KEYWORD: Guideline J

DIGEST: The Board concludes that the Judge received and considered the exhibits that Applicant alleges were not considered by the Judge. Applicant has not demonstrated that the Judge erred in concluding that Applicant had failed to mitigate the security concerns arising under Guideline J. Adverse decision affirmed.

CASENO: 06-14166.a1

DATE: 12/31/2007

DATE: December 31, 2007

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT
D. Daniel Kleckley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On December 28, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 6, 2007, after the hearing, Administrative Judge Michael H. Leonard 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 issues on appeal: whether the Judge erred by failing to admit and consider Applicant's Exhibits A and B; whether the Judge erred by concluding that the security concerns raised under Guideline J had not been mitigated.

Applicant argues that the Judge erred by failing to admit and consider Applicant's Exhibits A and B. The Board does not find this argument persuasive.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997). The Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992). A review of the record indicates that the Judge received Applicant's Exhibits A and B for identification during the hearing, but withheld ruling on their admissibility until Department Counsel had an opportunity to examine them and make any objections.[1] On June 29, 2007, Department Counsel filed a written Response to Applicant's Submission of Exhibits A and B which stated that she had no objection to their admission into evidence. In his Decision, the Judge explicitly referenced Exhibit A twice.[2] Based on the foregoing, the Board concludes that the Judge received and considered Applicant's Exhibits A and B, and Applicant's argument to the contrary is without merit.

Applicant also argues that the Judge erred in concluding that the security concerns raised under Guideline J had not been mitigated, because the criminal conduct is not recent, not likely to recur, and there is clear evidence of rehabilitation. Applicant's argument does not demonstrate that the Judge erred.

Once there has been a concern articulated regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown,* 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). After 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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 06-10950 at 2 (App. Bd. Jul. 25, 2007). "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*." *See, e.g.,* ISCR Case No. 05-11134 at 2 (App. Bd. Nov. 16, 2007). "An applicant's

[1]Tr. at 32.

[2]Decision at 4.

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. 05-07183 at 2 (App. Bd. Jun. 26, 2007).

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the criminal conduct allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case the Judge made sustainable findings that Applicant had been arrested on four occasions between 2000 and 2006, had three misdemeanor convictions, and was on probation until April 2009. The Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome 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 Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable security clearance decision under Guideline J is sustainable.

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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board