

KEYWORD: Guideline H; Guideline J; Guideline E

DIGEST: The Board need not address Applicant's factual explanation for conduct which was resolved in Applicant's favor and not appealed by Department Counsel. An applicant's conduct maybe alleged under more than one guideline. In this case, it there is a rational basis for alleging Applicant's drug use under both Guideline E and Guideline H. Adverse decision affirmed.

CASENO: 04-12556.a1

DATE: 04/27/2007

DATE: April 27, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-12556
)	
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 31, 2005, DOHA issued a statement of reasons (SOR)¹ advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On August 28, 2006, after the hearing, Administrative Judge Phillip 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 Judge’s unfavorable conclusion under Guideline E regarding Applicant’s past drug use was error, given the fact that the Judge found in Applicant’s favor regarding the same drug use under Guideline H; and whether the Judge’s unfavorable conclusions about Applicant’s falsifications were arbitrary, capricious, or contrary to law. The Board affirms the Judge’s decision.

Applicant devotes a significant portion of his appeal brief speaking to the issue of his criminal conduct that was alleged under Guideline J, and portions of which were alleged under Guideline E. The Board need not comment on Applicant’s various factual expositions and arguments in this area since the Judge made formal findings in favor of Applicant under Guideline J and those portions of Guideline E dealing with his criminal conduct, and there was no cross-appeal by Department Counsel.

Applicant notes that the Judge ultimately found in his favor regarding an allegation of 1998 drug use, but then ruled against him when the same substantive conduct was alleged under Guideline E. Applicant appears to be arguing that Guideline E does not provide any independent basis for an adverse formal finding after the Judge made a favorable formal finding under Guideline H involving the same conduct. Applicant’s argument lacks merit. 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. *See, e.g.*, ISCR Case No. 03-05072 at 6 (App. Bd. July 14, 2005). In this case, there is a rational basis for an SOR allegation involving Applicant’s drug use to be included under both Guideline H and Guideline E, and it was therefore legally permissible for the Judge to consider Applicant’s conduct under both and to reach different conclusions under both, so long as the Judge articulated a rational basis for his conclusions. Here, the Judge based his unfavorable conclusion under Guideline E on the fundamental concern of that Guideline relating to conduct demonstrating a lack of judgment and trustworthiness. The Judge relied to a considerable extent on Applicant’s use of drugs while he held a DoD security clearance as a basis for his unfavorable resolution of the conduct under Guideline E. Such a resolution is not inconsistent with the Judge’s conclusion that the same conduct was mitigated under Guideline H, inasmuch as that Guideline, unlike Guideline E, does not explicitly express a concern about conduct that reflects adversely upon aspects of applicant’s judgment or trustworthiness that go beyond drug use.

Applicant argues that he did not deliberately falsify his security clearance application by failing to disclose adverse information about his drug use, criminal involvements, and security clearance revocation. The Board does not find this argument persuasive.

¹The SOR was amended on motion of the government to add allegations and rearrange allegations under different paragraphs. The amendments were made without objection by the Applicant.

The Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question on his security clearance application. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. A review of the Judge's decision reveals that the Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1 Applicant has not demonstrated that the Judge's unfavorable conclusions regarding falsification are arbitrary, capricious, or contrary to law.

Order

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

Signed: Jeffery D. Billett

Jeffrey D. Billett
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