

KEYWORD: Guideline J; Guideline E, Guideline G

DIGEST: Given the record in this case the Judge acted reasonably within his discretion when he denied applicant's request for a second continuance. There is a rebuttable presumption that the Judge considered all the record evidence. The decision of Hearing Office Judge is not binding on another Judge in a different case. Adverse decision affirmed.

CASENO: 03-26115.a1

DATE: 04/05/2007

DATE: April 5, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 03-26115
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Thomas R. Anderson III, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 31, 2005 DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline

E (Personal Conduct), and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). The SOR was amended on July 7, 2005 to add allegations under Guideline F (Financial Considerations). Applicant requested a hearing. On July 12, 2006, after the hearing, Administrative Judge Philip S. Howe 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: whether the Judge's denial of Applicant's request for a continuance of his case was an abuse of discretion resulting in denial of due process and whether the Judge's overall negative security clearance decision was arbitrary, capricious or contrary to law. The Board affirms the Judge's decision.

Applicant argues on appeal that the Judge erred in not granting him a continuance at the hearing when his attorney was not able to be present due to a prior scheduled trial. Applicant claims he was then required to proceed with the case without the attorney he had hired and worked with for four months before the hearing.

Applicant's original attorney had already requested and received one continuance of the November 22, 2005 hearing date because of a scheduling conflict. The hearing was rescheduled for February 22, 2006, and Applicant had received more than the minimum of 15 days advance notice of that date as provided by the Directive. Applicant was, in fact, represented by another counsel at the rescheduled hearing, so he did not have to proceed *pro se*. The counsel at the rescheduled hearing was from the same law firm as Applicant's original attorney.

Rulings of DOHA administrative judges regarding the granting of continuances are reviewed under an abuse of discretion standard. *See, e.g.*, ISCR Case No. 01-03683 at 4 (App. Bd. Aug. 9, 2002). Applicant's appeal brief recites some of the facts relating to the continuance including the fact that Applicant's chosen attorney could not be present at the hearing. However, Applicant's appeal brief does not allege how Applicant was harmed by the Judge's failure to grant the continuance. Indeed, the appeal brief does not address the issue of prejudice at all. There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Administrative Judge. *See, e.g.*, ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001); ISCR Case No. 00-0248 at 2 (App. Bd. Mar. 21, 2001). Furthermore, the appealing party must set forth its claims of error with specificity. *See, e.g.*, ISCR Case No. 99-0519 at 9 (App. Bd. Feb. 23, 2001). While Applicant specifically identifies the error he believes the Judge made, he does not explain why the Judge's ruling was harmful to him. The Board declines to adopt the position that the mere fact that Applicant was required to proceed to hearing without counsel of his choice is prejudicial as a matter of law. Therefore, Applicant's claim of error on this point does not establish error. Given the record in this case, the Judge acted reasonably within his discretion in denying Applicant's request for a second continuance.

Applicant argues that it was arbitrary, capricious and contrary to law to deny him his request for a clearance. Specifically, he argues: (a) the Judge failed to consider and discuss certain evidence; (b) the Judge did not adequately consider and give sufficient weight to testimonial and documentary evidence submitted by Applicant and instead focused only on negative evidence; and (c) the Judge did not adequately consider various mitigating factors.

Applicant complains that the Judge did not consider evidence concerning his military career and the testimony of two witnesses. There is a rebuttable presumption that the Judge has considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 01-22566 at 3 (App. Bd. June 26, 2003). Furthermore, the Judge was not required to discuss each and every piece of evidence in his decision and the absence of the items of evidence highlighted by Applicant from the decision does not establish that the Judge did not consider them. Moreover, the Judge's decision contains references to evidence favorable to Applicant that was the subject of some of the testimony of the two witnesses in question. The Board concludes that Applicant has failed to demonstrate that the Judge did not consider all the record evidence.

The remainder of Applicant's arguments on appeal essentially go to the issue of how the Judge weighed the record evidence and the applicability of mitigating factors. The weighing of evidence is within a Judge's discretion, and will not be disturbed by the Board absent a showing by Applicant that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, or not supported by the record as a whole. The Board sees no basis for disturbing the Judge's weighing of the evidence in this case. The mere fact that a Judge concludes that favorable evidence presented by an applicant is not sufficient to outweigh or overcome the unfavorable evidence does not demonstrate that the Judge ignored or improperly weighed the evidence. *See, e.g.*, ISCR Case No. 00-0587 at 2 (App. Bd. May 28, 2002). In this case, the Judge made sustainable findings that Applicant had a history of alcohol-related problems including two DUI convictions, a history of failing to file tax returns and pay taxes for several years between 1989 and 2002, and had failed to disclose DUI arrests to alcohol assessment program personnel and on his security clearance application. In light of these facts, the presence of some mitigating evidence did 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 evidence in mitigation outweighs the unfavorable evidence, 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 that the Judge weighed matters in mitigation or reached ultimate conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006).

To the extent Applicant relies on decisions by Hearing Office Administrative Judges in other DOHA cases, his claim of error is not persuasive. The decision of one Hearing Office Judge is not legally binding on another Hearing Office Judge in a different case. Furthermore, the decision of any Hearing Office Judge is not legally binding precedent that the Board has to distinguish, follow, or explain why it does not choose to follow. To the contrary, a party citing a Hearing Office decision as persuasive authority has the burden of persuading the Board that such a decision should be followed. *See, e.g.*, ISCR Case No. 01-22606 at 3-5 (App. Bd. June 30, 2003). The Hearing Office decisions cited by Applicant do not establish the Judge erred in this case. Nor do those decisions persuade the Board that the Judge's conclusions in the case are arbitrary, capricious, or contrary to law.

In his decision, the Judge articulated a rational basis for not favorably applying any mitigating conditions or whole person factors, and reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines J, E, and G is not arbitrary, capricious or contrary to law.

Order

The decision of the Administrative Judge denying Applicant a 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