KEYWORD: Guideline J; Guideline M

DIGEST: The Judge's controverted findings are supported by substantial evidence. Adverse decision affirmed.

CASENO: 06-09643.a1

DATE: 06/22/2009

DATE: June 22, 2009

In Re:	)	
	)	
-----	)	ISCR Case No. 06-09643
	)	
	)	
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 November 20, 2008, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct), Guideline M (Use of Information Technology Systems), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested decision on the written record. On April 30, 2009, after considering the record, Administrative Judge Robert J. Tuider 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 certain of the Judge's findings of fact are supported by substantial record evidence; and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a 33-year-old employee of a defense contractor. He served in the Navy from 1993 to 2002, holding a security clearance during his service. Applicant has four criminal offenses on his record, two of them DUIs. The first DUI occurred in 1996 and the second in 1998. In February 2003, Applicant was convicted of providing alcohol to a minor, the result of his teenage stepchildren and their friends consuming alcohol at his house. In 2004 he was convicted of misdemeanor assault for slapping his teenage stepdaughter. From 2003 to 2005 Applicant was employed by a defense contractor. The contractor terminated his employment, due to Applicant having violated company policy concerning internet and e-mail usage. The company had given Applicant two prior written warnings that he risked losing his job unless he changed his behavior. Applicant's security clearance application inquired about drug- or alcohol-related convictions. Applicant listed his 1996 DUI but omitted the one in 1998. The Judge stated, "Applicant does not dispute that he deliberately failed to list his 1998 DUI. Applicant offered no mitigating evidence." In the Analysis portion of his decision, the Judge stated that "Applicant presented little or no evidence to explain, extenuate, or mitigate the security concerns raised. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision." Decision at 3, 7.

Applicant contends that his prior employer warned him only once about his improper use of e-mail and the internet. However, the record demonstrates that the Judge's finding of two warnings is supported by substantial evidence.[1] *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.") The Judge's finding that Applicant deliberately omitted his 1998 DUI is also supported by substantial evidence.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between

[1]*See, e.g.,* Item 9 at 2, Letter to Applicant terminating his employment. The letter states that Applicant was warned twice, in writing, about his conduct. Despite those warnings, "[m]anagement recently had cause to believe that you were again engaging in conduct that was in violation of [employer's] Internet and E-Mail Policies. Therefore . . . an audit of your recent internet and e-mail activities was conducted. As a result, it was determined that you had installed a 'track eraser' program on your computer without authorization, having continued to misuse the internet to access inappropriate sites and have stored additional inappropriate materials on your company computer."

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 decision that "it is not clearly consistent with national security to grant Applicant eligibility for a security clearance" is sustainable on this record. Decision at 8. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests 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