

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge’s finding of deliberate falsification is sustainable. The favorable evidence cited by Applicant is not sufficient to demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law. Adverse decision affirmed.

CASENO: 05-04874.a1

DATE: 05/23/2007

DATE: May 23, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-04874
)	
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 June 19, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided upon the written record. On

December 27, 2006, after considering the record, Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: 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 had not been mitigated.

(1) Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose his 2003 arrest and conviction for Battery Causing Bodily Injury. 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 finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

(2) In the alternative, Applicant contends that the Judge erred in concluding that the security concerns raised by his falsification had not been mitigated. In support of that contention, Applicant argues that "[he] disclosed all details of [his] arrest to the investigators without provocation."² Applicant's contention does not demonstrate that the Judge erred.

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 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). The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the

¹The Judge found in favor of Applicant under Guideline J. That favorable finding is not at issue on appeal.

²Applicant's Brief at 1.

government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline E 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