

KEYWORD: Guideline G; Guideline J

DIGEST: The ultimate state court dispositions of Applicant's criminal incidents did not preclude the Judge from finding that the incidents were alcohol related. Adverse decision affirmed.

CASENO: 05-03452.a1

DATE: 07/03/2007

DATE: July 3, 2007

In Re:)	
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)	
-----)	ISCR Case No. 05-03452
SSN:-----)	
)	
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 11, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 16, 2007, after the hearing, Administrative Judge Matthew E. Malone denied Applicant's request for a security clearance.

Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred by concluding that the security concerns raised under Guidelines G and J had not been mitigated.

Applicant contends that the Judge's adverse decision should be reversed because the Judge did not give sufficient weight to Applicant's mitigating evidence which showed that Applicant has held a security clearance without incident for approximately 17 years, and that four of the criminal charges against him had been dismissed or had resulted in a finding of not guilty. In support of this contention, Applicant restates the evidence he presented below, and offers new evidence in the form of an additional explanation about the four criminal charges. The Board does not find Applicant's contention persuasive.

The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 06-00799 at 2 (App. Bd. Apr. 16, 2007). Therefore, the Board may not consider Applicant's additional explanations.

The Board's review of a Judge's findings 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

The Judge found in favor of Applicant with respect to two of the charges to which he refers, both of which were alleged under Guideline J. Therefore, those findings are not at issue on appeal. The other two charges were alcohol-related, so they were considered by the Judge in the context of the Guideline G. A Judge can find an applicant has engaged in criminal conduct even if the criminal charges against the applicant were dropped or dismissed. *See* ISCR Case No. 03-11906 at 3 (App. Bd. July 19, 2005); ISCR Case No. 03-21761 at 5 (App. Bd. Nov. 28, 2005). The ultimate state court dispositions of Applicant's criminal incidents did not preclude the Judge from finding that those incidents were alcohol-related. *See* ISCR Case No. 02-01181 at 4 (App. Bd. Jan. 30, 2004). Considering the record as a whole, the Judge's material findings with respect to Applicant's alcohol-related conduct reflect a reasonable interpretation of the record evidence and are supported by substantial evidence. *See, e.g.*, ISCR Case No. 03-21933 at 2 (App. Bd. Aug. 18, 2006).

The absence of security violations does not bar or preclude an adverse security clearance decision. The federal government need not wait until an applicant actually mishandles or fails to properly handle classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole person analysis to determine an applicant's

security eligibility. A whole person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (App. Bd. June 4, 2004).

“[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 mitigation. 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. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, 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*. 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. *See, e.g.*, ISCR Case No. 02-01181 at 3-4 (App. Bd. Jan. 30, 2004).

In this case, the Judge found that Applicant had a lengthy and serious history of excessive alcohol consumption and criminal conduct. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in favor of Applicant with respect to some of the SOR allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government’s security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge’s decision is arbitrary, capricious, or contrary to law.

Order

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

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board