

KEYWORD: Guideline J; Guideline E

DIGEST: A Judge can find an applicant has engaged in Criminal conduct even if criminal charges were dropped or dismissed. Adverse decision affirmed.

CASENO: 06-00520.a1

DATE: 11/09/2007

DATE: November 9, 2007

---

In Re: )  
 )  
 )  
----- ) ISCR Case No. 06-00520  
 )  
 )  
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 March 7, 2007, 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 E (Personal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 30, 2007, Administrative Judge Shari Dam denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

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

Applicant argues that the Judge's adverse clearance decision under Guideline J should be reversed because: (a) a number of the criminal charges against him were dated and many had been dismissed; (b) a number of the incidents had resulted from marital or interpersonal difficulties that were no longer present; (c) the most recent incident, a 2004 conviction for Reckless Driving, was not serious; and (d) he had subsequently demonstrated rehabilitation under the whole person factors. Similarly, he argues that the Judge's adverse clearance decision under Guideline E should be reversed because the 2001 incident for misappropriation of time and allowing another person to enter hours in direct violation of company rules and policies was a dated, isolated incident, also mitigated under the whole person factors. Applicant's arguments do not demonstrate that the Judge erred.

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. Jul. 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 findings adverse to the Applicant. Moreover, it was reasonable for the Judge to consider the significance of Applicant's pattern of conduct as a whole, rather than analyzing each separate criminal or personal conduct 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 (2<sup>nd</sup> Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation). Considering the record as a whole, the Judge's material findings with respect to Applicant's conduct of security concern reflect a reasonable interpretation of the record evidence.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> 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 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.

---

<sup>1</sup>The Judge found in favor of Applicant with respect to SOR paragraphs 1.k, 1.1, 1.r, 2.a, 2.c, and 2.d. Those favorable findings are not at issue on appeal.

In this case, the Judge found that Applicant had a lengthy and serious history of criminal and personal misconduct. That history included 14 criminal incidents between 1990 and 2004.<sup>2</sup> 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 and whole person factors. She specifically considered such mitigating evidence as Applicant's military service, his candid disclosures about his past conduct, the dismissal of cases, his remorse, and "his current professional successes and aspirations, and enthusiasm for his new family" in reaching her decision.<sup>3</sup> She 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 under Guidelines J and E 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 Guidelines J and E is not arbitrary, capricious, or contrary to law.

---

<sup>2</sup>The charges against Applicant included Indecent Exposure, Domestic Assault, Disturbing the Peace, Reckless Driving, Concealed Weapon, Brandishing a Firearm, Assault, Annoying Phone Calls, Worthless Check, Communicating a Threat, Stalking, Violation of Probation, and Trespassing.

<sup>3</sup>Decision at 8.

**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