

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant argues that his 30 year period of marijuana use was interspersed with substantial periods of abstinence and that his falsifications were the result of naivete. Given the record before him, the Judge's decision was not arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 05-01676.a1

DATE: 06/11/2007

DATE: June 11, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-01676
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

David P. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 6, 2005, 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) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992,

as amended) (Directive). Applicant requested a hearing. On November 21, 2006, Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issue on appeal: whether the Judge's unfavorable security clearance decision under Guidelines H and E is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse security clearance decision under Guideline H should be reversed because Applicant's 30-year period of illegal marijuana use was "interspersed with substantial periods of total abstinence." As a result, Applicant's marijuana use was "infrequent [and] periodic" rather than "substantial and frequent."² Applicant also argues that the Judge's adverse security clearance decision under Guideline E should be reversed because Applicant's multiple falsifications were the result of his "naivete" and his "having failed to appreciate certain significant aspects of this matter," rather than a deliberate effort to mislead or not disclose information.³ Applicant's arguments do not demonstrate that the Judge erred.

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 finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1. Applicant has not demonstrated that the Judge's conclusion in that regard is arbitrary, capricious, or contrary to law.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application 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). 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 his decision, the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. He found in favor of Applicant with respect to two of the Guideline H allegations. However, the Judge reasonably explained why the evidence which the Applicant had

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.a and 1.b. Those favorable findings are not at issue on appeal.

²Applicant's Appeal Brief at 1.

³*Id* at 2.

presented in mitigation under Guidelines H and E was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines H and E is not arbitrary, capricious, or contrary to law.

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