

KEYWORD: Guideline E; Guideline H; Guideline J

DIGEST: Applicant’s argument on appeal did not establish that the Judge mis-weighed the record evidence. The Government does not have to demonstrate that Applicant’s access to classified information would pose an imminent threat to national security before denying a clearance. Adverse decision affirmed.

CASE NO: 09-01515.a1

DATE: 09/15/2010

DATE: September 15, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-01515
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Edward O. Lear, Esq. and Daniel Woodford, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 23, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 21, 2010, after the hearing, Administrative Judge Darlene D. Lokey Anderson 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: whether the Judge erred in concluding that Applicant failed to present sufficient evidence to overcome the government's security concerns, and whether the Judge misapplied the whole person factors. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings: Applicant is 20 years old. He has been cited for three driving infractions. In December 2007, at the age of 17, he was cited for driving past curfew. In February 2008, he was cited for unsafe turn signal, obstructed view and not having a driver's license in his possession. In May 2008, Applicant was cited for speeding. Applicant used marijuana two or three times between December 2007 and January 2008. He also used cocaine and ecstasy on one occasion in January 2008. He tested positive for illegal drugs during a drug screening test conducted by his probation office in January 2008. Applicant attributed his illegal drug use to peer pressure. He no longer associates with any drug users. In August 2005, Applicant was arrested for grand theft from person. Applicant was accused of taking a \$5 bill off of a person standing in line in front of him at a store. He was arrested and taken to jail. He was issued a citation and required to appear in court. Unintentionally, he missed his court date and a warrant was issued for his arrest. The court ultimately dismissed the case. In September 2007, Applicant was arrested and charged with felony burglary. Applicant stole a bottle of alcohol (liquor) from a department store with a friend, who stole additional items. Applicant was arrested and taken to jail. He was placed on supervised probation for one year, required to complete of 80 hours of community service and 20 hours of either AA or NA meetings. Applicant testified that he currently has a girlfriend, who has kept him on the straight and narrow path for the past two years. He feels that she has brought out the best in him and he is a completely changed person. He recently purchased a house. Applicant currently consumes alcohol, and is currently breaking the law. He knows that it is illegal for him to consume alcohol in the state, as he is under the legal age limit to consume alcoholic beverages.

The Judge concluded that the totality of the evidence indicates poor judgment, unreliability, and untrustworthiness on the part of the Applicant. Furthermore, although it is not alleged, Applicant is consuming alcohol while he is still under the legal age to do so in the state of his residence. Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the government's case. Under the whole-person concept, the totality of the conduct set forth under all the guidelines indicates that Applicant may not properly safeguard classified information.

Applicant contends that the Judge's unfavorable decision is not supported by the record evidence and that Applicant established mitigation of the government's concerns¹. He states that

¹Applicant proffers an additional argument by asserting that there is no reasonable basis for concluding that allowing Applicant's access to classified information poses an imminent threat to the national interest. He cites the Directive ¶ 6.4, for the proposition that clearance suspension is authorized where an imminent threat to the national interest is established. Applicant's argument is misplaced. Clearance suspension pending the normal security clearance adjudication process is a separate determination that is not applicable to this case. Thus, the standard of imminent threat

the conduct that the Judge cited as a basis for her decision can be attributed to his young age and inexperience. He states his unwillingness to jeopardize his current position, his disassociation from the harmful influences that contributed to his past indiscretions, and the positive influences represented by his girlfriend, his job and his new home. Applicant's arguments do not establish error on the part of the Judge.

Applicant cites his commitment to weekly psychiatric treatment as an additional factor which renders the Judge's clearance decision arbitrary and capricious. The evidence of psychiatric treatment is new evidence, which the Board cannot consider on appeal. Directive ¶ E3.1.29.²

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 adequately discussed why the disqualifying conduct established under Guidelines E, H, and J was not mitigated.

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.

is not applicable to this case.

²Included with Applicant's appeal brief was a Motion to Augment Record, wherein Applicant requested the Board to consider evidence relating to his psychiatric treatment. In keeping with the Directive's prohibition against considering matters not part of the record, the motion is denied.

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

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

To the extent that Applicant's brief raises the issue of whether the Judge adequately addressed questions of recency and maturity, I believe it raises a fair point. Two years have passed since the last misconduct alleged in the SOR (speeding five miles an hour over the speed limit) and Applicant is twenty-years-old. It would have been appropriate for the Judge to address in some detail the applicability of Directive, Enclosure 2 ¶¶ 2(a)(3), 2(a)(4), 2(a)(9), 2(e)(1), 2(e)(5), 17(c), 26(a), 26(b), 32(a) and/or 32(d) in her decision. Her failure to do so was error.

Signed: Michael Y. Ra'an _____
Michael Y. Ra'an
Administrative Judge
Chairperson, Appeal Board