

KEYWORD: Guideline J; Guideline H

DIGEST: The Board looks to Judge’s decision as a whole in evaluating his findings and conclusions. Judge’s material findings were supported by substantial record evidence. Adverse decision affirmed.

CASE NO: 10-05750.a1

DATE: 12/08/2011

DATE: December 8, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-05750
)	
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, 2011, 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 H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 22, 2011, after the hearing, Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant timely 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 contends that the Judge's adverse decision should be reversed because the evidence presented at the hearing was sufficient to mitigate the government's security concerns. In support of this contention, he argues that the Judge mis-characterized some of the evidence, making the disqualifying conduct look more serious than it actually was. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

The Board does not review sentences or passages in a Judge's decision in isolation. Rather, it looks at the whole of the Judge's decision to discern what the Judge found and concluded. *See, e.g.,* ISCR Case No. 08-08721 at 3 (App. Bd. Oct. 20, 2011). After reviewing the record that was before the Judge, the Board concludes that his material findings of security concern are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from that record. Accordingly, the Judge's material findings of security concern are sustainable. *See, e.g.,* ISCR Case No. 09-07424 at 2 (App. Bd. Aug. 16, 2011).

The Applicant is responsible for presenting witnesses and other evidence to rebut, extenuate or mitigate facts admitted by the Applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable decision. *See* Directive ¶ E3.1.15. 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*. 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. 09-07424, *supra* at 2.

In reaching his decision, the Judge considered the totality of Applicant's situation, including the circumstances surrounding the incidents in question, and the fact that Applicant had taken responsibility for his mistakes and expressed remorse. Decision at 2-4. He weighed the mitigating evidence against the length and seriousness of the disqualifying conduct, considered the possible application of relevant conditions and factors, and reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. Decision at 5-9. 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. 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