

Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On January 29, 2010, after the close of the record, Administrative Judge Noreen Lynch denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge erred in not applying Personal Conduct Mitigating Condition ¶ 17(c), and (b) whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found that Applicant e-mailed a nude photograph of himself to a co-worker from his company-issued laptop computer. The Judge also found that Applicant downloaded about 122 personal pictures, to include four nude photographs of himself, onto his company-issued laptop computer in violation of the company code of conduct. The Judge concluded that the sexual behavior security concerns were mitigated, but that Applicant failed to mitigate the concerns that his actions raised under Guidelines M and E.

Applicant argues that, under Guideline E, the Judge erroneously failed to apply Guideline E ¶ 17(c).¹ His principal argument in support of applying the mitigating condition was the fact that two years have passed since the events of concern took place. While it is true that the Judge did not specifically reference this particular mitigating condition when analyzing the case under Guideline E, she did specifically reference the fact that the conduct occurred in 2007 when detailing her reasons for not applying any of the mitigating conditions under Guideline M. Under Guideline M, the Judge did specifically consider Mitigating Condition ¶ 41(a),² and determined that it did not apply. This mitigating condition contains the same consideration of the passage of time as the Guideline E mitigating condition that Applicant claims was erroneously ignored. After a reading of the Judge's decision in its entirety, the Board concludes that the Judge adequately considered the relevant circumstances and concluded that they were not sufficient to extinguish the government's security concerns. Applicant has not established harmful error.

Applicant relies on two Hearing Office decisions to support his argument that the Judge should have concluded that his case was mitigated. The Board gives due consideration to these cases. However, each case "must be decided upon its own merits." Directive ¶ E2.2.3. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). Notwithstanding some factual similarities, the cases cited by Applicant contain no matters that establish error on the part of the Judge.

¹"[T]he offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

²[S]o much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

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 discussed the applicability of the Adjudicative Guidelines under Guidelines M, E, and D at some length, but then indicated why no mitigating conditions were available to overcome the government's security concerns under Guidelines M and E.³

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 evidence 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: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields

³The Judge did conclude that the government's case under Guideline D had been mitigated.

Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board