

KEYWORD: Guideline J; Guideline E; Guideline G

DIGEST: Applicant was convicted of driving under the influence twice: in 1990 and 2005. The favorable evidence cited by Applicant is not sufficient to demonstrate that the Judge's unfavorable decision is flawed. Adverse decision affirmed.

CASENO: 07-00261.a1

DATE: 03/11/2008

DATE: March 14, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-00261
)	
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 June 7, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline E

(Personal Conduct), and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On November 19, 2007, after the hearing, Administrative Judge Paul J. Mason 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 Judge's decision is arbitrary, capricious, or contrary to law.

Applicant was convicted of driving under the influence of alcohol (DUI) twice—in 1990 and in 2005. After the second conviction, Applicant was required to attend an alcohol counseling program and a certain number of Alcoholics Anonymous meetings. Applicant successfully completed those requirements. The government also alleged falsification because Applicant listed only the first DUI conviction on his Security Clearance Application (SCA), dated November 17, 2005. Applicant explained that he filled out the SCA in 2004, before the second arrest, but his employer did not submit the SCA until November 2005.

With regard to Guideline G, the Judge made findings based on Applicant's testimony regarding his current consumption of alcohol. Applicant testified that he has reduced his alcohol consumption, but did not specify the amount of the reduction. Applicant testified that the last time he was legally intoxicated was two weeks before the hearing; at another point in his testimony, he said he had last been drunk within six months of the hearing. Prior to reducing his alcohol consumption, Applicant drank a six-pack of beer on Friday night and perhaps another six-pack on Saturday night. He testified that after reducing his consumption, he had probably consumed a six-pack of beer in one sitting within six months of the hearing.

Once the government presented evidence raising security concerns, the burden shifted to Applicant to establish mitigation.¹ Directive ¶ E3.1.15. The Judge concluded that Applicant had not met that burden. In his appeal, Applicant disputes the weight the Judge gave to portions of the record evidence. 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. 06-23112 at 3 (App. Bd. Dec. 31, 2007). 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 in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge discussed the relevant disqualifying and mitigating conditions under Guideline G. Looking at both the favorable and unfavorable record evidence, the Judge reasonably explained why Applicant's evidence of mitigation did not overcome the government's security concerns. The Board does not review a case *de novo*. The favorable 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 decision under Guideline G is sustainable.

¹The Judge found in Applicant's favor as to Guidelines J and E, and those findings are not in issue here.

Order

The decision of the Judge denying Applicant a security clearance 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