

KEYWORD: Guideline J; Guideline H

DIGEST: A judge can find an applicant engaged in criminal conduct even if criminal charges were dropped or dismissed. The Judge properly considered the record as a whole, rather than analyzing the evidence piecemeal. Adverse decision affirmed.

CASENO: 05-02833.a1

DATE: 03/19/2007

DATE: March 19, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-02833
)	
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 September 27, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 27, 2006, Administrative Judge

Noreen A. Lynch denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issue on appeal: whether the Judge's unfavorable security clearance decision under Guideline J is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse security clearance decision should be reversed because, apart from the July 2006 arrest for second degree assault, Applicant's other criminal incidents date from the 1980s and, therefore, are not recent. Applicant also argues that the Judge erred in not applying a Guideline I Mitigating Condition 3 to mitigate his conduct under Guideline J. In support of his argument, Applicant presents new documentary evidence to establish that he was acquitted of the 2006 charge subsequent to the hearing in this case, and that he also has demonstrated rehabilitation by participating in marriage counseling. Applicant's arguments do not demonstrate that the Judge erred.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005).

A Judge can find an applicant has engaged in criminal conduct even if the criminal charges against the applicant were dropped or dismissed. *See, e.g.*, 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 incident did not preclude the Judge from making a finding adverse to the Applicant. The Judge was not required, as a matter of law, to apply a Guideline I Mitigating Condition 3 with respect to security concerns raised under Guideline J. Considering the record as a whole, the Judge's material findings with respect to Applicant's conduct of security concern reflect a plausible interpretation of the record evidence.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies 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. 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.

In this case, the Judge properly considered the significance of Applicant's pattern of conduct as a whole, rather than analyzing each separate criminal incident in a piecemeal fashion. *See, e.g.*, ISCR Case No. 04-12648 at 3-4 (App. Bd. Oct. 20, 2006) *citing Raffone v. Adams*, 468 F. 2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation). The Judge based her adverse decision, in part, on the fact that Applicant had not offered any independent evidence of rehabilitation and positive changes in

¹The Judge found in favor of Applicant under Guideline D. That favorable finding is not at issue on appeal.

behavior. It was not unreasonable for the Judge to expect the Applicant to present evidence to establish mitigation in that regard.

In her decision, 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. She found for Applicant with respect to the Guideline H allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation under Guideline J was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline J is not arbitrary, capricious, or contrary to law.

Order

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

Signed: Jean E. Smallin
Jean E. Smallin
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