



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
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 (703) 696-4759**

Date: June 6, 2022

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 In the matter of:)
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)
 Applicant for Security Clearance)
 _____)

ISCR Case No. 20-01577

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 20, 2020, DoD 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 February 23, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant contends the Judge erred in his analysis of the evidence. For reasons stated below, the Judge’s decision is affirmed.

The Judge found in favor of Applicant on the sole Guideline E allegation. This favorable finding was not raised as an issue on appeal. The Judge found against Applicant on the two Guideline J allegations. The Judge summarized the case as follows:

[About six years ago], Applicant was convicted at a special court-martial empowered to adjudge a bad-conduct discharge (BCD-SPCM) of three crimes involving illegal possession and importation of an automatic rifle, ammunition, and explosives from [a Middle East country] to the United States, and he was sentenced to 12 months of confinement and reduction [of rank]. He was charged with committing larceny of U.S. military munitions in [the Middle East country]; however, that charge was dismissed. He wrongfully appropriated basic allowance for housing (BAH) at the with dependent rate; however, he did not receive disciplinary action for this offense. Guideline J (criminal conduct) security concerns are not mitigated . . . Eligibility for access to classified information is denied. [Decision at 1.]

At the court-martial, Applicant pled guilty to various charges pursuant to a pretrial agreement. Although he pled not guilty to a larceny charge at the court-martial, the evidence at his security clearance hearing led the Judge to conclude he stole U.S. munitions. Decision at 11. Of note, Applicant arranged for foreign and U.S. munitions to be transported to a U.S. military base and then to his home. While Applicant was away on leave, his home was burglarized, the door was left open, and a neighbor called the police who discovered the munitions in his residence. The Judge noted that Applicant claimed he intended to use the munitions as aids in a military K-9 training program on base, but failed to explain how he could use it in that manner without incriminating himself. Decision at 17.

On appeal, Applicant contends the Judge erred because he did not have “the full picture and detailed information[.]” Appeal Brief at 1. He argues, for example, that the foreign and U.S. munitions he acquired did not shortchange U.S. units rotating into theater; that the U.S. munitions eventually would have been either destroyed or left behind in the country, possibly falling into the hands of terrorists; that the U.S. munitions were unaccounted for (*i.e.*, “off the property books” (*Id.*)) and, given this status, questions how they could be considered stolen property; that the Judge erred in concluding his surreptitious shipment of the munitions on military aircraft or its storage at his residence put military personnel and his neighbors at risk of death or serious injury; that he was never referred to court-martial for the BAH overpayments; and that the Judge erred in concluding he wrongfully appropriated those overpayments. Applicant further contends the Judge misapplied the Guideline J mitigating conditions, highlighting that the conduct at issue occurred over eight years ago as well as his performance of dangerous, combat duties and his successful rehabilitation. These arguments are unpersuasive. None of them are enough to rebut the presumption that the Judge considered all of the evidence in the record or sufficient to establish that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-04856 at 2-3 (App. Bd. Mar. 9, 2017).

In the decision, the Judge concluded:

[Applicant’s] story about his plan to use the stolen property for training is not plausible. Credibility is essential for a security clearance holder. The DOD must be able to rely on the security clearance holder to report his own security violation or the security violation of a colleague, even when disclosure might damage someone’s career. I have lingering doubts that Applicant would report a security

violation if he deemed the violation was done in good faith to complete the mission.
[Decision at 17.]

The Directive requires the Appeal Board to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. In essence, the Judge concluded that Applicant's testimony about using the munitions as training aids was not believable. Tr. at 38-42. The Judge could consider that determination in assessing whether Applicant successfully rehabilitated himself and in evaluating whether he mitigated the Guideline J security concerns. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (listing the purposes for which non-alleged conduct can be considered). Based on our review of the record, we find no reason to disturb the Judge's adverse conclusions.

Applicant failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board