

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant did not respond to the File of Relevant Material. The Judge’s conclusion that he had not mitigated the security concerns is sustainable. The Board cannot consider new evidence on appeal. Adverse decision affirmed.

CASENO: 08-11083.a1

DATE: 01/25/2010

DATE: January 25, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11083
)	
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 June 3, 2009, DOHA issued a statement of reasons 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 decision on the written record. On November 12, 2009, after considering the record, Administrative Judge Mary E. Henry 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.

In his appeal brief, Applicant contends that the Judge did not have all the necessary evidence to make an informed decision. Applicant then submitted new evidence for purposes of the appeal. The Board is unable to consider information that was not part of the record, because the Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

The Judge's decision was based entirely on the government's File of Relevant Material (FORM) including Applicant's response to the SOR. In July 2009, Applicant received a copy of the FORM and had the opportunity to submit materials to further refute, extenuate, or mitigate the information in the FORM. The FORM and the cover letter both had language advising Applicant of his opportunity to submit additional information and documentation in response to the FORM. At that time, Applicant could have submitted any materials he thought would strengthen his case before the Judge. Applicant did not respond to the FORM. Applicant has not demonstrated error on this issue.

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*. A party cannot reasonably expect a Judge's decision to be based on evidence which was not before the Judge. The Judge's decision is sustainable.

Order

The Judge's adverse security clearance decision 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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board