

KEYWORD: Guideline J; Guideline G; Guideline H

DIGEST: Applicant failed to mitigate security concerns arising from incidents of DUI, Assault, Domestic Violence, Possession of a Controlled Substance, among others. Mere disagreement with the Judge’s weighing of the evidence is not sufficient to establish error. Adverse decision affirmed

CASENO: 07-16210.a1

DATE: 10/20/2008

DATE: October 20, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-16210
)	
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 February 29, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption) and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 16, 2008, after the hearing, Administrative Judge Michael H. Leonard 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's adverse security clearance decision under Guideline J is arbitrary, capricious, or contrary to law.¹

Applicant argues that the favorable evidence in the record was sufficient, as a matter of law, to mitigate any security concerns presented by Applicant's conduct. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

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 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*. 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. 07-05632 at 2 (App. Bd. May 13, 2008).

In this case, the Judge found that between 1995 and 2006 Applicant had been involved in seven criminal incidents, including Driving Under the Influence, Driving with a Suspended License, Assault, Menacing, Domestic Violence, Possession of a Controlled Substance and Carrying a Pistol in a Vehicle without a Permit. A review of the record indicates that 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 conditions and factors. Decision at 6-7. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Id.*² 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). 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, 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 adverse decision is sustainable.

¹The Judge's favorable findings under Guidelines G and H are not at issue on appeal.

²The Judge found that as of the date of the hearing, Applicant was still serving probation for his 2006 DUI and still pending disposition of a charge for driving with a revoked license.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board