

KEYWORD: Guideline E; Guideline H; Guideline J; Guideline M

DIGEST: Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Adverse decision affirmed.

CASENO: 05-13515.a1

DATE: 07/19/2007

DATE: July 19, 2007

In Re:)	
)	
)	
-----)	ISCR Case No. 05-13515
SSN: -----)	
)	
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 March 29, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline M (Misuse of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 25, 2007, after the hearing,

Administrative Judge Kathryn Moen Braeman denied Applicant's request for a security clearance.¹ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred by concluding that the security concerns raised under Guideline E had not been mitigated.

Applicant contends that the Judge erred in concluding that the security concerns raised under Guideline E had not been mitigated. With respect to the falsification of his security clearance application, Applicant argues that the Judge should have found the disqualifying conduct mitigated, as a matter of law, under the relevant Mitigating Conditions, because the conduct was an isolated incident; not likely to recur; and he had subsequently provided the correct information voluntarily. With respect to his multiple instances of accessing premium, pay-per-view, pornographic and other satellite television programs (for himself and others) without paying the required fees, and his downloading of multiple computer programs without paying the required costs,² Applicant argues the Judge should have found the disqualifying conduct mitigated, as a matter of law, under the whole person factors, based upon the totality of the evidence. The Board does not find these arguments persuasive.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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 and whole person factors. The Judge found in favor of Applicant with respect to some of the SOR allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of 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. June 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under

¹The Judge found in favor of Applicant under Guidelines H and J. The Guideline M allegations and SOR ¶ 1.d were withdrawn. Those favorable dispositions are not at issue on appeal.

²The satellite television programs were accessed between 2002 and 2003, and were valued at approximately \$14,000. The 200 computer programs were downloaded between 1999 and 2003, and were valued at approximately \$10,000.

Guideline E is sustainable.

Order

The decision of the Judge denying Applicant a security 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