

KEYWORD: Guideline J; Guideline E

DIGEST: There is no requirement that the Judge mention or discuss every piece of record evidence. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Adverse decision affirmed.

CASENO: 08-12058.a1

DATE: 06/14/2010

DATE: June 14, 2010

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In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Daniel Wilkins, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 9, 2009, 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 23, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr., denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge should have found that Applicant’s conduct was mitigated, and whether the Judge’s decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm the Judge’s adverse security clearance decision.

The Judge made the following relevant findings of fact: Following a heated argument, Applicant shot and wounded a friend who had begun dating the mother of Applicant’s child. Applicant was charged with, and convicted of, felony attempted murder and one count of wearing or carrying a handgun. Eight other charges were *nolle prosequi*. Applicant was sentenced to thirty years in prison, but the sentence was reduced to fifteen years. Due to good behavior, Applicant actually served only ten years and was released in June 2005. Since Applicant was ordered to remain on probation until February 15, 2010, he was still on probation at the time of the hearing. While in prison, Applicant earned an associate’s degree in mechanical engineering. After his release, Applicant completed a community re-entry program and has re-established ties with family and friends. While incarcerated, Applicant maintained ties with his former employer, and his co-workers helped him with his homework and wrote letters to him. Applicant was rehired by his former employer. Applicant is liked and respected by his co-workers, and he is active in his community.

Applicant argues that he has mitigated any security concerns that might exist under Guideline J and that the Judge either did not consider or did not give adequate weight to his evidence of mitigation.<sup>1</sup> There is a rebuttable presumption that the Judge considered all the record evidence, unless the Judge specifically states otherwise; and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). Applicant admitted the criminal behavior alleged in the SOR. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. 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’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

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<sup>1</sup>The Judge found in Applicant’s favor as to Guideline E. The Judge’s findings regarding Guideline E are not at issue.

demonstrate that 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. 07-18303 at 2-3 (App. Bd. Nov. 13, 2008).

In discussing his mitigating evidence, Applicant specifically mentions the issue of rehabilitation and the fact that he was still on probation at the time of the hearing, but successfully completed his probation shortly thereafter. The Judge specifically considered the issue of rehabilitation in light of the seriousness of Applicant's crime and the fact that Applicant was still on probation at the time of the hearing.<sup>2</sup> The Judge evaluated the record evidence as a whole and considered the totality of Applicant's circumstances. The Judge also weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct. The Judge discussed his application of mitigating factors at length. The Judge articulated a rational basis for his decision and reasonably explained why Applicant's mitigating evidence was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable security clearance decision under Guideline J is not arbitrary, capricious, or contrary to law.

Applicant points out that he was put at a disadvantage by the timing of the hearing—the fact that the hearing was held on December 18, 2009, and he was scheduled to complete his probation on February 15, 2010. The Judge was aware that Applicant was about to complete his probation and discussed that situation in his decision. The fact that Applicant has now successfully completed his probation is new evidence which the Board cannot consider on appeal. *See* Directive ¶ E3.1.29. The Board does not review a case *de novo*. Nor does it have the authority to grant a conditional clearance. *See, e.g.*, ISCR Case No. 06-24458 at 2 (App. Bd. Jan. 14, 2008).

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, 158 (1962)). Accordingly, the Judge's ultimate unfavorable security clearance decision is sustainable.

### **Order**

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

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<sup>2</sup>The Judge correctly observed that the fact that an applicant is still on probation at the time of the hearing is a disqualifying factor under the Directive at Enclosure 2, ¶ 31(d).

Member, Appeal Board

Signed: Jean E. Smallin

Jean E.Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board