

KEYWORD: Guideline E; Guideline J

DIGEST: Given the Judge’s unchallenged findings of fact, the Judge made a reasonable determination that Applicant had failed to meet his burden of mitigating his false statements. Adverse decision affirmed.

CASENO: 04-12778.a1

DATE: 03/19/2007

DATE: March 19, 2007

In Re:	)	
	)	
-----	)	
SSN: -----	)	ISCR Case No. 04-12778
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

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 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 September 29, 2006, after the hearing,

Administrative Judge Philip S. Howe denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

The Board construes Applicant's appeal brief as arguing that the Judge should have mitigated the security concern addressed under Guidelines E and J, because his falsification of his security clearance application amounted to an isolated incident. Otherwise his brief does not make an allegation of harmful error.<sup>1</sup>

The Judge made the following findings: Applicant, a 51 year old married employee of a defense contractor, was arrested in October 1996 for speeding and possession of marijuana. In 1998 he pled guilty to the marijuana charge and was placed on probation, with a deferred judgement. Later, while still on probation, he smoked marijuana during a vacation to Florida. Upon his return, his probation officer directed Applicant to submit to a drug test, which yielded a positive result for marijuana. As a consequence, his probation was extended and he was required to submit to monthly drug tests. He subsequently failed one of these tests, which yielded a positive result for marijuana.

In addition to these incidents, Applicant used marijuana from 1992 to 1999, beginning on a weekly basis but increasing his usage to several times a week. Applicant no longer associates with his drug using companions.

On April 3, 2002, Applicant completed his security clearance application. He answered "no" to question 24, which inquired if he had ever been charged or convicted of an offense related to alcohol or drugs. Applicant stated that, since the charges in his marijuana possession case were dismissed in 2000, he had a clean record and believed he could truthfully answer the question in the negative. Additionally, he answered "no" to question 27, which inquired if he had illegally used any controlled substance during the previous 7 years. Applicant admitted that he was afraid that a truthful answer to this question would affect his employment.

The application of disqualifying or mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). 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*. A party's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 05-00609 at 2-3 (App. Bd. Nov. 24, 2006).

Given the Judge's unchallenged findings in this case, we conclude that he made a reasonable determination that Applicant had not met his burden of mitigating the Guideline E and J security concerns raised by his false statements on the security clearance application. Thus the Judge did not err in denying Applicant a clearance.

---

<sup>1</sup>Applicant also argues for a different result because his job only requires access to a secure area rather than access to classified information itself. However, this distinction is irrelevant, insofar as either type of access implicates the national security interests of the United States and requires a finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g.*, ISCR Case No. 98-0055 at 4 (App. Bd. Dec. 31, 1998).

**Order**

The decision of the Judge denying Applicant a security 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