

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge’s challenged finding is sustainable based on the record. We have no authority to rule on the conduct of investigations. Adverse decision affirmed.

CASENO: 14-04186.a1

DATE: 10/28/2015

DATE: October 28, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-04186
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 22, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline F (Financial Consideration) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 10, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 finding that he had deliberately falsified his security clearance application (SCA) and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Finding of Fact

Applicant is 72 years old. He has worked for a Defense contractor since 2007. Applicant and his second wife have been separated since January 2013 and are in divorce proceedings. Applicant retired from the U.S. military and from a civil service position with the Federal Government. He has held a clearance for many years.

After Applicant and his wife separated, she was awarded exclusive use of the marital home, with Applicant responsible for the mortgage payments, as well as utilities. In addition to other required expenses, Applicant was to make biweekly payments to her of \$1,000 pending a final settlement. Due to these obligations, along with the costs of maintaining a separate residence, Applicant could not keep up with all of his financial obligations.

Applicant’s SOR listed several delinquent debts, for a mortgage loan, a line of credit, various consumer debts, credit card charges, and state taxes. In addition, the IRS garnished Applicant’s retirement pay, and he has now entered into a payment agreement with that agency, the first installment due in June 2015. Applicant resolved nearly all of his state tax debt, although he owes delinquent state taxes for 2013 that he has not started paying. The Judge found that Applicant had not withheld sufficient taxes from his military or civilian retirement pay.

Applicant’s annual salary is \$129,000. After the hearing, he began making payments on some of his past-due consumer debts. He is currently living in the marital house, though he has not made mortgage payments since late 2013. He has recently put the house on the market and expects that the proceeds will cover his past-due obligations.

When completing Section 17 of his SCA, in September 2013, Applicant answered “no” to a question about whether he was currently cohabiting with someone with whom he shared bonds of affection, obligation, or commitment. In fact, at the time he completed the SCA, he was living with a young woman whom he had met at a picnic. This person (Ms. X) was a drug addict (heroin) and had previously worked as a prostitute. Ms. X has been arrested for numerous offenses. One of her arrests was for possession of a controlled substance, discovered while she was driving Applicant’s vehicle. This offense constituted a probation violation. Another probation violation resulted in Ms.

X's imprisonment for 29 days. Applicant and Ms. X became romantically involved in May or June of 2013.

During his clearance interview, Applicant stated that he had failed to disclose his cohabitant due to an oversight. At the hearing Applicant initially testified that he and Ms. X cohabited from February 2013 until March 2014. Later on, however, he testified that they separated in October 2013, reuniting in December 2014. As of May 2015, Applicant and Ms. X were still cohabiting.

Applicant enjoys a good reputation for diligence and honesty. He has handled classified information properly. He is in charge of about \$300,000 of equipment at his job.

The Judge's Analysis

Though acknowledging that Applicant's debts were affected by his marital separation, the Judge concluded that he had not demonstrated responsible action in regard to them. She cited to evidence that he did not withhold taxes from his retirement income, for example, as a circumstance affecting his debts that was within his control. She also stated that Applicant had made little effort to resolve his financial problems until he received the SOR. The Judge resolved the state tax debt in his favor, but she entered adverse findings regarding the others.

Concerning the allegation of falsification under Guideline E, the Judge found that Applicant's omission of his cohabitation was deliberate. She found his explanation that this was an oversight to be lacking in credibility, noting his inconsistent statements as to when the couple separated. She noted other inconsistent statements concerning the nature of their relationship.¹ The Judge concluded that Applicant had not mitigated concerns arising from his omission from the SCA. In the whole-person analysis, the Judge noted Applicant's years of military service and civilian employment with the Government. However, she concluded that his financial problems and personal conduct concerns called into question his judgment, reliability, and trustworthiness.

Discussion

Applicant challenges the Judge's finding that he deliberately failed to disclose his cohabitation with Ms. X. He claims that, at the time of his clearance interview, they were not cohabiting. In making this argument, he challenges the accuracy of the interview summary admitted as Government Exhibit 3. We evaluate a Judge's findings of fact to see if they are supported by "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." Directive ¶ E3.1.32.1. In evaluating an

¹"We're very close friends, but she's not my girlfriend. Not at all. I'm too old for that." Tr. at 81. *Compare* with Applicant's testimony later in the hearing: "We have a romantic relationship at this time, yes." Tr. at 150.

applicant's *mens rea*, a Judge should consider the omission or false statement in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No 14-04226 at 3 (App. Bd. Aug. 18, 2015).

We have examined the challenged finding in light of the record as a whole. The allegation in question pertained to an omission from the SCA, not the clearance interview, as Applicant asserted in his brief. Applicant testified that he cohabited with Ms. X beginning in February 2013 and lasting until either October 2013 or March 2014. In his clearance interview, conducted in March 2014, he stated that they were cohabiting at that time. Insofar as the SCA omission occurred in September 2013, Applicant's various statements support the Judge's finding that, as of the date of the SCA, his answer was objectively false. Moreover, the inconsistent statements cited by the Judge are sufficient to undermine the credibility of his claim of an honest oversight. Applicant expressed dissatisfaction with the way in which the investigators conducted his interview. However, we have no authority to rule on the manner in which officials conduct clearance investigations. *See, e.g.*, ISCR Case No. 09-06026 at 3 (App. Bd. Mar. 5, 2013).

Applicant cites to his various repayment efforts, arguing that the Judge erred in concluding that he had not mitigated the Guideline F concerns in the SOR. However, the record supports the Judge's finding that Applicant had significant delinquent debts that he did not begin seriously to address until after he had received the SOR and, indeed, some of them not until after the hearing itself. Timing of debt payment is a relevant matter in Guideline F cases. *See, e.g.*, ISCR Case No. 14-00279 at 3 (App. Bd. Jan. 23, 2015). Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Neither has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, 14-04031 at 3 (App. Bd. Aug. 28, 2015).

Applicant contends that the transcript contains errors. However, Applicant's SCA, his credit reports, his clearance interview, and the criminal history of Ms. X are not at significant variance with his hearing testimony. Even if there are some typographical errors in the transcript, such as one the Judge identified at p. 72, Applicant's brief provides no reason to conclude that the transcript distorted the testimony adduced at the hearing.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

I agree with my colleagues in their resolution of this case. The Judge cited to evidence of inconsistent statements in evaluating whether Applicant's omission from the SCA was deliberate. In addition to this, the record supports a conclusion that Applicant had a likely motive to conceal from investigators evidence that he, a 72-year-old man undergoing divorce proceedings, was living with a woman who was a heroin addict with a history of criminal arrests and convictions and who had engaged in prostitution. This evidence also supports the challenged finding.

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