

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant has failed to identify any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Adverse decision affirmed.

CASE NO: 15-01545.a1

DATE: 08/08/2016

DATE: August 8, 2016

In Re: ----- Applicant for Security Clearance))))))))	ISCR Case No. 15-01545
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 15, 2015, DoD 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 hearing. On May 31, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is a 42-year-old employee of a Federal contractor. He received an associate's degree in 2006 and a bachelor's degree in 2008. He has never been married, resides with a cohabitant, and has a child. He admitted each of the SOR allegations, but the Judge treated his responses to six falsification allegations as denials.

In 1993, Applicant was charged with felony possession of a firearm. During a background investigation, he stated he wrestled the pistol from an assailant in a convenience store, ran away, and hid in some bushes, while leaving his car running at the store. He later returned to the store, where police stopped him and told him a stolen pistol was found in the car. The store owner told the police that Applicant was a victim of an attempted robbery. The charge was dismissed.

In 1995, Applicant was charged with felony robbery by the use of force. During a background investigation, he stated that he returned to his home and found a man in the bedroom of his cohabitant's child. The man said he would not leave until the cohabitant returned home. They argued, went outside, and fought. The man threw the keys to the house on the ground and left. A short time later, the police arrived and charged Applicant. The charges were later dismissed.

In 2000, Applicant was charged with distribution of cocaine base and possession of that substance with the intent to distribute, both felonies. Later that year, he pled guilty to distribution of cocaine base and was sentenced to imprisonment for 70 months followed by 5 years of supervised release. After serving about 18 month in prison, he attended a boot camp, received counseling, was released to a halfway house, and was discharged from supervision in 2008.

In 2010 and 2014, Applicant submitted security clearance applications (SCAs). In both SCAs, he responded "No" to questions that asked whether he had ever been charged with a felony offense, whether he had ever been charged with a firearms or explosive offense, and whether he had ever been charged with any offense(s) related to alcohol or drugs. In the 2010 SCA, he also omitted other information about his family and work history and attributed the omissions to his employer rushing him to complete the SCA.

During his background investigation in 2010, Applicant told the investigator he never possessed, used, sold, or distributed drugs. He believed the evidence against him was a "bad bust," but his lawyer told him that the authorities would "mess" with his cohabitant who was a convicted felon on probation if he did not plead guilty. (Decision at 3-4) In his background investigation in 2014, he told the investigator that he did not list the 1993, 1995, and 2000 charges because he believed he was not required to do so due to them being more than seven years old. At the hearing, he testified that he misread the SCA questions. He could not remember whether his answers from his 2010 SCA were copied into his 2014 SCA or whether he completed the 2014 SCA "from scratch." He testified that, when he completed the 2014 SCA, he believed the Government already knew about his criminal record, but adhered to his contention that he misread the questions.

The Judge's Analysis

Noting that Applicant's descriptions of the 1993 and 1995 incidents were bizarre, the Judge concluded there was sufficient evidence that he did not commit those offenses. The Judge found that Applicant deliberately falsified his 2010 and 2014 SCA. He also considered those falsifications in concluding that Applicant's 2000 felony conviction was not mitigated by the passage of time.

Discussion

Applicant claims the Judge contradicted himself by first stating an omission does not prove falsification and then finding Applicant falsified his SCAs by omitting information about his criminal record. Applicant has apparently misconstrued the Judge's decision. Citing ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004), the Judge stated that "[a]n omission, standing alone, does not prove falsification." However, the Judge went on to say the record as a whole must be considered to determine an applicant's state of mind at the time of the omission. The Judge also cited to ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" ¹ [emphasis added] as the pertinent disqualifying condition under Guideline E for addressing Applicant's conduct. Our reading of the Judge's analysis of the falsification allegations reveals it was not contradictory, but correctly highlighted the disqualifying condition's requirement that an omission must be deliberate.

Applicant contends that the Judge erred by considering the falsification allegations as part of his mitigation analysis for Applicant's drug conviction in 2000. This argument lacks merit. In the decision, the Judge noted that the deliberate submission of a false answer on a SCA is a felony under the U.S. Code² and pointed out that, although the falsifications were not alleged as criminal conduct, non-alleged conduct could be considered for limited purposes, including the evaluation of evidence in extenuation or mitigation, citing ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). In case before us, the falsifications were alleged in the SOR under the personal conduct guideline. It stands to reason, if non-alleged conduct may be used in evaluating evidence in mitigation, then any proven SOR conduct may also be used for that same purpose in relation to any other allegation in the SOR.

Applicant also argues that the Judge did not consider all of the evidence in the record. He emphasizes that his last alleged criminal offense occurred almost 16 years ago and claims the Judge did not consider the steps he has taken to rehabilitate himself. The Judge, however, made findings about those matters, and Applicant has not rebutted the presumption that Judge considered all the evidence in the record. ISCR Case No. 14-05795 at 2 (App. Bd. Apr. 26, 2016). Applicant further argues that based on the record the Judge should have found the security concerns mitigated. This argument amounts to a disagreement with the Judge's weighing of the evidence, which is not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-04719 at 3 (App. Bd. Apr. 6, 2016). Furthermore,

¹ Directive, Enclosure 2.

² *See* 18 U.S.C. ¶ 1001. The Judge incorrectly cited to 10 U.S.C. ¶ 1001 in the decision.

the Judge's consideration of the totality of the evidence in reaching his decision complies with the whole-person analysis requirements. *See* Directive, ¶ 6.3, Enclosure 2 ¶ 2, and ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

Applicant has failed to identify any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board