

KEYWORD: Guideline H

DIGEST: Given the record that was before the Judge his ultimate unfavorable decision is not arbitrary, capricious or contrary to law. Adverse decision affirmed.

CASENO: 06-09782.a1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-09782
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Scott A. Ashelman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 11, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 29, 2006, Administrative Judge Philip S. Howe denied Applicant’s request for a security clearance. Applicant submitted a timely appeal pursuant to

Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's unfavorable security clearance decision under Guideline H is arbitrary, capricious, or contrary to law; whether the Judge erred in his interpretation and application of 10 U.S.C. §986(c)(2).

(1) Applicant's counsel contends that the Judge erred in concluding that the security concerns raised under Guideline H had not been mitigated. In support of that contention, he argues that the Judge overstated the seriousness of the Applicant's disqualifying conduct—the illegal use of marijuana and cocaine over a 17 year period—and gave insufficient weight to the fact that Applicant had acknowledged his drug problem, had been drug free for almost a year, had promised to abstain from using illegal drugs in the future, and was hard-working and responsible. Applicant's arguments do not demonstrate that the Judge erred.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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 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 his 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. He reasonably explained why the evidence which the Applicant had presented in mitigation under Guideline H was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline H is not arbitrary, capricious, or contrary to law.

(2) Applicant's counsel also contends that the Judge erred in his interpretation and application of 10 U.S.C. §986(c)(2), and therefore in his adverse finding with respect to SOR paragraph 1.d. In support of that contention, he argues that there is no record evidence that Applicant has used illegal drugs since January of 2006, so there is no evidence that Applicant is currently an unlawful user of, or is addicted to, a controlled substance, within the meaning of that statute. Although Applicant's argument in this regard may have merit (*See* ISCR Case No. 03-25009 at 3-5 (App. Bd. June 28, 2005)), the Board need not resolve the issue because, as noted above, the Judge's adverse clearance decision is otherwise 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: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board