

KEYWORD: Guideline H; Guideline G

DIGEST: Department Counsel cross-examined Applicant on inconsistent statements contained in the record evidence. Even though not alleged in the SOR, these statements could be considered on the issues of Applicant’s credibility, his evidence in mitigation, and his claims of rehabilitation. Adverse decision affirmed.

CASE NO: 08-09232.a1

DATE: 09/09/2010

DATE: September 9, 2010

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Fulton S. Hamilton, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 17, 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 G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 14, 2010, after the hearing, Administrative Judge Michael H. Leonard 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 Applicant was denied due process and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.<sup>1</sup> Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is an employee of a federal contractor. An "integration technician," he refurbishes shelters used by the U.S. armed forces during deployment. This is his first application for a security clearance.

Applicant has a history of cocaine abuse. He began using cocaine in about 2001 and continued until January 2008. His drug problem came to the attention of authorities when prenatal testing showed cocaine use by Applicant's wife and when both wife and child tested positive for cocaine after delivery. A subsequent child also tested positive for cocaine. Applicant and his wife lost custody of their children, regaining it only after having complied with court orders, including a requirement for drug abuse treatment.

Applicant began outpatient treatment in December 2007. He tested positive for cocaine use three times in December and three times in January 2008. By mid-January Applicant acknowledged that he was using cocaine every day and that he required inpatient care. Accordingly, he entered an inpatient program on January 28, 2008, and completed it on February 25, 2008. He continued with his outpatient care as well, completing that in May 2008.

In completing his security clearance application (SCA), Applicant stated that, during the previous seven years, he had used cocaine fifty times. He also stated on the SCA that, at the time he began inpatient treatment, he had not used cocaine for three months.<sup>2</sup>

The Judge found that Applicant had deliberately minimized both the duration and frequency of his cocaine use. He also found that Applicant's efforts to reconcile his SCA answers with other evidence in the record were not credible.

In the Analysis portion of the decision, the Judge noted Applicant's progress in renouncing his drug habit and remaining drug free. However, the Judge also concluded that Applicant's inconsistent statements about his drug use, and the perceived insufficiency of his explanations for the inconsistencies, impaired his efforts to demonstrate rehabilitation.<sup>3</sup> Therefore, the Judge

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<sup>1</sup>The Judge made favorable findings for all of the Guideline G allegations. Accordingly, they are not at issue in this appeal.

<sup>2</sup>Decision at 4. *See* Government Exhibit (GE) 1, SCA, at 24: "In January 2008, I admitted myself into, and successfully graduated from, a resident rehabilitation program at [facility] to help me understand how to maintain a healthy lifestyle. I was not taking when I entered and had been clean for about 3 months." The SCA required Applicant to provide the dates upon which he began and ended his drug use. Applicant responded, "04/2002 (estimated) to 06/2007."

<sup>3</sup>"His failure to give full, frank, and candid answers about his cocaine use and his lack of credibility in his hearing testimony undermine his evidence of reform and rehabilitation. It does so because honesty and willingness to self-report are key factors or considerations in this regard. An individual, like Applicant, who is dishonest with himself or others about the full extent of his drug abuse is not a rehabilitation success. Given these circumstances, a longer

concluded that Applicant had not succeeded in mitigating the security concerns arising from his drug abuse.

Applicant contends that the Judge's use of his SCA answers and his testimony deprive him of due process. In essence, Applicant argues that the Judge denied him a clearance because of security concerns arising from his false or misleading statements without having amended the SOR, in accordance with Directive ¶ E3.1.17. He contends that he was denied a meaningful opportunity to counter this evidence. In any event, Applicant contends that the record evidence does not support a conclusion that Applicant's false statements render him unfit for a clearance.

We find no reason to believe Applicant was denied due process. The inconsistent statements about which Department Counsel cross-examined Applicant were contained in Government exhibits provided to Applicant prior to the hearing. As previously noted, Applicant advised in his SCA that he had used cocaine fifty times and that he had ended this use in June 2007. On the other hand, GE 3 at 5, a record of Applicant's outpatient treatment, reflects that Applicant was engaging in daily cocaine use into mid-January 2008.<sup>4</sup> Therefore, the record evidence supplied to Applicant prior to the hearing placed him on notice, first, of the existence of a six to seven-month variance among his statements as to the extent of his use of cocaine and, second, of evidence suggesting that he had used cocaine more frequently than he had claimed in the SCA. It was reasonably foreseeable that these statements would be discussed at the hearing. Admittedly, the cross examination questions were at times confusing. However, the record viewed as a whole provides no basis to disturb the Judge's conclusion that Applicant's answers diminished his credibility and undercut his evidence in mitigation. *See* Directive ¶ E3.1.32.1 (“[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge.”)

Furthermore, we find no error with the manner in which the Judge treated evidence of Applicant's misleading statements. Even without amending an SOR, a Judge may nevertheless consider unalleged conduct for certain limited purposes. These include assessing an applicant's credibility, evaluating his evidence in mitigation, and considering the extent to which an applicant has demonstrated rehabilitation. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). The record reflects that the Judge examined Applicant's statements in the proper context. *See, e.g.*, Note 3. Contrary to Applicant's assertions, the Judge did not deny him a clearance because of security concerns not alleged in the SOR. Rather, he considered the totality of the evidence, including Applicant's prior statements and hearing testimony, in making a reasonable determination that Applicant had failed to meet his burden of persuasion under the standard set forth 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.’”)

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period of abstinence from cocaine use is prudent and sensible before a safe predictive judgment can be made about Applicant's suitability or fitness to hold a security clearance.” Decision at 8.

<sup>4</sup>“Client came in today to discuss his failure to process his relapses. Client would deny use and was discharged as a result. Client came in and admitted to everyday use . . . Client said he needs inpatient very bad and will do anything to get into inpatient as soon as possible.” This document, along with other evidence in the record, supports the Judge's conclusion that, on his SCA, Applicant understated the number of times he had used cocaine.

After reviewing the record, we conclude 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: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

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