

KEYWORD: Guideline D; Guideline E

DIGEST: The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision.

CASENO: 09-07229.a1

DATE: 02/15/2011

DATE: February 15, 2011

In Re:)
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 -----) ISCR Case No. 09-07229
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)
 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 March 24, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On November 19, 2010, after considering the record, Administrative Judge Robert J. Tuider denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse clearance decision is arbitrary, capricious or contrary to law.

Applicant argues that the Judge mis-weighed the evidence and that his adverse decision should be reversed. In support of his argument, Applicant asserts: 1) his sexual misconduct was not lengthy, 2) it occurred over five years ago, 3) he did not try to hide the misconduct, 4) he is not subject to coercion, and 5) he has held a clearance without incident since 1986. Applicant’s arguments do not demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law.

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 his decision, the Judge noted that Applicant had elected to have his case decided on the written record in lieu of a hearing and had “. . . presented little or no evidence to explain, extenuate, or mitigate the sexual behavior and personal conduct security concerns.” Decision at 7. As a result, he concluded that Applicant had failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. *Id.* The Judge weighed the limited mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. His analysis included consideration of the circumstances referenced in Applicant’s appeal brief. Decision at 2, 3, 6 and 7. He found in favor of Applicant with respect to two of the SOR factual allegations, but reasonably explained why the mitigating evidence was insufficient to overcome all of the government’s security concerns.

The Board does not review a case *de novo*. 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, 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 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board