

KEYWORD: Guideline F; Guideline E; Guideline J

DIGEST: The Judge articulated a rational basis for his conclusions that Applicant had not mitigated the security concerns raised by his conduct. Adverse decision affirmed.

CASENO: 06-12626.a1

DATE: 10/15/2007

DATE: October 15, 2007

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 06-12626
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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 November 21, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations),

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 May 31, 2007, after considering the record, Administrative Judge Michael J. Breslin denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in failing to mitigate the Guideline F, J, and E security concerns.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant enlisted in the Navy after high school, serving as an electronics technician. While in the Navy, unit tax representatives prepared his tax returns. Unknown to him, state returns for tax years 1999 and 2001 were never filed. His home state filed a notice of lien for unpaid taxes. "[H]e recently reached an agreement with the state to pay \$2,025.92 for both tax years at the rate of \$200.00 a month." Decision at 3.

Applicant was administratively discharged from the navy for misconduct (drug abuse) in 2003.² As a consequence, the government sought reimbursement for a reenlistment bonus by taking a portion of Applicant's income tax refunds. As of the date of the decision, this debt was in the amount of \$11,787.00.

In September 2000, Applicant, during a period of leave, visited a friend who was an automobile mechanic. Applicant and the friend stole four rims and tires from a vehicle at an automobile dealership, installing them on Applicant's car. The next day, the two stole a dual exhaust system from a car. He stored the contraband in his car, which he parked at his parent's home. When the thefts were discovered, Applicant's parents made restitution to the owners.³

When Applicant filled out his security clearance application, one of the questions was whether he had ever had any judgements against him that had not been paid. He did not mention the tax lien filed by his state.

Applicant has not challenged the Judge's findings. Therefore, they are not at issue in this appeal. Furthermore, we have considered the Judge's analysis of the various mitigating conditions in light of the record as a whole. He concluded that Applicant's financial problems were caused by his own misconduct, therefore precluding application of Financial Consideration Mitigating

¹The Judge's favorable findings under subparagraphs 1 (b) through (m) and 1 (o); and subparagraph 3 (a) of the SOR are not at issue in this appeal.

²Q: . . . The reason for your separation from the Navy . . . were you administratively separated? . . . A: Yes, sir. I was charged with a positive drug ID in the urinalysis, which I took to a hearing . . . And at the hearing, it was shown that there was misconduct, but I was separated with a under honorable conditions character. Q: A general discharge under honorable conditions? A: Yes, sir." Tr. at 53-54.

³The theft of the exhaust system was not alleged in the SOR. The Judge stated that he would consider this offense, along with the drug involvement for which Applicant was discharged from the Navy, for the limited purpose of evaluating whether Applicant had established any mitigating conditions.

Condition 20(b).⁴ Furthermore, the Judge noted that Applicant has not sought financial counseling, which might otherwise mitigate a bad credit report.⁵ The Judge also concluded that Applicant's uncharged misconduct precluded mitigating the Guideline J security concern.⁶ Furthermore, he stated that he had considered all the Guideline E mitigating factors and concluded that none applied. Decision at 9.

In arriving at these conclusions, the Judge weighed the evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of the relevant mitigating conditions, deciding in Applicant's favor on a substantial number of allegations. Furthermore, he articulated a rational basis for his conclusion that Applicant had not mitigated those security concerns reflected in his adverse formal findings. *See* ISCR Case No. 05-12532 at 2 (App. Bd. Aug. 10, 2007). *See also 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)) (A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices made.'"); *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'") Therefore, we hold that the Judge's decision is not arbitrary, capricious, or contrary to law. *See* Directive ¶¶ E3.1.32.3 and E3.1.33.3.

⁴"[T]he conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances . . ."

⁵Financial Consideration Mitigating Condition 20(c): "[T]he person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or in under control. . ."

⁶*See* Criminal Conduct Mitigating Condition 32(d): "[T]here is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity . . ." Applicant argues, *inter alia*, that he was coerced into committing the criminal misconduct addressed in the SOR. We have examined the record, which includes, a written statement by Applicant describing the offense. Although Applicant's friend apparently suggested the theft, there is no basis in the record to conclude that Applicant was other than a willing participant. The Board finds no reason to disturb the Judge's decision. *See* Government Exhibit 2, at 5-6.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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