

KEYWORD: Guideline H; Guideline E

DIGEST: The fact that the Judge did not explicitly mention portions of the evidence that Applicant considers mitigating does not establish error. Adverse decision affirmed.

CASENO: 07-16947.a1

DATE: 07/16/2009

DATE: July 16, 2009

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In Re: )	
)	
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)	
)	
Applicant for Security Clearance )	
_____ )	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Thomas McCarthy, Sr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 4, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) and

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 23, 2009 after the hearing, Administrative Judge Rita C. O'Brien denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge failed to properly consider various matters in mitigation in the case; and (b) whether the Judge's finding that Applicant falsified an answer on a security clearance application is sustainable. For the following reasons, the Board affirms the Judge's adverse security clearance decision.

The Judge found, *inter alia*, that Applicant, after he graduated from college, used marijuana five times between 1999 and 2005, used psychedelic mushrooms in 2001 or 2002, and used anabolic steroids from March to June 2005, December 2005 to February 2006, and October to December 2006. Applicant had held a security clearance since 2001. When filling out a security clearance application in April 2007, Applicant answered "no" to a question asking whether he had ever been terminated from a job for cause, or otherwise left a job under unfavorable circumstances. The Judge found that in 2000, Applicant was informed by his employer that he "was not working out" and that he would be leaving the company. The Judge also found that Applicant was unhappy with his work situation and that he "welcomed" leaving the company.

The Judge concluded that Applicant's illegal drug use was not mitigated. The Judge specifically mentioned Applicant's willingness to engage repeatedly in illegal drug use while he was a mature adult and while he held a security clearance. The Judge concluded that Applicant had engaged in deliberate falsification when he did not reveal the circumstances of his termination from employment in 2000. The Judge concluded the falsification was unmitigated.

Applicant asserts that the Judge did not consider important matters in mitigation under Guideline H. There is a rebuttable presumption that the Judge considered all the record evidence in a case unless he or she specifically states otherwise. A review of the Judge's decision convinces the Board that Applicant has not overcome this presumption. 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. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct under Guideline H and considered the possible application of relevant conditions and factors. However, the Judge concluded that there was insufficient evidence to mitigate the Guideline H allegations. This conclusion is reasonably supported by the record. The fact that the Judge did not specifically mention portions of evidence that Applicant considers mitigating, including Applicant's willingness to sign an agreement not to use drugs in the

future and Applicant's statement that his security clearance and his career are very important to him, does not establish error.

Regarding the Judge's conclusion that Applicant engaged in a deliberate falsification when he failed to reveal the circumstances involved in the termination of his employment in 2000, that conclusion is sustainable on this record. Applicant revealed the pertinent information about the job termination when responding to a set of interrogatory questions subsequent to his completion of the security clearance application. The Judge correctly noted that the interrogatory question was the same question as the one on the security clearance application and reasonably concluded that the explanation Applicant provided on the interrogatory question could easily have been provided on the security clearance application. The record evidence indicates that the circumstances surrounding Applicant's termination of employment in 2000 were of such a nature that they were reasonably contemplated by the question on the security clearance application. Applicant's ability to provide an explanation for his failure to answer the application question affirmatively does not render the Judge's contrary conclusion arbitrary, capricious, or contrary to law.

### **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: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board