

KEYWORD: Guideline E

DIGEST: A party'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. Adverse decision affirmed

CASENO: 09-03010.a1

DATE: 04/16/2010

DATE: April 16, 2010

In Re:)
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)
 -----) ISCR Case No. 09-03010
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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 September 11, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 20, 2010, after the hearing, Administrative Judge Mark Harvey 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 issues on appeal: (a) whether Applicant was denied procedural due process and (2) whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found that Applicant was on active duty with the Army and went AWOL in 2003. He found that Applicant remained away from his military unit until 2005 when his AWOL status was terminated by apprehension by civilian authorities. Applicant was ultimately discharged from the service with an "under other than honorable conditions discharge." After weighing the disqualifying and mitigating evidence, the Judge concluded that Applicant had not fully mitigated all security concerns.

Applicant states that he was ill prepared for what took place at the hearing and is now better prepared to plead his case. He would like the chance to plead his case again. This raises the issue of whether Applicant, acting as his own counsel, made a knowledgeable decision to represent himself, and whether or not he was capable of acting effectively in concert with his own interests during the hearing. The Board has reviewed the transcript of the hearing, and concludes that the Judge asked pertinent questions of Applicant and made an adequate inquiry into Applicant's ability to represent himself before the commencement of the evidentiary portion of the hearing. The transcript also indicates that Applicant had no apparent difficulty understanding the nature of the proceedings and performed reasonably in presenting his case. At no time did Applicant object to going forward without an attorney or other representative. Under these circumstances, there is no basis for granting Applicant an additional opportunity to present his case.

Applicant argues that he has mitigated the government's case against him. He states that in the five years since his discharge from the military, he has grown up and changed his life. He points to his stable employment as an example of his personal transformation. This argument fails to establish error on the part of the Judge.

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. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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 seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of numerous mitigating conditions under Guideline E at some length, but indicated with considerable detail why those Guideline E mitigating conditions could not be invoked in this case to alleviate the government's security concerns. Thus, the Judge's adverse security clearance decision is sustainable.

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: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board