

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge was not bound as a matter of law to accept or reject Applicant’s explanation
Adverse decision affirmed.

CASENO: 05-05439.a1

DATE: 05/29/2007

DATE: May 29, 2007

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In Re:)
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SSN:-----)
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Applicant for Security Clearance)
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ISCR Case No. 05-05439

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 January 31, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October

16, 2006, after the hearing, Administrative Judge Joseph Testan denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: whether the Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; and whether the Judge erred by concluding that the security concerns raised under Guidelines G and F had not been mitigated.

(1) Applicant argues that he did not deliberately falsify his security clearance application by failing to disclose two prior felony charges and three prior misdemeanor charges in response to two different questions. In support of that argument, Applicant contends that he did not list the charges because he was uncertain as to their nature and disposition, and he believed that the government had the information about them already. Applicant's argument does not demonstrate that the Judge erred.

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. 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.

(2) Applicant also contends that the Judge erred in concluding that the security concerns raised under Guidelines G and F had not been mitigated. In support of that argument, Applicant essentially restates the facts of his case and argues that the Judge incorrectly weighed the evidence, by failing to give adequate consideration to the fact that he has held a security clearance for approximately 17 years without any problems, and that the disqualifying conduct essentially amounts to a number of isolated incidents. Based upon the record as a whole, Applicant asserts that his conduct was not of sufficient seriousness to be of security concern. Applicant's arguments do not demonstrate error on the part of the Judge.

The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-22325 at 3-4 (App. Bd. July 30, 2004). Security clearance determinations are not limited to consideration of work performance or conduct during duty hours. *See, e.g.*, ISCR Case No. 04-08623 at 5 (App. Bd. July 29, 2005). The federal government need not wait until an applicant actually mishandles or fails to properly safeguard 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). The absence of security violations does not bar or preclude an adverse security clearance decision. *See* ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005).

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

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

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 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). He reasonably weighed the mitigating evidence against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. The Judge found in favor of Applicant under one of the Guidelines. However, he reasonably explained why there was insufficient mitigating evidence to overcome the government's other security concerns. The Board does not review a case *de novo*. The favorable evidence cited by the 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. June 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines J and E is sustainable.

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