

KEYWORD: Guideline F

DIGEST: Applicant rebutted the presumption that a Judge has considered all the record evidence by demonstrating that the Judge failed to consider a letter of character reference. However, in light of the entirety of the record evidence, this was a harmless error. Adverse decision affirmed.

CASENO: 08-04624.a1

DATE: 10/28/2009

DATE: October 28, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-04624
)	
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 August 13, 2008, 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 decision on the written record. On July 9, 2009, after considering the record, Administrative Judge Paul J. Mason denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant raises the following issue: whether the Judge's decision is arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm the Judge's decision.

The Judge made the following relevant findings of fact: Applicant is 62 years old and had a lengthy career as a police officer. Applicant now works as a security guard. The SOR indicates that Applicant filed a Chapter 13 bankruptcy petition in April 2005 to protect his house from foreclosure, and the petition was dismissed in May 2005. In October 2005, Applicant filed a Chapter 7 bankruptcy petition and was discharged from all dischargeable debts except for a student loan for his daughter. The SOR lists eight debts, of which Applicant admits two and denies six. Some of the debts in the SOR were discharged in the Chapter 7 bankruptcy, and some Applicant paid after he received the SOR. Applicant attributes some of his financial difficulties to a divorce, to medical expenses related to hair transplant surgery, and to a student loan for his daughter's college education.

In his appeal brief, Applicant presents some information not contained in the record below. The Board cannot consider this new evidence. *See* Directive ¶ E3.1.29.

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Applicant objects to the Judge's characterization of some of the evidence he submitted. After reviewing the record, the Board concludes that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-01105 at 2 (App. Bd. Dec. 15, 2008).

Applicant contends that the Judge did not acknowledge or give proper consideration to his character references. Applicant refers in part to the persons he named as references on his security clearance application and others he assumes an investigator would have interviewed. An applicant has the burden of persuasion to obtain a favorable security clearance decision. *See* Directive ¶ E3.1.15. The Judge had access only to the materials before him. If Applicant wished to have character references from the persons he identified on his application, he had a responsibility to provide written references from those persons. *See* ISCR Case No. 03-08073 at 4-5 (App. Bd. Oct. 25, 2005). Applicant does cite one character reference letter he submitted which he argues that the Judge did not acknowledge. Applicant is correct in this regard. Generally, there is a rebuttable presumption that a Judge has considered all the evidence in the record, even if he does not mention each item of evidence. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). In this case, the Judge stated that Applicant did not submit any character evidence about his job performance. Decision at 4. Applicant did submit a letter from a supervisor at his place of employment in his response to the File of Relevant Material (FORM). The Judge therefore committed error. However, in light of the record as a whole, the error is harmless, since it is unlikely

that the Judge would have reached a different decision based on that one reference letter.

Applicant argues that he has mitigated any security 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. Applicant admitted some of 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*. An 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 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. 07-18303 at 3 (App. Bd. Nov. 13, 2008).

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 factors. Decision at 5-6. The Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *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 his 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). Accordingly, the Judge's adverse decision is sustainable.

Order

The Judge's decision 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board