

KEYWORD: Guideline H; Guideline E

DIGEST: The federal government need not wait for an applicant to mishandle classified information before it can deny or revoke access to such material. Adverse decision affirmed.

CASENO: 06-23318.a1

DATE: 10/30/2007

DATE: October 30, 2007

In Re:)	
)	
-----)	
)	ISCR Case No. 06-23318
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Michael C. Bruno, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 4, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline E

(Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested the case be decided on the written record. On May 24, 2007, after considering the record, Administrative Judge Joan Caton Anthony 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 issue on appeal: whether the Administrative Judge's decision is arbitrary, capricious, and contrary to law.

In this case, Applicant had a history of cocaine use, including while he held a security clearance. He purchased cocaine and on two occasions pled guilty to cocaine possession, a felony. Following another arrest, for possession of a controlled substance, Applicant was not prosecuted. Applicant was arrested four times for driving while intoxicated or driving under the influence and, on one of those occasions, for driving with a suspended license. Applicant provided only some of the above information when he filled out security clearance applications in 1992 and 2005.

Applicant admitted most of the allegations, and those admissions were sufficient to establish the government's case against him. The burden of proof then shifted to Applicant to rebut, explain, extenuate, or mitigate the case against him. *See* Directive ¶ E3.1.15. With regard to the falsification allegations, Applicant explained that his omissions were due either to inadvertence or to his misunderstanding of the questions. In mitigation of the Guideline H concerns, Applicant stated that he had completely stopped using cocaine and had changed his lifestyle for the better due to his religious involvement. He also pointed out that he has held a security clearance for 31 years, been a dutiful employee, and never compromised national security. Applicant did not submit any documentary exhibits or witness statements.

With regard to Applicant's work record, the federal government need not wait until an applicant actually mishandles classified material before it can deny or revoke access to such material. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 06-11172 at 2 (App. Bd. Sep. 4, 2007). In this case, Applicant admitted using cocaine while he held a security clearance.

Applicant objects to the Judge's statement, under each of the Guidelines, that there was no credible evidence to support Applicant's statement as it related to each of the Guidelines. Applicant's statement regarding his present drug-free lifestyle and his explanation of his failure to provide certain information on his security clearance applications were relevant and material evidence. However, Applicant's statement were not binding and conclusive on the Judge. Rather, the Judge had to consider Applicant's statement in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0005 at 3 (App. Bd. Apr. 19, 2000). In this case, Applicant elected to have his case decided upon the written record—a circumstance which deprived the Judge of an opportunity to question Applicant about her concerns and evaluate his credibility in the context of a hearing. In response to the government's File of Relevant Material (FORM), Applicant did not submit any documentary evidence or witness statements, other than his own statement. The Judge did not find Applicant's statement credible. Applicant has not met his burden of demonstrating that the Judge erred in concluding that the government's security concerns had not been mitigated.

Even if she had found some evidence of mitigation, that alone would not 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, 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.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, 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