

KEYWORD: Guideline E; Guideline D

DIGEST: Considering the record as a whole, the Judge’s material findings of fact with respect to SOR paragraph 1.c. reflect a plausible interpretation of the record evidence. A party’s disagreement with the Judge’s weighing of the evidence is not sufficient to demonstrate error. Applicant overstates the significance of the passage of time since his last incident of sexual misconduct. Adverse decision affirmed.

CASENO: 03-25153.a1

DATE: 03/20/2007

DATE: March 20, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 03-25153
)	
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 14, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and

Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested the case be decided on the written record. On August 14, 2006, after considering the record, Administrative Judge Shari Dam denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: whether the Judge's adverse finding with respect to SOR paragraph 1.c is supported by substantial evidence; whether the Judge erred by concluding that the security concerns raised under Guidelines E and D had not been mitigated.

(1) Applicant argues that the Judge's adverse finding with respect SOR paragraph 1.c is not supported by substantial evidence, because Applicant's company had never provided him with any documentary evidence that he had falsified his time cards. The Board does not find Applicant's 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). The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material finding with respect to SOR paragraph 1.c reflects a plausible interpretation of the record evidence and is supported by substantial evidence. It is therefore sustainable.

(2) Applicant argues that the Judge should have concluded his disqualifying conduct under Guidelines E and D was extenuated or mitigated because the sexual behavior at issue occurred over 21 years ago and is therefore not recent. The Board does not find this argument persuasive.

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. 01-14740 at 7 (App. Bd. Jan.15, 2003). 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 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.

The passage of time since an applicant last engaged in conduct is a relevant factor that a Judge should take into account when evaluating the record evidence. However, Applicant overstates the significance of the passage of time since his last incident of sexual misconduct. Given the seriousness of the conduct, the Judge could reasonably have concluded that the time that had elapsed was not significant. Moreover, the Board need not decide whether that passage of time would be

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.b and 1.e. Those favorable findings are not at issue on appeal.

significant or decisive in this case because the Judge's decision is not based solely on Applicant's sexual misconduct. Rather, the Judge's decision is also predicated on her findings that Applicant is vulnerable to influence or coercion because of that past conduct, and that Applicant had been terminated from his employment because of time card fraud in August 2002. The Judge's findings on this aspect of the case are unaffected by the passage of time since Applicant engaged in the sexual misconduct in question. *See, e.g.*, ISCR Case No. 02-26685 at 5 (App. Bd. Dec. 22, 2004). Even dated conduct can be the source of an applicant's current vulnerability to coercion or influence. *See* ISCR Case No. 02-32254 at 4-5 (App. Bd. May 26, 2004). And the passage of time since Applicant's acts of sexual misconduct do not extenuate or mitigate his later acts of falsification. *See* ISCR Case No. 02-33091 at 3 (App. Bd. July 6, 2004).

In this case, the Judge weighed the mitigating evidence against the seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge reasonably explained why the evidence presented in mitigation was insufficient to overcome the government's security concerns. 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. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines E and D is sustainable.

Order

The decision of the Judge denying Applicant a 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