

KEYWORD: Guideline E; Guideline J; Guideline D

DIGEST: An applicant is not entitled to a delayed or deferred adjudication of his or her security eligibility. A review of the decision indicates that the Judge weighed the mitigating evidence against the length and seriousness of the disqualifying conduct. Adverse decision affirmed.

CASENO: 06-22044.a1

DATE: 02/28/2008

DATE: February 28, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-22044
)	
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 January 10, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 1, 2007, after the hearing, Administrative Judge Martin H. Mogul 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 issue on appeal: whether the Judge erred by concluding that the security concerns raised under Guidelines E, J and D had not been mitigated.

Applicant argues that the Judge’s adverse decision should be reversed because he voluntarily admitted to the issues raised in the SOR and those issues would not have become known if not for his disclosures. In support of his contention, Applicant essentially reargues the facts in his case and states that his mistakes are in the past and he has demonstrated a new sense of trustworthiness. Alternatively, Applicant asks that the Board grant him a probationary clearance, subject to random drug testing and counseling. Applicant’s arguments do not demonstrate that the Judge erred.

An applicant is not entitled to a delayed or deferred adjudication of his or her security eligibility. *See, e.g.*, ISCR Case No. 01-07018 at 10 (App. Bd. Dec. 6, 2005). Likewise, the Board does not have authority to grant a clearance on a conditional or probationary basis. *See, e.g.*, ISCR Case No 04-04302 at 5 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-17410 at 4 (App. Bd. Apr. 12, 2005).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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. *See, e.g.*, ISCR Case No. 06-11172 at 2 (App. Bd. Sep. 4, 2007).

A review of the decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge reasonably explained why the evidence which 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 record evidence cited by Applicant is not sufficient to demonstrate the Judge’s decision is arbitrary, capricious, or contrary to law. Given the record that was before him, the Judge’s ultimate unfavorable security clearance decision under Guidelines E, J and D is sustainable.

Order

The decision of the Judge 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