

KEYWORD: Guideline E; Guideline J

DIGEST: Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. The security concerns raised by Applicant’s falsification were not necessarily overcome by his subsequent disclosures. The favorable evidence cited by Applicant is not sufficient to demonstrate that the Judge’s decision was arbitrary capricious or contrary to law. Adverse decision affirmed.

CASENO: 04-00949.a1

DATE: 03/27/2007

DATE: March 27, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-00949
)	
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 October 18, 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 July 31, 2006, after the hearing, Administrative Judge Joan Caton Anthony 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 her findings; whether the Judge erred in concluding Applicant's falsification of his security clearance application 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 with respect to a number of findings relating to the nature, circumstances, and timing of Applicant's April 2001 arrest on four felony counts of "Child Abuse Parent." However, even if each of the challenged findings of fact 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 best 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 adverse information in response to three different questions. In support of this contention, he argues that the omission of the information was due to a misunderstanding on his part, and he subsequently provided the correct information. The Board does not find this argument 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 omission was 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 falsifications had not been mitigated. In support of that contention, Applicant argues that his falsifications were an isolated incident outweighed by the favorable evidence presented by the Applicant. 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, and considered the possible application of relevant mitigating conditions. 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 her, 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: 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