

KEYWORD: Guideline E

DIGEST: Department Counsel bears the burden of proving controverted SOR allegations by substantial evidence. The Judge was bound to consider Applicant’s version of events but the Judge is not bound as a matter of law to accept or reject Applicant’s explanation. Guideline E, Mitigating Condition 2 is properly used in a case where the falsification is old and the applicant subsequently provides correct information to the government about other matters not covered by the old falsification. Adverse decision affirmed.

CASENO: 05-10921.a1

DATE: 04/19/2007

DATE: April 19, 2007

In Re:	)	
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SSN: -----	)	ISCR Case No. 05-10921
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Nichole Noel, Esq., Department Counsel

**FOR APPLICANT**

Andrea H. Brisbin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 15, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested

a hearing. On August 22, 2006, after the hearing, Administrative Judge Thomas M. Crean denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the record supports the Judge's conclusion that Applicant violated his company's policies and later failed to take responsibility for his actions; whether the Judge's conclusion that Applicant's conduct under Guideline E was not mitigated was arbitrary, capricious, or contrary to law; and whether the Judge failed to properly apply the "whole person" concept. The Board affirms the Judge's decision.

Applicant alleges that there was insufficient record evidence for the Judge to conclude that the government had established its case with regard to the first of two SOR allegations under Guideline E, to wit: that reliable unfavorable information provided by a former employer created a security concern. That information consisted of Applicant's involuntary termination from his position as a bell captain at a hotel for violating company policy regarding the making and distribution of a room key, and for failing to take responsibility for his actions once hotel management began investigating the matter. Applicant does not dispute the fact that he was terminated from his hotel employment. He does assert that the Judge erroneously leaped to the conclusion that, because Applicant had been terminated, he must have actually engaged in the conduct underlying the termination. In support of this assertion, Applicant states that other than double and triple hearsay statements contained in two documentary exhibits introduced by Department Counsel, there is nothing in the record to support the conclusion the Applicant actually engaged in the underlying conduct. Applicant insists that his consistent denials of the alleged conduct over three years, coupled with his hearing testimony, overwhelmingly outweigh the government's documentary evidence.

Department Counsel bears the burden of proving controverted SOR allegations by substantial evidence. The substantial evidence standard is a lower standard than preponderance of the evidence. Within the framework of the substantial evidence standard, the Judge is required to weigh conflicting evidence. The weighing of evidence is within a Judge's discretion, and will not be disturbed by the Board absent a showing by Applicant that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, or not supported by the record as a whole. The Board sees no basis for disturbing the Judge's weighing of the evidence in this case. The documentary evidence relied on by the Judge when he concluded that Applicant had engaged in the underlying conduct alleged was sufficient to sustain that conclusion. The mere assertion by Applicant that the documents contained hearsay evidence is not sufficient to significantly undermine the reliability of the representations contained in the documents, particularly where the documents were official documents promulgated by the hotel in the course of its business. The Judge was bound to consider Applicant's version of events relating to his termination, but the Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. 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 that the Judge made findings or reached conclusions on controverted issues that were arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 04-08934 at 2 (App. Bd. Aug 17, 2006).

Applicant argues that the Judge's conclusion that Guideline E mitigating factors did not apply to his case was arbitrary, capricious, and contrary to law. Specifically, Applicant claims it was error

for the Judge not to apply Guideline E Mitigating Condition 1<sup>1</sup> to SOR allegation 1.a dealing with his termination from his hotel employment and the related underlying conduct, and it was error for the Judge not to apply Guideline E Mitigating Conditions 2<sup>2</sup> and 3<sup>3</sup> to mitigate the Judge's finding of falsification under allegation 1.b of the SOR.<sup>4</sup>

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply 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 compel the Judge to apply a particular mitigating factor in an applicant's favor and does not compel him to make an overall favorable security clearance decision.

The basis of Applicant's argument that the Judge should have applied Guideline E Mitigating Condition 1 is Applicant's assertion that the evidence of record failed to substantiate the allegation that Applicant engaged in a violation of the hotel's policy. Applicant's argument regarding the application of Mitigating Condition 1 is based on his assertion that a reasonable mind could not have arrived at the conclusion that Applicant actually violated company policy based on the government's evidence. Here, Applicant is merely restating the initial argument he made regarding the legal sufficiency of the Judge's conclusion that Applicant violated company policy and failed to take responsibility for his actions. Inasmuch as the Board has already concluded that there was sufficient record evidence for the Judge to conclude that Applicant did actually commit the acts for which he was fired, Applicant's argument regarding Mitigating Condition 1 is not persuasive.

Regarding Guideline E Mitigating Condition 2, Applicant alleges that the Judge never considered or applied it. There is no presumption of error below, and the Board notes that in the Judge's decision, he stated that he considered all of the Personal Conduct Mitigating Conditions. Moreover, as a matter of law, Guideline E Mitigating Condition 2 is not applicable to the facts of this case. Mitigating Condition 2 is properly used in a case where the falsification is old and the applicant subsequently provides correct information to the government about other matters not covered by the old falsification. In a situation where an applicant seeks to correct a falsification, such as the instant case, the potentially applicable factor, if there is one, is Mitigating Condition 3

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<sup>1</sup>"The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."

<sup>2</sup>"The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

<sup>3</sup>"The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

<sup>4</sup>Subparagraph 1.b of the SOR alleged Applicant failed to disclose the fact of his termination from his hotel employment on his security clearance application. In its brief, Department Counsel correctly points out that Applicant's statement of facts in his brief seems to implicitly dispute whether Applicant intentionally falsified his security clearance application. However, Applicant's appeal arguments do not, either implicitly or explicitly, challenge the Judge's finding that Applicant engaged in falsification. The Board concludes that in this instance, the posture of Applicant's statement of facts do not rise to the level of an assertion of error, and therefore the issue of whether the Judge erred in finding that Applicant engaged in falsification is not before us.

(E.2.A5.1.3.3), not Mitigating Condition 2. *See, e.g.*, ISCR Case No. 99-0557 at 3 (App. Bd. July 10, 2000).

Regarding Guideline E Mitigating Condition 3, Applicant argues that the Judge erroneously found that Applicant did not acknowledge he was fired until he was confronted by an investigator, since there is no evidence in the record to support this conclusion. Applicant then argues that, because the record supports the application of Mitigating Condition 3, the “Board must find in favor of Applicant and dismiss SOR Paragraph 1.b.” Applicant’s assertions are not persuasive. The record evidence indicates that Applicant did not disclose his termination from the hotel until he was at his security clearance interview. The record also indicates that the investigating agent asked about the hotel in the context of previous employments and Applicant indicated he worked there. The investigator then asked if anyone at the hotel would have anything negative to say about Applicant, at which time Applicant supplied the investigator with a name and the hotel management. Subsequently, Applicant informed the investigator that he had been fired from the hotel. On these facts, the Board declines to hold that the Judge was required, as a matter of law, to apply Guideline E Mitigating Condition 3, or to otherwise find that Applicant’s falsification had been mitigated. Therefore, Applicant has not established that the Judge erred.

Applicant alleges that the Judge failed to properly apply the “whole person” concept. In doing so, he emphasizes the favorable evidence in the record concerning his overall employment history, work ethic, reliability, and high job performance ratings. He argues that even if the Board finds the SOR disqualifying conditions to be substantiated, consideration of Applicant’s other personal and employment history over a ten-year period can only lead to the conclusion that he qualifies for the privilege of holding a security clearance. The presence of some favorable evidence does not 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*. In this case, after a review of the record and the Judge’s decision, the Board concludes that the Judge adequately considered the whole person factors enumerated by Applicant. The Judge’s ultimate unfavorable clearance decision is not arbitrary, capricious, or contrary to law.

### **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: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board