

KEYWORD: Guideline F; Guideline E

DIGEST: Appeal Board cannot consider new evidence on appeal. A Judge is presumed to have considered all of the evidence in the record. An ability to argue for an alternative interpretation of the evidence is not sufficient to demonstrate error. Adverse decision affirmed.

CASE NO: 11-07821.a1

DATE: 02/25/2013

DATE: February 25, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-07821
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 27, 2012, DoD 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 November 16, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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: (1) whether the Judge failed to consider record evidence; and (2) whether the Judge erred in his application of mitigating factors. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 55 years old. He has been married since 1989 and he has three minor children. He owns a house in Greece given to him by his father which is worth \$175,000. Applicant earns \$127,750 per year. His delinquent debts include a \$96 medical bill, credit card debts in the amounts of \$22,370, \$10,482, \$6,907, \$13,299, and \$48,000, and a delinquent home mortgage in the amount of \$68,991. In June or July 2010, Applicant enrolled in a debt consolidation program after he received letters from collection companies. Two of the creditors would not deal with Applicant's debt consolidation company. Applicant was unable to resolve these debts by contacting the creditors directly. He made payments to the debt consolidation company until about December 2010, when he terminated the relationship because the fees were too high and the debts were not being paid.

In January 2012, Applicant accepted an offer to settle the \$6,907 credit card debt for \$3,600. As of the date of the hearing, he had timely made nine out of twenty four monthly payments of \$150. In May 2012, Applicant accepted an offer to settle the \$22,370 debt for \$13,422. As of the date of the hearing, he had timely made the first four monthly payments of \$560. By May 2012, Applicant had made no payments on the \$10,482 debt, the \$13,299 debt, and the \$48,000 debt. In October 2012, Applicant indicated that he disputed these debts. The documentation of the disputes does not reflect the basis of the dispute. Applicant simply stated, "My account balance is incorrect." He testified that he will begin making payments as soon he and the creditors agree on the balances due. Applicant provided evidence of his unsuccessful attempts to obtain documents pertaining to the \$48,000 debt. The records he submitted dated from August 2010 and show a balance of \$36,869, of which \$13,212 was past due. He had not received responses relating to his disputed debts as of October 23, 2012, the date the record closed.

The delinquent home mortgage resulted from the 2004 purchase of an \$845,000 house. The initial interest rate was 2.5% but it increased to 8% after the first year. He testified that he knew he had an adjustable-rate mortgage, but he did not realize at the time that there was no cap on the interest rate. Applicant's spouse, who had been earning about \$45,000 per year, was laid off in 2009. Applicant was unsuccessful in getting a loan modification. He then entered into a long period of negotiations with the mortgage company. He claims that the mortgage company was guilty of fraud. He sued the mortgage company and the suit was settled, although it is not clear what relief, if any, Applicant received as a result of the lawsuit. His most recent credit report reflects that his monthly payments are \$2,875, but it does not reflect any reduction in the principal amount of the loan.

When Applicant submitted his security clearance application (SCA) in October 2010, he answered "no" to all questions pertaining to financial difficulties. He told the security investigator that he answered "no" because none of the debts had been referred for collection, none of his credit cards had been suspended, and he did not believe his debts were delinquent because he was engaged in negotiations to keep them from becoming delinquent. At the hearing, Applicant testified that he

believed that all his accounts were current when he submitted his SCA.

The Judge reached the following conclusions: Applicant's debts are numerous and most of them are unresolved. Some of the delinquencies arose under circumstances unlikely to recur, and Applicant acted responsibly regarding his mortgage and some of the credit card debts. However, he has not acted responsibly regarding the \$96 medical debt, the \$10,482 debt, the \$13,299 debt and the \$48,000 debt. These debts are not resolved. Regarding disputed debts, Applicant offered no testimonial or documentary evidence showing why he thought the balances were incorrect or what he believed the balances should be. The timing of his disputes and the absence of any articulation of the basis for the dispute suggests that he is using the dispute mechanism as a bargaining tool to negotiate a settlement for less than the full amount due. Applicant deliberately falsified his answers to two of the four SCA questions alleged in the SOR. The falsifications were not minor because they undermined the integrity of the security clearance process. They were recent, and he persisted in his falsifications as recently as his January 2011 security interview. Applicant has not mitigated the security concerns based on his financial problems and his personal conduct.

Applicant asserts that the Judge's decision disregards record evidence, including documentary evidence that he submitted, and that the Judge did not properly consider the mitigating evidence under Guideline F. There are numerous assertions made in Applicant's appeal brief that are not supported by record evidence. Chief among these are Applicant's statements that the \$96 medical bill, the \$10,482 debt, and the \$13,299 debt have been paid in full. There is no record evidence to support these assertions and it was not Applicant's position that he had paid these debts at the point of the close of the record in this case. The Board cannot consider new matters not contained in the record. *See* Directive ¶ E3.1.29.

Applicant argues that the Judge failed to consider record evidence, asserting variously that the Judge did not consider efforts that Applicant has made to contact his creditors, did not consider proof of Applicant's legitimate disputes involving the unresolved debts, did not consider the fact that Applicant had a 401k account valued at \$550,000 which he could use to retire debts, and did not consider Applicant's exemplary life history, job record, and lack of financial expertise. 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). After a review of the record and the Judge's decision, the Board concludes that Applicant has not overcome this presumption. The Judge discussed at some length Applicant's ongoing relationship with his creditors, the fact that debts were disputed, and he specifically mentioned the 401k in a comprehensive discussion of Applicant's assets. The Judge also discussed aspects of Applicant's career and personal life under the whole person concept.

Applicant argues that proper application of the Guideline F and Guideline E mitigating factors mandated a favorable decision in his case. 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). Applicant'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). Applicant’s appeal arguments essentially set forth his version of the record evidence and as such do not demonstrate error. The Judge made sustainable findings that Applicant had a lengthy and serious history of not meeting financial obligations. Central to the Judge’s Guideline F analysis was his conclusion that Applicant took no action on three large credit card debts for more than two years, then disputed the amounts of those debts shortly before the hearing without offering testimonial or documentary evidence as to why the balances were incorrect or what he believed the balances should be. Regarding Guideline E, Applicant argues that he engaged in no deliberate falsification and argues in the alternative that any such falsification has been mitigated. The Judge’s conclusion that falsifications occurred and that they have not been mitigated is supported by the record.

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 his 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 Judge’s decision 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: James E. Moody

James E. Moody

Administrative Judge
Member, Appeal Board