E, Applicant cites to evidence offered by a witness at the hearing that W had a reputation for conflicts with employees in Applicant's job category involving falsifying reports and intimidation. Applicant claims that the witness's testimony establishes that the unfavorable evidence concerning Applicant's job performance came from an unreliable source. The Judge specifically mentioned this witness's testimony in her findings of fact, but based none of her conclusions upon it. Rather, the Judge concluded that Applicant's workplace behavior exhibited poor judgment and questionable reliability. This indicates that she found the government's evidence about Applicant's work history to be credible. By challenging the Judge's conclusions on this point, Applicant is merely arguing for a different interpretation of the record evidence. Applicant has failed to establish that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, Applicant's argument does not speak to the issue of Applicant's falsification. Regardless of the merits of X's and W's contentions regarding Applicant's on-the-job behavior and performance, objective evidence on the record, with much of the evidence coming from Applicant himself, clearly indicates a stormy relationship and separation between X, W, and Applicant. The circumstances surrounding Applicant's termination of employment mandated a "yes" response on the security clearance application and during subsequent phases of the security clearance investigation. The record reasonably supports the Judge's conclusion that Applicant deliberately sought to conceal the details behind his termination from his employers. The record also supports her conclusion that the acts of falsification were unmitigated.

Applicant cites to other Hearing Office cases, which he argues support his position that he ought to be granted a security clearance. The Board gives these cases due consideration. However, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 10-05738 at 3 (App. Bd. Jun. 26, 2012). Nothing contained in the cited cases establishes error on the part of the Judge in the present case.

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).

As indicated in a previous paragraph, Applicant’s appeal brief essentially argues for an alternate interpretation of the record evidence.

The Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guidelines F 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: 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