

KEYWORD: Guideline E; Guideline J

DIGEST: 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. Given the record in this case the Judge's adverse decision is affirmable. Adverse decision affirmed.

CASENO: 06-26061.a1

DATE: 03/17/2008

DATE: March 17, 2008

<p>In Re:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 06-26061</p>
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**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 June 6, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On December 5, 2007, after considering the record, 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.

Applicant raised the following issue on appeal: whether the Judge erred in concluding that Applicant’s falsification of his security clearance application was deliberate.

Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose an arrest on charges of Driving Under the Influence of Alcohol and Driving While Having a Measurable Blood Alcohol of .08% or More by Weight. In support of this contention, he argues that he thought he was only required to disclose convictions. 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.

Applicant elected to have his case decided on the written administrative record and then did not respond to the government’s file of relevant material (FORM). As a result, the Judge did not have an opportunity to question him about the omission and evaluate his credibility in the context of a hearing.<sup>1</sup> A review of the Judge’s decision indicates that the Judge considered Applicant’s explanation for why he failed to disclose the information in question. 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 omission was deliberate and intentional. Given the limited record that was before him, the Judge’s finding of deliberate falsification is sustainable, and his ultimate unfavorable clearance decision under Guidelines E and J not arbitrary, capricious nor contrary to law. See Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

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<sup>1</sup>In evaluating the Guideline J allegations, the Judge noted: “Applicant may very well have been able to overcome the Government’s *prima facie* case had he offered credible evidence in mitigation. However, applicant offered no evidence in mitigation, and without such evidence, there is no basis upon which to conclude he has overcome the Government’s security concerns . . .” Decision at 3.

**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