KEYWORD: Guideline H; Guideline E; Guideline J

DIGEST: A Judge is not required to discuss every piece of evidence. The Judge had to consider Applicant's explanation in light of the record as whole. The Judge reasonably explained why the Applicant's mitigating evidence was insufficient to overcome all the government's security concerns. Adverse decision affirmed.

CASENO: 03-27045.a1

DATE: 08/31/2007

DATE: August 31, 2007

In Re:	)	
---	)	ISCR Case No. 03-27045
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
M. Jefferson Euchler, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On June 23, 2006, DOHA issued a statement of reasons (SOR) 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 February 28, 2007, 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 issues on appeal: whether the Judge erred as to certain findings of fact; whether the Judge erred in concluding that Applicant deliberately falsified his security clearance application; whether the Judge's adverse clearance decision under Guidelines H and J is arbitrary, capricious or contrary to law.[1]

(1) Applicant contends that the Judge failed to reference in his decision: (a) Applicant's work for the Navy from 1978 to 1980, and (b) the fact that another employee who was charged for the same 1994 incident in which Applicant used cocaine in the presence of subordinates, still works for the Navy. Applicant's contention does not demonstrate that the Judge erred.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise, and the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 04-01961 at 2 (App. Bd. Jul. 12, 2007). Moreover, even if it were assumed for the purposes of this appeal that the Judge's failure to mention the aforesaid facts was error, such error would be harmless. An additional allegation of error will be discussed later in the context of one of the falsifications.

(2) Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose that he had previously used marijuana and cocaine. In support of this contention, he argues that his omissions were the result of a reasonable misreading of the application's questions. Applicant also argues that the Judge omitted making a finding that in 2005 an inexperienced investigator never asked him any questions about the 1994 incident in which Applicant used cocaine in the presence of subordinates and that the purpose of the interview was limited to financial matters. Again, Applicant's arguments do not demonstrate that the Judge erred.

The Judge had the opportunity to consider 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 had to consider Applicant's explanation in light of the record evidence as a whole, in reaching his conclusion as to whether Applicant's omissions were deliberate and intentional. *See, e.g.,* ISCR Case No. 05-11175 at 2 (App. Bd. Jun. 15, 2007). Applicant offers a rational alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient, as a matter of law, to render the Judge's interpretation arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). On this record, the Judge's findings with respect to the Guideline E allegations are sustainable. *See* Directive ¶ E3.1.32.1; *See, e.g.,* ISCR Case No. 04-03849 at 2-3

[1]The Judge found in Applicant's favor with respect to SOR paragraphs 1.c, 1.d, 2.a, 2.d, and 3.b. Those favorable findings are not at issue on appeal.

(App. Bd. Jan. 26, 2006).

(3) Applicant also contends that the Judge erred in concluding that the security concerns raised under Guidelines H and J had not been mitigated. In support of that contention, Applicant argues that his 30-year history of marijuana and cocaine use—which included use while holding a security clearance—actually amounted to a series of isolated incidents, and that his most recent use in 2003 was not recent. The Board does not find this contention persuasive.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by his disqualifying conduct had not been mitigated. Although Applicant disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown,* 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *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.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the nature 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 the Applicant with respect to some of the factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of 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. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines H and J is sustainable.

Order

The decision of the Judge denying Applicant a 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