

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant failed to mitigate security concerns arising from his criminal history, which included serving an 8-year prison sentence, and his false answers on his security clearance questionnaire. Adverse decision affirmed.

CASENO: 08-06822.a1

DATE: 05/13/2009

DATE: May 13, 2009

In Re: <div style="text-align: center; margin-top: 10px;"> ----- </div> Applicant for Security Clearance))))))))	ISCR Case No. 08-06822
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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 November 17, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 16, 2009 after the hearing, Administrative Judge Joan Caton Anthony 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, and contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found, *inter alia*, that Applicant was convicted of drug related crimes in 1968. In 1979 he was convicted of felony burglary and receiving stolen property. In 1989 he was convicted in federal court of "possession of a controlled substance with intent to distribute" and "use of a firearm in relation to drug trafficking." He was sentenced to 10 years in federal prison and served eight years after which he was on supervised probation for 4-5 more years. Applicant prepared public trust and security clearance applications in 2000, 2004, and 2007. Each time he deliberately failed to disclose pertinent information regarding his drug and criminal history.

Applicant does not deny his past criminal history, nor does he deny the fact that he deliberately falsified answers to questions about his criminal history on public trust position and security clearance applications. He asserts, however, that he has paid dearly for his past offenses, is now rehabilitated, and leads an honorable life. Applicant feels that the genuine remorse that he now feels, the many difficulties in life that he has experienced, and the success that he has recently achieved mitigate the security concerns raised by his past misconduct. These assertions do not establish error on the part of the Judge.

Applicant's appeal brief contains a lengthy discussion of his life, the problems he has experienced, and his thoughts about those problems. Some of the matters discussed by Applicant are not included in the record below. The Board cannot consider new evidence on appeal. Directive, ¶ E3.1.29.

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. She applied applicable mitigating conditions and found in Applicant's favor regarding significant criminal activity he had engaged in prior to 1990. However, the Judge concluded that there was insufficient evidence to mitigate the more recent and repeated instances of falsification of public trust position and security clearance applications. These conclusions are reasonably supported by the record. The Judge also considered Applicant's overcoming of his earlier difficulties and his recent career successes in her whole person analysis.

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 her 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
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board