

KEYWORD: Guideline E; Guideline D; Guideline J

DIGEST: The Judge’s findings are based on substantial evidence or constitute reasonable characterizations or inferences. Applicant has not demonstrated that the Judge erred. Adverse decision affirmed.

CASENO: 07-09301.a1

DATE: 08/22/2008

DATE: August 22, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-09301
)	
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 December 17, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct),

Guideline D (Sexual Behavior) 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 May 20, 2008, after considering the record, Administrative Judge Mary E. Henry 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's findings are based on substantial evidence; whether the Judge erred in concluding that Applicant had deliberately falsified his security clearance application; and whether the Judge's adverse clearance decision under Guidelines D, E and J is sustainable.

(1) Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge erred with respect to several of his findings about the circumstances of Applicant's disqualifying conduct. The Board does not find this argument persuasive.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

After reviewing the record, the Board concludes that the Judge's findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

(2) Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose that he had been asked to resign from his employment in 2004 in lieu of being terminated. In support of this contention, he argues that he misread the question at issue because he was “. . . being rushed to get the form turned in.” Applicant has not demonstrated that the Judge erred.

Applicant elected to have his case decided on the written administrative record. 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. 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 her, the Judge's finding of deliberate falsification is sustainable.

(3) Finally, Applicant argues that the Judge's adverse decision should be reversed because the Judge did not give sufficient weight to Applicant's mitigating evidence as to positive changes in his life since the occurrence of the disqualifying conduct. This argument does not establish 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, 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 or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge found in favor of Applicant with respect to some of the SOR's factual allegations. However, the Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. 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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her decision, "including a 'rational connection between the facts found and the choice made.'" *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)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge's ultimate adverse decision under Guidelines E, D and J is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
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