

KEYWORD: Guideline E; Guideline J

DIGEST: The Judge was not bound as a matter of law to accept Applicant's explanation for his failure to disclose his prior drug use. The government is not estopped from making an adverse security determination when there are prior favorable determinations.

CASENO: 06-11898.a1

DATE: 12/26/2007

DATE: December 26, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-11898
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

David M. Duwel, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 19, 2007, DOHA issued a statement of reasons (SOR) 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 July 30, 2007, after the hearing, Administrative Judge Philip S. Howe denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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’s unfavorable clearance decision under Guidelines E and J is arbitrary, capricious, or contrary to law.

(1) Applicant argues that he did not deliberately falsify two security clearance applications and several signed, sworn statements by failing to disclose his prior drug usage. In support of that argument, Applicant contends that his omissions were the result of a mistake and that he had no reason to hide his past drug use.¹ Applicant’s argument does not demonstrate that the Judge erred.

In this case, Applicant omitted information of obvious security concern from two security clearance applications and several signed, sworn statements. He gave multiple, inconsistent reasons for his omissions. The Judge had the opportunity to consider Applicant’s explanations 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 explanations. The Judge considered Applicant’s explanations in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omissions were deliberate and intentional. On this record, the Judge’s finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1.

(2) Applicant also argues that the Judge should have concluded, as a matter of law, that the security concerns raised by his multiple falsifications were mitigated by Applicant’s favorable evidence. As part of his argument, Applicant notes that: (a) his prior drug use is so old that it is no longer of security concern, (b) the government knew of his prior drug use during earlier investigations and had still granted him a clearance, and (c) he has held a clearance for a number of years without any adverse incidents. Applicant’s arguments do not demonstrate that the Judge erred.

Prior security clearance adjudications and the granting of clearances for the Applicant have no bearing on the legal sufficiency of the Judge’s adverse clearance decision here. *See, e.g.*, ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 01-24506 at 3 (App. Bd. Feb. 11, 2003). In that regard, the government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct or circumstances having negative security significance. *See, e.g.*, DISCR Case No. 91-0775 at 3 (App. Bd. Aug. 25, 1992); ISCR Case No. 02-17609 at 3-4 (App. Bd. May 19, 2004).

¹Applicant used marijuana, sometimes on a weekly basis, from 1968 to 1994. He purchased it between 1968 and 1985, and sold it in high school and college. Applicant used hashish in high school and college, his last use occurring in 1993. He used “speed” in college and cocaine on three occasions in 1993 and tried LSD 25 times between 1969 and 1974. Applicant used heroin and morphine in 1974. Some of his drug use occurred while he held a security clearance. Decision at 2.

The absence of security violations does not bar or preclude an adverse security clearance decision. The federal government need not wait until an applicant actually mishandles or fails to properly handle classified information before it can deny or revoke access to such information. *See* ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007) citing *Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole-person analysis to determine an applicant's security eligibility. A whole-person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (App. Bd. Jun. 4, 2004).

The existence of any record of a prior investigation is irrelevant to Applicant's duty to be truthful with the government when he was asked about his past. Likewise, Applicant's state of knowledge as to the existence of any record of a prior investigation is irrelevant to his duty to fully disclose his past conduct of security concern when asked. To the extent that Applicant is arguing that these facts provide mitigation for his falsifications in this case, his position lacks merit. *See, e.g.*, ISCR Case No. 99-0381 at 2 (App. Bd. Feb. 23, 2000). Similarly, inasmuch as Applicant's prior drug use was sufficiently mitigated by the passage of time so as to obviate any residual security concerns under Guideline H (Drug Involvement) that did not constitute evidence of mitigation as to the Guideline E and J security concerns raised by his recent falsifications.

Once there has been a concern articulated regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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 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 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*. *See, e.g.*, ISCR Case No. 06-06459 at 2 (App. Bd. Oct. 24, 2007). 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 that 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. 06-17409 at 2 (App. Bd. Oct. 12, 2007).

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by Applicant's falsifications had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3. 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. He reasonably explained why the evidence which the 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 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). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines E and J is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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