

KEYWORD: Guideline H; Guideline J; Guideline E

DIGEST: Applicant’s testimony at the hearing was relevant evidence but it was not binding on the Judge. Adverse decision affirmed.

CASENO: 05-07182.a1

DATE: 05/17/2007

DATE: May 17, 2007

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| In Re:                           | ) |                        |
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| SSN:-----                        | ) |                        |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |
|                                  | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 27, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal 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 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.

On appeal, Applicant raises the following issue: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues that the Judge should have accepted Applicant's testimony of her innocence as to drug charges in 2004, despite her guilty plea to those charges at the time, and her testimony that she did not intentionally falsify her security clearance application because of the state court expungement of her drug offenses. She contends that the Judge should have mitigated her drug arrests in 1995 and 1993 due to the passage of time and the fact that the charges in 1995 were dismissed. Applicant also argues for mitigation due to successful completion of a drug rehabilitation program. The Board affirms the Judge's decision.

Applicant's testimony at the hearing about the events at issue was relevant evidence, but it was not binding on the Administrative Judge. As the trier of fact, the Judge has to consider an applicant's testimony in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-22404 at 4 (App. Bd. May 5, 2005). Here, the Judge's material findings were reasonably supported by the record evidence, and the Judge's conclusions follow rationally from the Judge's findings.

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. 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. *See, e.g.*, ISCR Case No. 05-02471 at 2 (App. Bd. Apr. 11, 2007).

In this case, the Judge reasonably weighed the mitigating evidence against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. He reasonably explained why there was insufficient mitigating evidence to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable evidence cited by the Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case 05-02619 at 2 (App. Bd. Mar. 21, 2007). Given the record that was before him, the Judge's ultimate unfavorable security clearance decision under Guidelines H, J, and E is sustainable.

**Order**

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple  
Michael D. Hipple  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board