

KEYWORD: Guideline H; Guideline E; Guideline J

DIGEST: Although the Judge found some evidence of mitigation, that did not compel the Judge to reach a favorable security clearance decision. Applicant's evidence of good duty performance was not sufficient to mitigate security concerns arising from unlawful drug use and falsification of his security clearance application. Adverse decision affirmed.

CASENO: 07-10454.a1

DATE: 08/12/2008

DATE: August 12, 2008

In Re:	)	
	)	
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	)	
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 November 16, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On May 12, 2008, after the hearing, Administrative Judge Charles D. Ablard 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 failure to find that Applicant's conduct is mitigated renders the Judge's decision arbitrary, capricious, and contrary to law.

The Judge made the following relevant findings of fact in his decision: Beginning in 1996, Applicant used illegal drugs and used prescription drugs illegally. In 1998, Applicant was arrested for driving under the influence and possession of a controlled substance. He plead *nolo contendere* and was sentenced to perform community service and one year of probation. Applicant completed a pre-trial diversion program on the drug charge, and it was later dismissed. Applicant asserts that when he enlisted in the Army, his recruiter told him that he did not want to hear anything about prior drug use from Applicant. Other than his 1998 arrest and diversion, Applicant did not mention his history of illegal drug use on a security clearance application in 2001 or in his subsequent interview with an investigator. Applicant continued to use drugs while he was in the Army and in possession of a security clearance. After he received a security clearance in September 2003, Applicant's use of illegal drugs included cocaine (at least twice) between June 2005 and March 2006. Applicant was discharged from the Army and last used illegal drugs at approximately the same time, in March 2006. When Applicant went to work for his current employer after his discharge, he was told that the company did not tolerate illegal drug use during the period of employment and for two years prior to employment. Applicant was forthright in revealing his history of drug abuse in completing a security clearance application in 2007 and in a subsequent security interview.

The Judge also found that Applicant had a distinguished military career. He has received consistently high evaluations and certificates of recognition from his current employer. Applicant has moved from the city where he used drugs and no longer associates with the persons he used drugs with. He is engaged and has purchased a home.

Applicant admitted to the allegations against him, and those admissions were sufficient to establish the government's case against him. The burden of proof then shifted to Applicant to rebut, explain, extenuate, or mitigate the case against him. Directive ¶ E3.1.15. Applicant attempted to explain his falsification of his 2001 security clearance application. He presented evidence regarding his successful military career and a favorable job evaluation from his current employer.

With regard to Applicant's work record, the federal government need not wait until an applicant actually mishandles classified material before it can deny or revoke access to such material. *Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An

applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 06-11172 at 2 (App. Bd. Sep. 4, 2007). In this case, Applicant admitted to using illegal drugs while in the Army, during a period when he held a security clearance.

Applicant argues that he presented enough evidence of rehabilitation that the Judge should have granted him a clearance. The Judge found some evidence of mitigation. However, that alone did not 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. 06-23318 at 2 (App. Bd. Oct. 30, 2007).

After reviewing the record as a whole, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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, 158 (1962)). Accordingly, the Judge's ultimate unfavorable security clearance decision is sustainable. *See* Directive ¶ E3.1.32.1.

### Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple  
Michael D. Hipple  
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