

KEYWORD: Guideline H; Guideline E; Guideline J

DIGEST: The Judge's adverse conclusion under Guideline H is in direct conflict with his findings of fact. However, the Judge adverse security clearance decision is sustainable on other grounds. Adverse decision affirmed.

CASENO: 04-11181.a1

DATE: 05/08/2007

DATE: May 8, 2007

In Re:	)	
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SSN: -----	)	ISCR Case No. 04-11181
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

Christopher J. Fekete, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 10, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On August

22, 2006, after the hearing, Administrative Judge Philip S. Howe 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 record supports the Judge's conclusion that Applicant's disqualifying conduct under Guidelines H, E, and J had not been mitigated; and whether the Judge's overall security clearance decision was arbitrary, capricious, or contrary to law. The Board affirms the Judge's decision.

Applicant challenges the Judge's conclusion that Guideline H Mitigating Conditions 1,<sup>1</sup> 3,<sup>2</sup> and 4<sup>3</sup> were not sufficient to mitigate the government's concerns about his history of drug abuse. In making his argument, Applicant notes that in his Findings of Fact, the Judge stated, "He [Applicant] has not used controlled substances since his religious conversion experience on May 10, 1998." A reading of the Judge's Findings of Fact reveals that the Judge actually made this finding twice. Applicant asserts that such a finding is in direct and irreconcilable conflict with the Judge's conclusion that ". . . there is no written favorable prognosis or current information on Applicant's use or dependence on controlled substances." On this specific point, Applicant's argument has merit.

In addition to the passage in the Judge's Conclusions quoted by Applicant, the Judge also stated, "The burden is on Applicant to present persuasive evidence on his current drug involvement, if any, after his 1998 diagnosis." Given the Judge's earlier, unequivocal findings that Applicant had not used controlled substances since May 10, 1998, his statement that Applicant had a burden to come forward with evidence of non-involvement with drugs since that date is puzzling.<sup>4</sup> An unqualified finding that Applicant did not use drugs after a certain date necessarily relieves Applicant of producing further evidence establishing the same. The Judge's comments in his Conclusions about the lack of evidence do not flow logically from his Findings of Fact and constitute error. The remaining issue is whether this error impacted on the Judge's decision not to apply the Guideline H Mitigating Conditions. An overall reading of the Judge's comments in his Conclusions section convinces the Board that it did.<sup>5</sup> Inasmuch as error impacting on the application of mitigating conditions occurred, remand to the Judge for reconsideration of the applicability of those factors would ordinarily be appropriate. However, because the Judge's adverse security clearance decision is sustainable on other grounds, remand is unnecessary and the error is deemed harmless.

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<sup>1</sup>"The drug involvement is not recent."

<sup>2</sup>"A demonstrated intent not to abuse any drugs in the future."

<sup>3</sup>"Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse and a favorable prognosis by a credentialed medical professional."

<sup>4</sup>There was record evidence, essentially Applicant's testimony, that provided the basis for the Judge's finding that Applicant had not used controlled substances since May, 1998. The Judge's principal complaint about the state of the evidence in his Conclusions section was that Applicant had not produced a more recent written favorable prognosis or current information on his use or dependence on controlled substances.

<sup>5</sup>The following passage from the Judge's Conclusions is instructive: "The burden is on Applicant to present persuasive evidence on his current drug involvement, if any, after his 1998 diagnosis. He has not done so, and I am not persuaded in considering his history that any MC should apply."

Applicant argues on appeal that the Judge erred by not applying Guideline E Mitigating Condition 4<sup>6</sup> to allegations that he falsified his answers on three security clearance applications executed in June 1986, August 1986, and 2003. Applicant argues, in essence, that the mitigating factor should apply because the personnel officer completed the applications and merely handed them to Applicant for his signature and did not provide detailed instructions to him. The Judge made sustainable findings that Applicant never disclosed anything unfavorable about himself during the entire time he had a security clearance and completed three security clearance applications, notwithstanding the facts that he had an extensive history of illegal drug use, numerous arrests and convictions, and 13 debts whose delinquent status should have been reported. The Judge also noted that Applicant claimed he never read, corrected and changed any information on the security clearance applications when they were presented to him by his company personnel officer, but merely signed them. The record evidence indicates that the personnel officer had a standard practice of meeting with employees during the initial application process to go over individual questions on the application and to record their responses. It was also the personnel officer's standard practice for subsequent applications to ask employees if anything had changed since the previous application. The personnel officer did not specifically recall what she did in the case of Applicant, but testified that she likely followed her standard practice.

The Judge concluded that Applicant's failure to list his arrests, drug use and financial delinquencies were deliberate. In explaining why he was not applying mitigating factors, the Judge stated, "I am not persuaded by Applicant's attempts to shift the obligation to provide a truthful SCA to his company's personnel officer, and make himself a mere naive signatory." On these facts, the Judge's conclusion that Applicant engaged in deliberate falsifications is sustainable, and he was not required, as a matter of law, to apply Guideline E Mitigating Condition 4 in Applicant's favor.

Regarding the allegations brought under Guideline J, Applicant asserts on appeal that his criminal activity between 1982 and 1998 was mitigated. Specifically, Applicant contends that, insofar as the criminal involvement with drugs ended in 1998, it is not recent. However, the Guideline J security concerns alleged in the SOR focus exclusively on Applicant's false statements on two security clearance applications about, inter alia, his drug involvement. It does not allege the underlying drug involvement itself. Because the false statements at issue here were far reaching and numerous and because some were made as recently as 2003, the Judge's conclusion that Applicant had not mitigated the Guideline J security concerns is sustainable. Therefore, Applicant's argument does not establish error on the part of the Judge.<sup>7</sup>

Applicant cites favorable evidence relating to his employment record, honesty, and rehabilitation since 1998 in support of the proposition that he should be granted a security clearance. The Board construes these assertions as an argument that the Judge's overall decision is arbitrary, capricious, or contrary to law. 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

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<sup>6</sup>"Omission of material facts was caused by or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."

<sup>7</sup>Similarly, in a portion of his brief, Applicant argues that he established a case in mitigation regarding his numerous delinquent and overdue debts. The underlying circumstance of unresolved delinquent debts was not alleged in the SOR and was only relevant because Applicant failed to disclose the debts on his security clearance questionnaire.

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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious or contrary to law.

**Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairman, 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