

KEYWORD: Guideline H; Guideline E

DIGEST: The judge weighed the mitigating evidence offered by Applicant and reasonably explained why it was insufficient to overcome the government's security concerns. Adverse decision affirmed.

CASENO: 04-08651.a1

DATE: 12/10/2008

DATE: December 10, 2008

	)	
In Re:	)	
-----	)	
	)	ISCR Case No. 04-08651
	)	
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 29, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the

basis for that decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2008, after the hearing, Administrative Judge LeRoy F. Foreman 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 issue on appeal: whether the Judge’s adverse security clearance decision under Guideline E is arbitrary, capricious, or contrary to law.<sup>1</sup>

Applicant asserts that he made false statements on his e-QIP and to government investigators because disclosing his drug involvement was an issue for him due to feelings of embarrassment, nonacceptance, and guilt. It is his position that the Judge should have found the security concerns presented by his conduct mitigated because disclosing his drug involvement is no longer an issue for him due to the counseling he is receiving from his drug treatment program.<sup>2</sup> Applicant’s argument does not demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable 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. *See, e.g.*, ISCR Case No. 07-05632 at 2 (App. Bd. May 13, 2008).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. Decision at 7-9. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government’s security concerns. *Id.* 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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). The Judge examined the relevant data and articulated a satisfactory explanation for his decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge’s adverse decision is sustainable.

---

<sup>1</sup>The Judge’s favorable findings under Guideline H and paragraphs 2(a) and (b) are not at issue on appeal.

<sup>2</sup>Applicant’s Brief at 1.

**Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board