

KEYWORD: Guideline E; Guideline J

DIGEST: The application of disqualifying and mitigating conditions and whole person factors does not turn simply of a finding that one or more of them apply to the particular facts of a case. Adverse decision affirmed.

CASENO: 03-25310.a1

DATE: 06/18/2007

DATE: June 18, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 03-25310
	)	
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 May 17, 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 J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2006, after the hearing,

Administrative Judge John Grattan Metz, Jr. 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 in his findings; whether the Judge erred in concluding Applicant's falsification of his security clearance application and a signed, sworn statement to a government investigator was deliberate; whether the Judge erred by concluding that the security concerns raised under Guidelines E and J had not been mitigated.

(1) Applicant asserts that the Judge erred in finding he had a clearance while in the military, when in fact he had only had a National Background Check. Applicant also asserts that the Judge erred with respect to the "small details" of incidents alleged in the SOR or otherwise mischaracterized the evidence. However, assuming solely for the purposes of this appeal that each of the challenged findings were changed to reflect Applicant's interpretation of the record evidence, it would not have undermined the Judge's conclusions. Therefore, any such error would be at most harmless. *See* ISCR Case No. 05-08459 at 2, n. 1 (App. Bd. Nov. 16, 2006). Applicant has not met his burden of demonstrating that the Judge's material findings with respect to Applicant's conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

(2) Applicant also contends that he did not deliberately falsify his security clearance application by failing to disclose information about his prior criminal conduct in response to three different questions. Likewise, he also contends that he did not falsify a signed, sworn statement to a government investigator by failing to disclose that same conduct. In support of this contention, he argues that the omission of the information was due to a faulty memory, a misunderstanding of the questions, and his unfamiliarity with the security clearance process. He also argues that he subsequently provided the correct information. The Board does not find Applicant's contentions persuasive.

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 considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. On this record, the Judge's findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006). The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004).

(3) Finally, Applicant contends that the Judge erred in concluding that the security concerns raised by his conduct had not been mitigated. In support of that contention, Applicant argues that the prior criminal incidents which he failed to disclose are not recent and not likely to recur, and that their adverse implications are outweighed by the favorable evidence presented by the Applicant. As a result, Applicant requests that the Board "take another look at [his] case." The Board does not find these arguments 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.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct. The Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome 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 E 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: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board