

KEYWORD: Guideline F; Guideline e

DIGEST: The Judge's questioning of Applicant was at times gratuitous, argumentative and harsh. However, a review of the Judge's handling of the case as a whole does not lead the Board to conclude that the Judge evidenced bias. Adverse decision affirmed.

CASENO: 10-06943.a1

DATE: 02/17/2012

DATE: February 17, 2012

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| In Re:) | |
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| -----) | ISCR Case No. 10-06943 |
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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

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 24, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 26, 2011, after the hearing, Administrative Judge John Grattan Metz, Jr., 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 was biased against Applicant; whether the Judge failed to consider significant record evidence favorable to Applicant; and whether the Judge failed properly to apply the pertinent mitigating conditions. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant has a history of financial problems, including numerous delinquent debts, financial improprieties resulting in administrative action by employers, and two crimes. In 1996, while on active duty with the U.S. military, Applicant was counseled for writing checks without sufficient funds to cover them. Later in 1996, he was reprimanded for having used a Government travel card for personal expenses.

In 1998, Applicant left military service. Later that year, Applicant was charged with robbery and several other crimes. He was convicted of theft, robbery, and second degree assault, and the remaining charges were *nolle prossed*. Two of the three convictions were felonies. Additionally, two of the charges that had been dropped were also felonies. Applicant was sentenced to a year in jail, which was suspended; one year of probation; \$3,000 restitution; and 300 hours of community service.

In November 2005, while a civilian employee of the Government, Applicant was charged with theft of money from an office coffee fund.¹ He was placed in pretrial diversion, and after completing the requirements, the charges were dismissed. Due to this offense, Applicant’s security clearance was revoked, resulting in his resignation from his job in 2007.

In October 2001, Applicant completed a security clearance application (SCA). He omitted reference to the 1998 charges and convictions. In May 2002, he made a false statement concerning these charges. In November 2005, Applicant deliberately misstated the circumstances of the November 2005 criminal charges to criminal investigators of the Government.²

¹Government Exhibit (GE) 12, U.S. Navy Criminal Investigation Division Report of Investigation, states that the series of thefts occurred in a high security, classified area. The complainant stated that all employees working in the building where the thefts occurred held high-level security clearances. Accordingly, it was a matter of concern if an employee was stealing.

²GE 12 describes Applicant’s statement to investigators. He initially claimed that he had removed the money and given it to a person who would use it to purchase fresh food supplies for the G-dunk fund and for coffee supplies for the coffee fund. After further interviews, however, Applicant admitted that he had been in a financial bind and had been using the money to purchase gasoline for his personal vehicle.

In addition, Applicant has twelve delinquent debts, totaling over \$24,000. These include eight collection accounts, two judgments, one of which was being paid by garnishment; one charged-off account; and one account 180 days past due. He attributes his financial problems to unemployment following his resignation in 2007. His current job does not pay him enough to begin to resolve his debts.

His character references describe him as honest and trustworthy. However, none of the letters of reference indicate that the authors were aware of the SOR allegations.

In the Analysis, the Judge concluded that Applicant had failed to mitigate the Guideline F security concerns. He stated that Applicant's unemployment had not been due to circumstances outside his control, because it resulted from his theft of coffee fund money and consequent loss of a security clearance. He also noted evidence demonstrating that Applicant's financial problems preceded his job loss. He concluded that Applicant had not acted responsibly in regard to his debts;³ had not received counseling or demonstrated that his financial problems were under control;⁴ nor demonstrated a good-faith effort to satisfy his debts.⁵

The Judge also concluded that Applicant had not demonstrated mitigation of the Guideline E security concerns. He noted Applicant's failure to list his 1998 felony conviction on his 2001 SCA. He stated that Applicant did not disclose this information until his subject interview and then did so in a misleading way.⁶ He concluded that Applicant's unwillingness to be forthright with Government investigators was not consistent with the standards of behavior expected of persons who hold security clearances.

Applicant contends that the Judge was biased against him. He states, among other things, that the Judge engaged in "name calling and insults with respect to how I produced some of my evidentiary documentation. It seemed like he was making references to my character that were inappropriate just to provoke a response from me." He also states that the Judge demonstrated bias in the manner in which he discussed Applicant's letters of reference. Appeal Brief at 1-2, 5.

We have examined Applicant's contention in light of the record, particularly the hearing transcript. On the whole, we find no evidence of bias in the Judge's handling of the case. He

³See Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]"

⁴See Directive, Enclosure 2 ¶ 20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

⁵See Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

⁶See Directive, Enclosure 2 ¶ 17(a): "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts[.]"

admitted the exhibits which Applicant offered and permitted Applicant to testify in narrative fashion without interruption. Applicant's complaint appears to be directed at the Judge's own questions, which occurred toward the end of the hearing. While questioning Applicant, the Judge did appear to be argumentative, equating Applicant's 2005 theft of coffee fund money with barracks theft, describing it as "the lowest form of low." Tr. at 106. He also questioned Applicant on apparent false statements made during the processing of his 2009 SCA.⁷ Tr. at 110-111. Concerning Applicant's character letters, the Judge questioned him sharply over whether the persons who wrote the letters (one of whom was a U.S. Congressman) were aware of his various incidents of misconduct. Tr. at 105-106. While some of the Judge's comments and questions might be characterized as gratuitous or harsh, he did not act in such a way as to lead a reasonable person to believe that he lacked the requisite impartiality. *See, e.g.*, ISCR Case No. 09-07395 at 2-3 (App. Bd. Sep. 14, 2010).

Applicant argues that the Judge failed to consider all of the record evidence. He cites to evidence of his efforts to resolve his debts, to his having worked in jobs that he believes demonstrate his reliability, to his character references, and to his having prior favorable clearance adjudications, among other things. On this last point, Applicant's prior security clearance adjudications do not impair the legal sufficiency of the Judge's adverse clearance decision. The Government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct having negative security significance. *See, e.g.*, ISCR Case No. 06-10859 at 4 (App. Bd. Sep. 2, 2010). Given the extent of Applicant's misconduct and his ongoing financial delinquencies, there is no reason to believe that the Judge failed to consider, or failed properly to weigh, Applicant's prior clearance adjudications. Applicant's arguments fail to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 10-10068 at 2 (App. Bd. Dec. 20, 2011).

Applicant requests that, if we are not able to reverse the Judge's decision outright, we award him a probationary clearance. We have no authority to grant an interim, conditional, or probationary clearance. *See, e.g.*, ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011). His brief contains matters outside the record, such as the circumstances underlying his discussions with staff members of the Congressman who wrote a letter in his behalf. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. He states that loss of his clearance will affect his ability to maintain employment. However, the effect that an adverse decision may have on an applicant is not a relevant or material consideration in evaluating his security eligibility. *See, e.g.*, ISCR Case No. 08-08373 at 3 (App. Bd. Dec. 3, 2010).

⁷Applicant answered "no" to a question on the 2009 SCA asking if he had ever been charged with a felony. GE 1 at 39. Moreover, when interviewed in December 2009, he initially denied ever having been charged with a felony. GE 4, Interrogatories, Personal Subject Interview. These statements were not alleged in the SOR. However, non-alleged conduct may be relevant for other reasons, such as accessing an applicant's credibility, evaluating an applicant's case for mitigation, considering whether an applicant has demonstrated rehabilitation, etc. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

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: Jeffrey D. Billett

Jeffrey D. Billett
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