

KEYWORD: Guideline J; Guideline E

DIGEST: The party challenging a Judge’s credibility determination has a heavy burden on appeal. Applicant has not met that burden. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. Adverse decision affirmed.

CASENO: 07-08882.a1

DATE: 01/12/2009

DATE: January, 12, 2009

In Re:)	
)	
-----)	ISCR Case No. 07-08882
)	
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 April 8, 2008, 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 October 14, 2008, after the hearing, Administrative Judge Juan J. Rivera 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 adverse security clearance decision is arbitrary, capricious, or contrary to law.

Specifically, Applicant argues that the Judge should have found his criminal conduct to be mitigated, and he disagrees with the Judge’s conclusion that his testimony was “not fully candid.” Applicant also disagrees with the Judge’s whole-person analysis and lists positive factors the Judge should have considered in that analysis.

The Judge made the following relevant findings of fact:

While a midshipman at the United States Naval Academy, Applicant removed certain sporting goods items from a retail store without paying for them. Applicant was detained by the store’s security officers and held for the local police. Applicant’s detention led to discovery of the fact that he had manufactured false military identification cards for himself and at least two other midshipmen. At that time, Applicant was not “handcuffed, photographed, fingerprinted, or placed under arrest.” Decision at 2. Applicant was subsequently served with a theft charge/summons at home. Applicant was found guilty of theft in a civilian court and placed on unsupervised probation before judgment. He completed his term of probation without incident. As a result of a Commandant’s Hearing under the Naval Academy’s Administrative Conduct System, Applicant was disenrolled from the Academy. Some of the charges Applicant faced at that hearing were based on articles under the Uniform Code of Military Justice (UCMJ).

In November 2007, Applicant drove his car after consuming alcoholic beverages. He was forced to make an emergency stop after one of his tires blew out. A policeman who stopped to render assistance smelled alcohol and administered a field sobriety test, which Applicant failed. On his own initiative, Applicant attended a program concerned with alcohol abuse. In July 2008, Applicant was convicted of driving under the influence of alcohol (DUI) and was placed on probation before judgment for 12 months. As a result, Applicant is required to visit his probation office monthly and pay a fee. Applicant will be on probation until July 2009.

Applicant completed a security clearance application in February 2007. When asked in question 23(e) as to whether he had been subject to court martial or other disciplinary proceedings under the UCMJ in the last seven years, Applicant answered “no,” because he did not believe his hearing before the Commandant was a proceeding under the UCMJ. When asked in question 23(f) of the application whether he had been arrested for, charged with, or convicted of any offenses not

listed in response to other questions, Applicant failed to list the theft incident mentioned above. Applicant stated that he did not believe that he had been arrested and believed that he did not need to list it because it was removed from his record when he successfully completed his probation. Although Applicant did not mention the theft incident on his application, he did disclose it in a follow-up interview with a government investigator.

In the SOR, the theft and the DUI were listed under Guideline J. The Guideline E subparagraphs included the theft incident, the false identification cards, and Academy disenrollment, as well as falsification regarding the disenrollment and the theft. In his Formal Findings, the Judge found against Applicant as to both subparagraphs under Guideline J and as to all but one of the subparagraphs under Guideline E.

Applicant disagrees with the Judge's statement that Applicant's testimony was "not fully candid." Decision at 7. A Judge's credibility determinations are entitled to deference on appeal. Directive ¶ E3.1.32.1. The party challenging a Judge's credibility determination has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 03-09483 at 3 (App. Bd. Nov. 17, 2004). Applicant has not met that burden.

Applicant also disagrees with the Judge's conclusions regarding mitigation. In support of his position, Applicant repeats portions of his explanations for his conduct. He also lists mitigating factors which he believes should have led the Judge to a whole-person analysis favorable to Applicant. The Judge found some evidence of mitigation. However, the application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.*, ISCR Case No. 05-05439 at 2 (App. Bd. May 29, 2007). 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, 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. *See, e.g.*, ISCR Case No. 06-22515 at 2 (App. Bd. Dec. 7, 2007).

In this case, the Judge discussed the relevant disqualifying and mitigating conditions under Guidelines J and E. 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. 07-09048 at 2-3 (App. Bd. Dec. 15, 2008). The Judge has drawn "a rational connection between the facts found" and his adverse decision. *See Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Accordingly, the Judge's adverse decision is sustainable.

Order

The decision 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