

KEYWORD: Guideline J; Guideline E

DIGEST: There is no merit to Applicant's contention that he was limited to providing yes or no answers in his response to the government's FORM, or that he was otherwise denied an opportunity to submit matters in his own behalf. Applicant also challenges the Judge's finding that he left the scene of an accident. The record evidence supports the Judge's finding on this matter. Adverse decision affirmed.

CASE NO: 10-06195.a1

DATE: 10/04/2011

DATE: October 4, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-06195
)	
Applicant for Security Clearance)	
)	

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 January 21, 2011, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under 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 decision on the written record. On July 29, 2011, after considering the record, Administrative Judge David M. White 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; whether certain of the Judge’s findings were supported by substantial record evidence; whether the Judge erred in his application of the mitigating conditions; 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 found that Applicant is an employee of a Defense contractor. Applicant previously worked for a state-licensed health care facility. During the course of this employment, in 2009, he was driving home from work and struck a pedestrian while turning a corner. Applicant left the scene of the accident without providing contact information and without rendering assistance. He was charged with hit-and-run, a felony.

During his subsequent court appearance, pursuant to a plea agreement, Applicant pled *nolo contendere* to misdemeanor hit-and-run. The court sentenced him to three years probation, fines and fees totaling \$160, 30 days community service, and restitution to the victim. Subsequently, the state department of social services ordered that Applicant be precluded from contacting clients and excluded from the licensed treatment facility due to his criminal offense.

The Judge found that Applicant had “submitted no other evidence tending to establish good judgment, trustworthiness, or reliability.”¹ The Judge also stated that he was unable to evaluate Applicant’s credibility, demeanor, or character in person, because Applicant had elected a decision on the written record. Decision at 3.

In the Analysis, the Judge concluded that Applicant’s offense raised security concerns under Guidelines J and E. He also concluded that Applicant had failed to meet his burden of persuasion as to mitigation. In the whole-person analysis, he stated:

Applicant is a mature, accountable adult who voluntarily left the scene of an accident after hitting a pedestrian with his car and causing her substantial injuries. There was no reason for him to have done so other than to avoid responsibility and accountability for his own conduct. This demonstrates a lack of the integrity and trustworthiness that are fundamental to eligibility for being entrusted with national security information and sensitive duties. Decision at 7.

Applicant contends that he was not given a sufficient chance to present evidence in mitigation. He states that he received documents from DOHA that permitted only yes or no answers,

¹The record shows that Applicant provided answers to DOHA interrogatories and to the SOR but that he did not respond to the File of Relevant Material (FORM).

thereby denying him an opportunity to address his conduct in detail.

The record demonstrates that Applicant's copy of the FORM was accompanied by a letter advising him of his right to "submit any material you wish the Administrative Judge to consider or to make any objections you may have as to the information in the file." Applicant returned a receipt for the FORM dated March 15, 2011. Applicant did not provide a response to the FORM. The record does contain Applicant's answers to DOHA interrogatories. Attached to the record as Item 6, this exhibit includes, among other things, a written letter by Applicant addressing his criminal offense. There is no merit to Applicant's contention that he was limited to providing yes or no answers or that he was otherwise denied an opportunity to submit matters in his own behalf.

Applicant challenges the Judge's finding that he left the scene of the accident. We review challenged findings to determine if they are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.") Applicant's admissions to the SOR and other evidence, including a copy of the court record of the case history, a copy of the FBI record of Applicant's conviction, and a copy of the pleading submitted by the state licensing division to the state department of social services,² support the Judge's finding on this matter.

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).

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

²This document is included in Item 6, Applicant's answers to interrogatories. It states in part that, on the date in question, Applicant "hit a pedestrian in the street while driving his vehicle and left the scene of the accident without obtaining the victim's information or waiting for the police to arrive. As a factor in aggravation, [Applicant's] statement is inconsistent with the police report regarding certain facts."

Administrative Judge
Member, Appeal Board

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