

KEYWORD: Guideline E; Guideline J

DIGEST: Once the government presents evidence raising security concerns, the burden is on the applicant to establish appropriate mitigation. An applicant's security related conduct may be raised under more than one guideline. Adverse decision affirmed.

CASENO: 05-02581.a1

DATE: 05/29/2007

DATE: May 29, 2007

In Re:)	
)	
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SSN:-----)	ISCR Case No. 05-02581
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Robert F. Bethea, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 23, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under 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 September 28, 2006, after the hearing, Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's analysis of the relevant mitigating conditions was arbitrary, capricious, or contrary to law. We affirm the decision of the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant works as manager of a technical library for a defense contractor. Prior to his current employment, Applicant was a member of the U.S. Navy, retiring in the grade of E-6 (Petty Officer First Class).

In 1994, Applicant was stopped by the police for a minor traffic violation. In the car with Applicant was a young woman, whom the policeman recognized as a prostitute. Applicant denied knowing that she was a prostitute. When the woman got out of the car, her purse spilled, revealing drugs and related paraphernalia. Applicant was arrested for possession of marijuana and for possession of drug related equipment. Both charges were ultimately *nolle prossed*.

In 1997, Applicant was again arrested. He had picked up a young woman, whom he knew to be a prostitute, with the intent of "engaging her services." Applicant was arrested while in his car. Upon searching it, the officers discovered drugs. Applicant was charged with "lewd and lascivious behavior," possession of marijuana, and possession of drug paraphernalia. The court withheld adjudication on the first charge and *nolle prossed* the second and third. Applicant paid court costs of \$100.

In December 2003, Applicant completed his security clearance application. Question 24 asked if Applicant had ever been charged or convicted of any drug or alcohol related offenses. He answered "no" to this question, making no reference to the two arrests described above. The SOR alleges the false statement under Guideline E. Guideline J includes both the false statement and the underlying criminal activity.

The Judge found that Applicant had made inconsistent statements about his reasons for having answered the question in the negative. For example, in his response to the SOR Applicant stated that he had been advised that he did not have to report criminal conduct more than five years old. He also stated that he did not understand the question. During the hearing, Applicant admitted that when completing his security clearance application, "he thought about the 1994 and 1995 incidents . . ." He also stated, "I was . . . embarrassed from the instances and thought they were in the past and I guess I wanted to cover them up."

B. Discussion

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 such a conclusion in light of all the contrary evidence in the 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 findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1. The Judge’s findings are not challenged on appeal.

Whether the Record Supports the Judge’s Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices 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 national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. “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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” See ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Applicant argues that the Judge erred by considering the allegations to be interrelated, contending that the false statement should have been alleged only under Guideline E and the two arrests only under Guideline J.¹ He also argues that, due to this perceived error, the Judge did not properly analyze the mitigating factors raised by the record evidence. We do not find this argument to be persuasive. There is no error in the way in which DOHA framed the allegations. “An Applicant’s security related conduct can be alleged under more than one guideline and, in an appropriate case, can be given independent weight by an administrative judge under different guidelines.” ISCR Case No. 04-09251 at 2-3 (App. Bd. Mar. 27, 2007). See also ISCR Case No. 01-03107 (App. Bd. Aug. 22, 2002).

In his brief, Applicant discussed various mitigating factors under Guidelines E and J which he believed should have led the Judge to decide the case in his favor. We have examined the Judge’s

¹In advising Applicant at the beginning of the hearing, the Judge stated, “The SOR alleges security concerns under Guidelines E and J, E for personal conduct and J for criminal conduct. Although the allegations appear to be related to one another.” Tr. at 8.

treatment of these factors in light of his unchallenged findings.² He considered Applicant's explanations in light of the record evidence as a whole and concluded that Applicant had failed to meet his burden of persuasion.³ We conclude that the Judge "articulated a rational basis for not favorably applying any mitigating conditions or whole person factors" with respect to both Guidelines. ISCR Case No. 04-00536 at 3 (App. Bd. Jan. 29, 2007). Accordingly, the Judge's unfavorable clearance decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, 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

²"I have reviewed the seven mitigating conditions (MC) under [Guideline E] and conclude that none apply. Making false statements during the security-clearance process is a serious matter, not easily explained away, extenuated, or mitigated because it goes to the heart of the process—whether the government can rely on an applicant to do the right thing even when it might be against their own interests." Decision at 6. "I reviewed the six MC under [Guideline J] and conclude none apply. Applicant's involvement with the police ended some years ago. But his criminal conduct continued in 2003 when he made a false statement on his security clearance application, which is too recent and serious to be mitigated by passage of time." Decision at 7.

³"Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole—including Applicant's exhibits and his many years of honorable military service—the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive." Decision at 7.