

KEYWORD: Guideline E; Guideline J

DIGEST: Even if the challenged finding was changed it would not have undermined the Judge's conclusions. The Judge considered Applicant's explanations but was not bound by them. The Judge's findings of deliberate falsification are sustainable Adverse decision affirmed.

CASENO: 06-23112.a1

DATE: 12/31/2007

DATE: December 31, 2007

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 06-23112
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**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 12, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline F (Financial Considerations), 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 August 30, 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 issues on appeal: whether the Judge erred in his findings; whether the Judge erred in concluding Applicant’s falsification of his security clearance application was deliberate; whether the Judge erred by concluding that the security concerns raised under Guidelines E and J had not been mitigated.<sup>1</sup>

(1) Applicant asserts that the Judge erred in findings that Applicant had served in the U.S. Navy from 1980 through 1986 and had resigned when his shoulder was broken, when in fact Applicant had served from 1980 to 1997 and had medically retired because of the injury. Applicant has not met his burden of demonstrating that the Judge’s material findings with respect to Applicant’s conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence.

The Board’s review of a Judge’s findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620, (1966). In this instance, even if the challenged finding was changed to reflect Applicant’s interpretation of the record evidence, it would not have undermined the Judge’s conclusions. Therefore, any such error would be at most harmless. *See* ISCR Case No. 05-08459 at 2, n.1 (App. Bd. Nov. 16, 2006). Considering the record as a whole, the Judge’s material findings with respect to Applicant’s conduct of security concern reflect a reasonable interpretation of the record evidence and are supported by substantial evidence. *See, e.g.*, ISCR Case No. 03-21933 at 2 (App. Bd. Aug. 18, 2006).

(2) Applicant also contends that he did not deliberately falsify his security clearance application by failing to disclose unfavorable information of security concern in response to four different questions. In support of this contention, he argues that the omission of the information was due to a misreading of the questions or a lack of information on his part. Applicant has not demonstrated that the Judge erred.

The Judge had the opportunity to consider Applicant’s explanation 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 explanation. The Judge considered Applicant’s explanation 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 findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

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<sup>1</sup>The Judge found in favor of Applicant under Guideline F. That favorable finding is not at issue on appeal.

(3) Finally, Applicant contends that the Judge erred in concluding that the security concerns raised by his falsifications had not been mitigated, based upon the favorable record evidence, particularly his lengthy, honorable military service. Again, Applicant has not demonstrated that the Judge erred.

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 (9<sup>th</sup> 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 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. 06-17691 at 3 (App. Bd. Jul.19, 2003). 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 under Guideline F. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's other 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. 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: Jeffrey D. Billett

Jeffrey D. Billett  
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