

KEYWORD: Guideline E; Guideline J

DIGEST: Applicant contends that the Judge found against him on a matter not raised in the SOR under Guideline E. The Judge found against Applicant under allegations under both Guideline E and Guideline J. Her adverse determination under Guideline J is sustainable. Adverse decision affirmed.

CASENO: 06-11682.a1

DATE: 06/06/2007

DATE: June 6, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-11682
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 26, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal 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 Joan Caton Anthony denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge improperly applied the relevant mitigating conditions and whole person factors; and whether the Judge's decision is arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm.

The Judge made the following findings of fact: Applicant is a program analyst working for a government contractor. He has held a security clearance since 1994.

In December 1985, Applicant entered the U.S. Marine Corps. In 1997, he completed Officer Candidate School and was commissioned with the rank of Second Lieutenant.

In July 2001, Applicant was charged under the Uniform Code of Military Justice (UCMJ) with fraternization, conduct unbecoming an officer, sodomy, and adultery. He entered a conditional plea of guilty and, upon conviction, was sentenced to 165 days confinement, forfeiture of all pay and allowances, and a dismissal from the Marine Corps. Applicant served 139 days of confinement. His conviction was still in appeal, and therefore his dismissal unexecuted, at the close of the record in this security clearance hearing.¹

In arguing the issues on appeal in his security clearance case, Applicant states that he was advised by his military counsel prior to the security clearance hearing not to be specific in discussing the facts underlying his court-martial. As a consequence, the Judge concluded that his failure to discuss the facts in detail establishes security concerns with respect to the Guideline E allegations under Directive ¶ E2.A5.1.1.2: "Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination." Decision at 6. Applicant contends that the Judge found against him on a matter that was not raised in the SOR, therefore depriving him of the due process afforded by the Directive.

The above disqualifying condition was not the only one on which the Judge relied in reaching her adverse conclusions under Guideline E. Moreover, even if it is assumed for the purposes of this appeal that Applicant's position is correct as regards Guideline E, we nevertheless conclude that the Judge's adverse clearance decision is sustainable under Guideline J. We note that the Judge's findings are consistent with other record evidence: that Applicant was convicted of conduct unbecoming an officer and of adultery, the other charges having been dismissed either as part of his plea agreement or during the UCMJ appellate process; that the facts underlying the conviction include, at least in part, Applicant's having offered a subordinate female Marine time off from work in exchange for sex; and that the Navy and Marine Corps Court of Criminal Appeals (Court) held that Applicant's dismissal was a sentence appropriate for the offenses of which he was convicted. *See* Applicant Exhibit A at 1-2. This misconduct is serious, the Court describing it as

¹"If in the case of a commissioned officer . . . the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or by such Under Secretary or Assistant Secretary as the Secretary concerned may designate." 10 U.S.C. § 871(b).

“unconscionable.” *Id.* at 2.² Viewed in light of the record as a whole, we hold that the Judge’s adverse decision under Guideline J is neither arbitrary, capricious, nor contrary to law.

Order

The Judge’s decision 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

²“Conduct [Unbecoming an Officer] is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the . . . person’s standing as an officer. . .” Manual for Courts-Martial United States, Part IV, ¶ 59(c)(2)(2000 ed.).