

KEYWORD: Guideline D; Guideline E

DIGEST: The Judge’s conclusion that Applicant’s security significant conduct was both repeated and extensive was supported by the record. The Judge’s decision reflects that she considered the totality of the record evidence. Adverse decision affirmed.

CASE NO: 10-10482.a1

DATE: 12/20/2011

DATE: December 20, 2011

In Re:)
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 -----) ISCR Case No. 10-10482
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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 June 8, 2011, 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 a hearing. On October 6, 2011, after the hearing, Administrative Judge Carol G. Ricciardello 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 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 almost seven years have past since he engaged in the disqualifying conduct, and that he is not at risk of manipulation, coercion, exploitation, and duress. Applicant's argument does 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*. 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. 09-07229 at 2 (App. Bd. Feb. 15, 2011).*

In reaching her adverse decision, the Judge considered the totality of Applicant's situation, including the factors referenced by the Applicant, but noted that Applicant had not presented sufficient evidence to document his treatment, therapy, prognosis, or the qualifications of his therapist. Decision at 6. She weighed the mitigating evidence offered by Applicant 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. *Id.* at 5-9. Based upon the record that was before her, the Judge's conclusion that Applicant's "repeated and extensive behavior" was not mitigated is sustainable. *Id.* at 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 the 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