

KEYWORD: Guideline H

DIGEST: The Judge's challenged credibility determination is based on a reasonable interpretation of the record evidence. Adverse decision affirmed.

CASENO: 10-04596.a1

DATE: 10/26/2011

DATE: October 26, 2011

In Re:)
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 -----) ISCR Case No. 10-04596
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 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Philip J. Katauskas, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 23, 2010, 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 July 29, 2011, after the hearing, Administrative Judge Marc E. Curry 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 the Judge erred in his credibility determination and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant works for a Government contractor, maintaining a personnel database. He served in the Army from 1985 to 1993. He enjoys an excellent reputation for the quality of his work performance and his reliability.

On a Saturday evening in 2007, Applicant attended a social event at a Veterans of Foreign Wars (VFW) post. He met a woman who invited him to a party. He left the VFW post and accompanied the woman to the party, which was held in the basement of a home. People were playing cards, shooting pool, and smoking cigars.

The next Monday, Applicant was required to submit a urine sample as part of a random screening for drug use. Applicant's came back positive for cocaine. He requested a re-test, which also yielded a positive result for that drug.

Applicant's employer suggested that he participate in counseling through the employee assistance program. A counselor told him that he might be able to keep his job if he enrolled in a drug program. Applicant chose not to do so, believing that it would be tantamount to an admission of illegal drug use. Applicant's employer subsequently fired him.

Applicant denies having used any illegal drugs or substances. He stated that he left the party because he began feeling strange—"hot," "sweaty," and "out of sorts." He stated that he had never felt that way before. He went home alone. When he got home, he called another woman and asked her to come to his apartment and "hang out." When she arrived at his apartment, he told her that he thought someone had spiked his drink. He did not seek medical attention.

During his security clearance interview, Applicant told the investigator that some of the people at the party had been smoking marijuana.

In his analysis, the Judge stated that Applicant's testimony that he had left the party feeling ill was not consistent with his subsequently having called a friend to come "hang out" with him. He also stated that Applicant's hearing testimony that no one was using drugs at the party was not consistent with his prior statement to the investigator that people there had been using marijuana. Although the Judge acknowledged evidence favorable to Applicant, such as his good work performance and the isolated nature of his drug use, he concluded that Applicant's testimony was not believable in certain respects and that this undercut Applicant's case for mitigation.

In his brief, Applicant contends that the inconsistencies cited by the Judge were relatively minor and that they did not detract from the favorable evidence which he had presented.

We have considered Applicant's brief in light of the record. The Judge's credibility determination is based upon a reasonable interpretation of the record evidence. *See, e.g.*, ISCR Case No. 07-17076 at 3 (App. Bd. May 11, 2011). Applicant's appeal brief argues for an alternative interpretation, but it is not sufficient to undermine the Judge's conclusions about Applicant's credibility. *See, e.g.*, ISCR Case No. 10-03380 at 3 (App. Bd. Jul. 27, 2011).

The record supports a conclusion 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. "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

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