

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge's decision explicitly discussed Applicant's explanations for his false statements. Given the record before him, the Judge's adverse conclusions are sustainable. Adverse decision affirmed.

CASENO: 06-25322.a1

DATE: 07/03/2008

DATE: July 3, 2008

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| ----- |) | ISCR Case No. 06-25322 |
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| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Todd C. Conormon, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 18, 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 24, 2008, after the hearing, Administrative Judge Mark E. Curry denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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

(1) Applicant contends that he did not deliberately falsify his security clearance application (SF-86) by failing to disclose that he had been court-martialed in 2003 for Burglary and Larceny of Private Property, and was ultimately found guilty of Wrongful Appropriation. In support of this contention, he argues that the Judge gave insufficient weight to his explanations, and gave too much weight to his Answer to the SOR, in which he had stated: “I admit to willfully omitting information regarding court-martial proceedings while a member of the U.S. Army” because “this was an extremely embarrassing time in my military career,” and that he had omitted the information “in an attempt to obtain a security clearance.” Applicant’s argument does not demonstrate that the Judge erred.

The Judge’s decision explicitly discussed Applicant’s explanation as to why he failed to disclose the information in question. He 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. The Board does not review a case *de novo*. 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 by his falsifications had not been mitigated, based upon the favorable record evidence, particularly his lengthy military service, his many years of holding a security clearance without adverse incident, and his favorable employment and character evidence. Again, Applicant has not demonstrated that the Judge erred.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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*. See, e.g., ISCR Case No. 06-17691 at 3 (App. Bd. Jul.19, 2003). 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 weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of

relevant mitigating conditions and whole person factors. The Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's other security concerns. The favorable record evidence cited by 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. Jun. 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: Michael Y. Ra'anan
Michael Y. Ra'anan
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