

KEYWORD: Guideline E; Guideline F

DIGEST: A Judge is not required to make findings on every issue that might conceivably have arisen during the hearing. Adverse decision affirmed.

CASENO: 10-04821.a1

DATE: 05/21/2012

DATE: May 21, 2012

In Re:)
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-----) ISCR Case No. 10-04821
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)
Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Terry D. Bork, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 4, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 26, 2012, after the hearing, Administrative Judge Henry Lazzaro 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 made findings sufficient to support his conclusions; whether the Judge erred in his application of the mitigating conditions; whether certain of the Judge’s findings were supported by substantial record evidence; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is a merchant mariner, who works under contracts. In June 2005, Applicant was charged with possession of marijuana and with money laundering, a felony. He had been attempting to drive across the border into Mexico and was stopped by border agents. Upon searching his vehicle, the agents found, among other things, marijuana residue and \$16,000 in cash. He claimed that the marijuana was placed in the car by a friend and that the money was his salary from a recent contract. He pled guilty to money laundering and received three years probation, which was terminated after he completed 18 months of his sentence.

In 1996, Applicant was charged with selling crack cocaine, a felony. He claimed that he was not guilty, but that he pled guilty to the offense through fear of being killed if he had identified the true drug dealers. He was sentenced to serve six months in jail.

In 1995, he was charged with carrying a concealed weapon, a felony. He claimed that he was a passenger in car driven by another. Applicant claimed that he and the driver pursued a woman who had cut them off in traffic. Upon reaching her, Applicant opened the glove compartment to get a pencil and paper, and a gun fell out into his lap. The woman reported Applicant and the driver to the police. The charge was ultimately dismissed.

In 1995, Applicant was charged with trafficking in crack cocaine, a felony. He claimed that he had been set up by a friend. The charges were dismissed. In 1994, he was charged with forgery, a felony. He stated that someone gave him a stolen check in payment for a stereo and that he was arrested when he attempted to cash it. The charges were dismissed.

In 2008, Applicant completed his security clearance application (SCA). Certain questions inquired if he had ever been charged or convicted of a felony offense, a firearms offense, or an offense related to drugs. Applicant answered “no” to each question. The Judge found that Applicant’s explanations for his false answers were “rambling and unclear.” Decision at 3. Applicant claimed that he had filled out a different SCA from the one he actually signed, that he had not been properly represented by an attorney, and that he did not think he was required to disclose arrests more than seven years old.

Applicant has numerous delinquent debts, for medical bills, credit cards, utility charges, and a repossessed car. He stated that the medical bills were on behalf of his girlfriend and that her mother had promised to pay them, although she had not followed through. He submitted proof that he had settled one debt and that he had entered into an agreement with a debt settlement organization to pay off certain others. He did not corroborate his testimony that he had made all the required payments under the agreement. His debts have been delinquent for many years. He claimed that he did not have the money to pay his debts because he was paying off a debt to his mother and because he had given money to his sister to start up a beauty salon, which ultimately failed.

In the Analysis, the Judge stated that Applicant's multiple explanations for not disclosing his arrests were not credible. He stated that he had considered all of the mitigating conditions and concluded that none applied. Regarding the Guideline F allegations, the Judge discussed three mitigating conditions that had possible applicability to Applicant's circumstances. However, he noted that Applicant had done nothing to resolve the medical debts, that he had not corroborated his claim to have made all the required payments under his repayment plan, and that, in any event, several of Applicant delinquent debts are not addressed by this plan. The Judge also stated that, even if Applicant fully complied with this plan, it would be another two and a half years before the covered debts are satisfied. The Judge concluded that Applicant had not met his burden of persuasion as to mitigation.

Applicant contends that the Judge failed to make findings sufficient to support his adverse conclusions. He contends that the Judge made no findings concerning Applicant's claims that the questions at issue were confusing, that he had been misinformed by his previous counsel concerning his convictions, and that he had complied with the debt repayment plan. He also contends that the Judge did not make pertinent findings concerning his mitigation evidence under Guideline F. The Directive requires a Judge to "make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR[.]" Directive, Enclosure 2 ¶ E3.1.25. A Judge is not required to enter findings on every issue that might conceivably have arisen during the course of a hearing. Rather, the Directive requires that he enter such factual findings as enable him both to draw reasonable conclusions on each of the SOR allegations and to formulate his ultimate decision regarding the granting of a clearance.¹ In any event, and despite Applicant's arguments to the contrary, the Judge did enter findings pertinent to the issues raised in this assignment of error. He did so in the context of his negative credibility determination and in his findings concerning the circumstances of Applicant's debts and his efforts, or lack thereof, to pay them off. These findings are consistent with the record evidence, and they provide an adequate foundation for the Judge's discussion of Applicant's case for mitigation. We find no error in the scope of the Judge's findings of fact.

Applicant contends that the Judge erred in his credibility determination. He argues that his mitigation evidence concerning (1) the omissions from the SCA and (2) his debt repayment plan were worthy of belief. He also argues that the Judge should have accepted Applicant's evidence to

¹See ISCR Case No. 08-07803 at 2-3 (App. Bd. Sep. 21, 2009) for a discussion of the relationship between a Judge's findings and the issue of finality in agency decision making.

the extent that the evidence was not contradicted. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. In this case, the Judge based his determination on what he characterized as the rambling nature of much of Applicant's testimony and Applicant's multiple explanations for his omissions.² The Judge also noted that Applicant's claim to have made all payments under his repayment plan lacked corroboration, which was a proper matter for him to consider, given Applicant's burden of persuasion as to mitigation. Much of Applicant's appeal argument appears to be a disagreement with the Judge's weighing of the evidence. He has not provided a reason for us to disturb the Judge's credibility determination.

Applicant contends that the Judge's finding as to the deliberate nature of his omissions from the SCA was not supported by record evidence. In analyzing an applicant's intent, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 09-08023 at 2-3 (App. Bd. Sep. 6, 2011). As stated above, the Judge's conclusion as to the credibility of Applicant's explanations for his omissions was supported by the record. We also note the wording of the questions at issue, which a reasonable person could find to be clear and unambiguous, undercutting Applicant's claims that he was confused. The Judge's finding as to the deliberate nature of the omissions is sustainable.

Applicant contends that the Judge erred in his analysis of the mitigating conditions. He notes the Judge's conclusion that it may take Applicant over two years to pay off the debts covered by the repayment plan, arguing that the length of time for debt repayment is not relevant. He also argues that the Judge addressed mitigation merely by stating that the mitigating conditions do not apply rather than by providing a reasoned analysis. Regarding the first point, the Judge's statement was part of his overall discussion of the insufficiency of Applicant's efforts to address his debts. He noted that Applicant had made no effort to pay off the medical bills and that, even if he paid off the debts addressed by the payment plan, Applicant would leave several others unaddressed. Viewed in that light, it was not unreasonable for the Judge to conclude that a plan to pay off a fraction of Applicant's debts years hence was not sufficient to mitigate the security concerns arising from Applicant's significant delinquent debts.

On the second point, as noted above, the Judge did provide substantive discussion in his analysis of Guideline F. Moreover, although his treatment of the Guideline E mitigating conditions was admittedly conclusory, we cannot say that it was erroneous or that it did not follow from the Judge's sustainable findings. We note, for example, Applicant's claim that in completing the SCA he relied on bad advice by a lawyer. This claim was the basis of his appeal argument that the Judge should have extended favorable application to Guideline E mitigating condition 17(b).³ However, the record provides no evidence that Applicant received any legal advice on the precise issue of how

²Additionally, a reasonable person could find Applicant's claims of factual innocence for all of his convictions to be self-serving and lacking in credibility.

³Directive, Enclosure 2 ¶ 17(b): "the . . . omission . . . was caused or significantly contributed to by improper or inadequate advice of . . . legal counsel advising or instructing the individual specifically concerning the security clearance process."

he should answer the SCA questions.⁴ Rather, he testified that at some point in the past his lawyer had promised to seek to have some of Applicant's charges dropped. Tr. at 43. The Judge did enter a sustainable finding on this matter. Insofar as this finding did not raise on its face the provisions of Mitigating Condition 17(b), the Judge did not err in resolving the applicability of this mitigating condition in a summary fashion. We find no error in the Judge's treatment of the mitigating conditions under either Guideline.

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: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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

⁴ "[Department Counsel]: [D]id you stop and ask anybody questions or did you have any questions about what you were filling out? The Applicant: No." Tr. at 42.