

KEYWORD: Guideline J; Guideline E

DIGEST: Once the government presents evidence raising security concerns the burden is on the applicant to establish mitigation. The government need not wait until an applicant actually mishandles classified information before it can deny or revoke access to such information. Adverse decision affirmed.

CASENO: 03-06241.a1

DATE: 11/16/2007

DATE: November 16, 2007

In Re:	)	
	)	
-----	)	ISCR Case No. 03-06241
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Jeremiah Donovan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 5, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E

(Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 29, 2007, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 decision is arbitrary, capricious, or contrary to law, because the Judge failed to find that Applicant's conduct was mitigated.

The Judge made the following relevant findings of fact: Applicant used marijuana with varying frequency from 1971 until at least 1994. Applicant was convicted of conspiracy to distribute illegal drugs in about 1974. Applicant sold marijuana for profit to a coworker while working for a defense contractor and holding a security clearance. In 1994, Applicant was convicted of selling illegal drugs. When Applicant completed a security clearance application (SF 86) in 2002, he listed his 1994 drug conviction, but not the one in 1974.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> 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. In this case, Applicant admitted most of the conduct. With regard to the falsification of his SF 86, Applicant testified that he did not include his 1974 conviction because he thought it did not have to be listed because he believed it came under the Federal Controlled Substances Act exception to the question and had been expunged. The Judge was not required, as a matter of law, to accept Applicant's testimony. Rather, the Judge had to consider Applicant's statements in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0005 at 3 (App. Bd. Apr. 19, 2000).

Moreover, the application of disqualifying and mitigating conditions 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 (Jan. 15, 2003). In this case, the Judge found some mitigation due to the passage of time since the conduct at issue. However, that did not compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable, or *vice versa*. 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. 06-17691 at 3 (App. Bd. Jul. 19, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct. The Judge considered the possible application of relevant mitigating conditions and discussed why she did not apply them in Applicant's case. The Judge explained why the evidence Applicant submitted in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable 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).

In his brief, Applicant points out that he has been a dutiful employee for many years, has never been accused of using marijuana on the job or allowing marijuana to affect his job performance, and has not used marijuana since 1994. The government need not wait until an applicant actually mishandles classified information before it can deny or revoke access to such information. *See 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. 06-10950 at 2 (App. Bd. Jul. 25, 2007). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security significance. *Id.*

Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines J and E is sustainable.

**Order**

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

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