KEYWORD: Guideline H; Guideline E

DIGEST: Applicant due process claims are unsuccessful. Whatever objections might have been available regarding the testimony of an OPM investigator were waived. Adverse decision affirmed.

CASENO: 08-04546.a1

DATE: 07/08/2010

DATE: July 8, 2010

In Re:	)	
	)	
------	)	ISCR Case No. 08-04546
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 30, 2009, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision–security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 29, 2010, after the hearing, Administrative Judge Roger C. Wesley denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether he was denied due process; whether the Judge's formal findings are inconsistent with his analysis; and whether the Judge erred in his application of the mitigating conditions. Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is married with two children. He holds a Bachelor of Science degree.

He began using illegal drugs in high school. He experimented with marijuana, cocaine and hashish during the late 1970s and used marijuana with friends while in college. After college he went to work for a Defense contractor and was awarded a security clearance. Despite his knowledge of Defense policy on drug abuse, he continued to smoke marijuana, though at a reduced frequency. He sometimes contributed money toward the purchase of marijuana for sharing among his friends.

Applicant quit using marijuana in 2004 but resumed using it during the first half of 2005. He has not used marijuana since June 2005, and he rarely associates with his former associates who were involved in drugs.

In 1980 Applicant tried cultivating marijuana. He tried cultivating it again in 1987, growing four or five plants in his closet.

In 1984 Applicant completed a security clearance application (SCA). He omitted reference to his prior purchases of illegal drugs, due to embarrassment.

In 1988, Applicant was interviewed by a representative of the Defense Investigative Service (DIS). He stated that the had omitted his drug purchase in 1984 due to concerns over the effect truthful answers would have had on his clearance. During this interview, he initially denied having cultivated marijuana. However, when confronted with evidence that he had in fact done so, Applicant admitted the conduct and stated that he had lied in order to keep his job. In this interview, he stated that he would no longer use drugs.

In 2007, Applicant completed another SCA. He admitted to having used illegal drugs, but he denied the purchase, sale, or manufacturing of such within the previous seven years. During a 2008 interview with an OPM investigator, Applicant stated that he had never sold, supplied, manufactured, or grown illegal drugs.

In the Analysis portion of the decision, the Judge cleared Applicant of the Guideline H concerns. However, he concluded that Applicant's omissions had been deliberate and that, under the circumstances, he had failed to mitigate the security concerns arising from them.

Applicant's appeal raises the issue of whether he was denied due process. The issue involves the testimony of an OPM investigator taken by telephone at the hearing and Applicant's efforts to contact her though Department Counsel prior to the hearing. Applicant argues that, with more time to prepare, he could have done a better job of questioning the investigator. For this purpose both parties cite to documents which are not in the record. Applicant submitted documentation to the Judge which was not admitted into evidence. The Judge failed to preserve the documents for the record, which was error. Applicant's brief contains four enclosures which, for purposes of resolving this issue, the Board will accept as accurately reflecting the documentation not accepted into evidence.

Enclosure 1 shows that Applicant, by means of an e-mail dated December 14, 2009, to Department Counsel sought to obtain a statement from the OPM investigator to confirm his description of events or, in the alternative, to have her as a witness. Enclosure 2 contains a letter from Applicant, dated December 28, 2009, to Department Counsel requesting contact information or a statement from the named investigator and delineating Applicant's attempts at contacting her himself. Also in Enclosure 2 is a list of documents to be presented at the hearing, including the contents of Enclosures 1 and 2. Enclosure 3 includes a January 11, 2010, e-mail from Applicant again requesting contact information for the investigator so that Applicant can obtain a statement from her. Enclosure 4 contains multiple e-mails dated January 11, 2010. Department Counsel advises Applicant that he has called the investigator, that the investigator has interviews in another city the day of the hearing, so she cannot attend. He then says, "I will arrange with the Judge to do telephonic testimony of her during our hearing. We probably will have to take her out of order, but I cannot subpoena her. Hopefully this will work for you." Applicant responds: "I appreciate your efforts. I thought a statement from [OPM Investigator] to corroborate the interview discussion as I described would be sufficient. Alternatively, her telephonic testimony will be greatly appreciated. I trust she has been advised of the matter and will have had an opportunity to review her meeting notes? Have you shared my description of the discussion with her? Thank you again." Department Counsel responds "I have provided her with Exhibits 8 and 9, the affidavits she prepared. It will be up to you elicit expected testimony from her."

At the beginning of the hearing two days later, the OPM investigator was contacted by telephone, and Applicant asked her several questions. Although she recalled Applicant, she could not recall the information he sought. At no time did he object to the timing or the format of her testimony. After she testified Applicant said ". . . I will describe the details of the testimony leading to the affidavit that contains my admission. I did hoped (sic) that [OPM Investigator] would recollect the details of the discussion better. I've been attempting to get in contact with her to respond to my statement or provide testimony. I appreciate the opportunity to have her. And I'll have to describe the details, by my recollection which was very vivid." (Tr. 35)

At no time–whether at the beginning of the hearing, during or after the questioning of the investigator, or at the hearing's conclusion–did Applicant state that he had not had enough time to prepare. We conclude that whatever objections might have been available to Applicant regarding the timing of the witness's participation in the proceedings, her availability to Applicant, or the format in which her testimony was taken, were waived.

Applicant contends that the Judge erred in his conclusion as to mitigation under Guideline E. We have examined the Judge's decision in light of the record as a whole. We note the multiple nature of Applicant's omissions and his stated motives for the ones occurring in 1984 and 1988. We also note the hearing testimony of the OPM investigator in which she unequivocally denied having advised Applicant in 2008 that it was permissible to lie.[1] The Judge's conclusion as to mitigation is sustainable, in light of the standard announced in *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 the national security.'")

Applicant contends that the Judge's decision is inconsistent. This argument pertains to a SOR allegation under Guideline E that Applicant had used marijuana while holding a security clearance. The Judge entered a formal finding against Applicant on this allegation, although the Analysis portion of the decision contains language suggesting that the Judge believed it had been mitigated. To the extent that this is an error, it is harmless, in light of the Judge's sustainable conclusions regarding Applicant's deliberate omissions. *See* ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009) for a definition of harmless error.

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 Judge's adverse decision is sustainable on this record.

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett

[1]We also note that, in the 2007 SCA (prior to the 2008 interview with the OPM investigator) Applicant denied ever having used illegal drugs while holding a security clearance. This denial is inconsistent with record evidence and the Judge's finding that he had, in fact, done so. Although this apparently false statement was not separately alleged, it is relevant to the issue of Applicant's knowledge and intent and buttresses the Judge's conclusion that Applicant deliberately omitted information he was required to provide.

Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

I agree with my colleagues that Applicant has waived the due process issue by failing to have raised it at the hearing. However, even if he had not waived the issue, I do not believe that he was denied an adequate opportunity to prepare his case. Applicant contended that the investigator had advised him that it was acceptable for Applicant to deny having grown drugs, because his cultivation of marijuana had occurred a long time ago. However, when questioned at the hearing, the investigator denied having said that.

> Q: Is it possible . . . I answered "Yes, I had grown a small amount, a small number of marijuana plants in the 1980s." Do you recall, or is it possible that I did answer that in our discussion that I had, in fact, admitted to that use?
>
> A: I don't recall.
>
> Q: . . . I asked you to read the statement again to see if there was some passage of time that . . . would allow a negative response to that question?
>
> A: What are you asking me?
>
> Q: . . . [I]s it possible that you advised me that the fraction was so small and so long ago that that did not warrant a positive response?
>
> A: No. Tr. at 19-20.

The investigator's testimony was unequivocal that she did not advise Applicant that he could legitimately deny having grown marijuana. There is nothing in the record or in Applicant's brief to suggest that he could have uncovered other evidence in support of his contention, if he had had more time prior to the hearing. I see no reason to believe that Applicant's right to prepare his case and to present evidence in his behalf was compromised.

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