

KEYWORD: Guideline E; Guideline H

DIGEST: The Judge reasonably explained why the evidence in mitigation was insufficient to overcome the government’s security concerns under Guideline E. Adverse decision affirmed.

CASENO: 08-03335.a1

DATE: 11/24/2009

DATE: November 24, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-03335
)	
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 February 9, 2009, 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 H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as

amended) (Directive). Applicant requested a hearing. On September 21, 2009, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Specifically, Applicant contends that the Judge based his decision on his erroneous belief that Applicant still uses illegal drugs. Applicant also argues that the Judge did not give adequate weight to the character references she submitted. Finding no error, we affirm the Judge's decision.

The Judge made the following relevant factual findings: Applicant is 53 years old. Applicant bought and used an illegal substance with varying frequency from approximately 1990 until 2003 or 2004. From 1990 until 2001, her usage was approximately two days per month. Applicant sought counseling in 2001 and underwent treatment for approximately a year. Then in 2003 or 2004, Applicant bought and used the illegal substance once and became sick. In response to a question on her Security Clearance Application, Applicant falsely denied her drug use.

Applicant is incorrect in stating that the Judge based his decision on a belief that Applicant continues to use illegal drugs. In fact, the Judge found in Applicant's favor as to the Guideline H allegations in the SOR, concluding that Applicant's abstinence since 2003 or 2004 was sufficient to mitigate the government's concerns as to her drug involvement.¹ Decision at 5.

Applicant argues that the Judge did not give adequate weight to the character references she submitted. The Judge stated that he considered Applicant's five letters of reference.² However, 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, 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. 07-05632 at 2 (App. Bd. May 13, 2007).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant under Guidelines H and E and considered the possible application of relevant mitigating conditions and factors. The Judge found sufficient evidence of mitigation to rule in Applicant's favor as to Guideline H, but reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns under Guideline E. The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient

¹The Judge applied the Directive's Drug Involvement Mitigating Condition (b)(3): "a demonstrated intent not to abuse any drugs in the future, such as: . . . an appropriate period of abstinence[.]" *See* Directive ¶ E2.26 (b)(3).

²In this case, the Judge specifically stated that he considered the reference letters to be of little weight because none of the writers indicated that they were aware of Applicant's prior drug use. Decision at 3.

to demonstrate the Judge’s decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 08-01105 at 2-3 (App. Bd. Dec. 15, 2008). 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, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines 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.’” *Dep’t of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge’s adverse decision is sustainable.

Order

The Judge’s decision 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board