

KEYWORD: Guideline M; Guideline E

DIGEST: Applicant failed to mitigate security concerns resulting from his having downloaded pornography onto a company computer. He submitted new evidence in his appeal, which the Board cannot consider. Adverse decision affirmed.

CASENO: 08-00162.a1

DATE: 01/14/2010

DATE: January 14, 2010

<p>In Re: _____</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 08-00162</p>
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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 June 3, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Use of Information Technology Systems) and Guideline E (Personal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a disposition on the written record. On October 21, 2009, after the close of the evidentiary record, Administrative Judge Thomas M. Crean 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 issue on appeal: whether the Judge’s decision is arbitrary,

capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found that despite the fact that Applicant's company prohibited the accessing and downloading of pornographic materials on company computers, pornographic material was found on Applicant's work computer in May 2006. Applicant was a facility security officer at the time. Applicant also failed to file a state income tax return for tax year 1998. He subsequently filed the return, paid his penalties and resolved the debt. Applicant also used marijuana about 20 times from September 1996 until December 2000. The Judge concluded that Applicant's accessing, viewing and downloading of pornography on his company computer was not mitigated and was made worse by the fact that, at the time, he was the facility security officer and was responsible for the company's compliance with security procedures, its security posture, and proper use of computer systems. The Judge concluded that Applicant's tax delinquency and marijuana use were no longer of security significance.

Applicant argues that the Judge's findings of fact contain inaccuracies, namely the finding that the hardest thing about his viewing of pornography was having to tell his wife about it, the finding that he failed to mail his 1998 state tax return, and the finding that his last admitted use of marijuana was in 2000 as opposed to 2003. Applicant also argues that the record and a whole person analysis mandate a conclusion that his case has been mitigated. Applicant's claims do not establish harmful error on the part of the Judge.

In support of his appeal, Applicant has submitted new matters not contained in the record, which the Board cannot consider. *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"). *See also* ISCR Case No. 08-06518 at 2 (App. Bd. Mar. 3, 2009).

Inasmuch as the Judge ultimately found in Applicant's favor regarding the tax return and marijuana use allegations, and resolved them favorably in his whole person analysis, any errors in the Judge's findings of fact regarding these two allegations are harmless. Regarding the alleged error in the Judge's finding of fact relating to the accessing pornography allegation, the Judge's finding is supported by the evidence.

Applicant's arguments concerning mitigation do not establish error on the part of the Judge. 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 and considered the possible application of relevant conditions and factors. He discussed the applicability of Guideline M mitigating conditions and

cogently explained why there was insufficient mitigation to overcome the government's security concerns. He also discussed the inapplicability of Guideline E mitigating conditions as they related to the pornography allegation. His conclusions are reasonably supported by the record evidence.

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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision 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  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board