

KEYWORD: Guideline E

DIGEST: As a practical matter, a finding regarding an applicant's state of mind may not always be based on the applicant's statements but rather may rely on circumstantial evidence. Adverse decision affirmed.

CASENO: 06-21792

DATE: 11/06/2009

DATE: November 6, 2009

_____)	
In Re:)	
)	
-----)	ISCR Case No. 06-21972
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Ronald P. Keller, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 12, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 24, 2009, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed.

Applicant raises the following issue on appeal: whether the Judge’s adverse decision is not supported by the record evidence. Department Counsel cross-appealed on the issue of whether the Judge’s finding favorable to Applicant on one of the allegations in the SOR was contrary to the record evidence. For the following reasons, the Board affirms the Judge’s unfavorable decision.

Applicant’s supervisor went to Applicant’s work station on one occasion and observed Applicant sitting at his desk, preparing to fill a syringe with an unknown substance from a vial. Applicant stated to the supervisor that the substance was an antibiotic prescribed to treat an injury. The supervisor asked Applicant to produce a copy of the physician’s prescription to confirm Applicant’s explanation. Applicant never produced the prescription and changed his explanation several times regarding why he could not produce the prescription. Applicant’s supervisor determined that Applicant’s responses concerning the workplace incident were not credible, and he decided to terminate Applicant. The termination process proceeded with an effective date four days after the creation of a memorandum of record indicating the termination decision and discussing Applicant’s right to request a review by a division chief. There is no record evidence of Applicant’s acknowledgment of receipt of the written termination memo. Applicant met with the division chief and provided results from a drug test that were negative. The termination proceeded however. A few hours before the termination became effective, Applicant resigned his position.

Applicant completed a security clearance application in December 2004. He answered “no” to Question 20 concerning his employment record in the past seven years. He did not acknowledge that he had quit a job after being told he would be fired or that he left a job for other reasons under unfavorable circumstances. In March 2006, Applicant was interviewed as part of a security clearance investigation. When questioned during the interview, Applicant did not report anything about the syringe and vial incident and did not disclose that he had been terminated by his former employer. The interviewing agent asked Applicant if he had been fired or resigned under adverse conditions, and he said “no.” Applicant was interviewed by another agent in 2007. That agent confronted Applicant specifically about the syringe and vial incident. Applicant claimed he did not know anything about such an incident. Applicant also denied that he was going to be terminated. In 2008, Applicant responded to DOHA interrogatories. He stressed that he did not use illegal drugs or abuse legal drugs. He added that he was certain that he intended to quit his prior job and that is why he did not discuss being fired earlier. At the hearing, Applicant denied all allegations. He did not recall any incident with a syringe and vial and stated that he never received a notice of termination. He did not recall any meeting with his supervisor where he was told he would be terminated for inappropriate behavior.

The Judge concluded that the government established by substantial evidence the fact that Applicant's supervisor told Applicant that he would be terminated for inappropriate behavior. The Judge concluded that Applicant deliberately falsified a material fact with his response on the 2004 security clearance application.

Applicant contends that the Judge's adverse conclusions are contrary to the manifest weight of the evidence. He states that evidence of his good character and professionalism must be taken into consideration and that the credibility of government witnesses is suspect. He states that the evidence supports the conclusion that he resigned his position solely for personal reasons. Applicant also asserts that many of the facts brought out in the testimony of government witnesses occurred after the fact and without his knowledge. Therefore, Applicant claims he could not have answered Question 20 of the security clearance questionnaire untruthfully.

An Applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). There was a sufficient evidentiary basis for the Judge to accept the supervisor's testimony that he saw Applicant with a syringe and vial at his work station and to accept the supervisor's testimony that Applicant's explanations for his behavior were evasive and contradictory. Regarding the falsification allegation, although the Judge was required to consider Applicant's explanations as to why he answered security clearance application Question 20 the way he did, she was not required to accept those explanations. A case involving alleged falsification requires a Judge to make a finding of fact as to an applicant's intent or state of mind when the alleged falsification occurred. As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. It is not mere speculation or surmise for a Judge to make a finding of fact about an applicant's intent or state of mind based on circumstantial evidence. To the contrary, it is legally permissible to do so. *See, e.g.,* ISCR Case No. 00-0601 at 2-3 (App. Bd. Sep. 21, 2001). In this case, the Judge noted Applicant's favorable character references and professional background when evaluating the plausibility of Applicant's claim that he did not answer Question 20 with an intent to deceive. She noted that, even if the underlying allegations concerning Applicant's possible on-the-job illegal drug use are not true, and regardless of whether he received formal written notice of termination, an honest answer to Question 20 would require that Applicant list the incident on the security clearance application and explain the situation. The Judge's conclusions in this regard are sustainable on this record. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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)).

Department Counsel cross-appealed on the issue of the Judge's finding that the evidence failed to establish falsification on the part of Applicant based on the manner in which he answered the interviewing agent's questions in 2006. Department Counsel asserts that the Judge's findings and conclusions on this allegation were contrary to the weight of the evidence. Given the Board's

resolution of the issues presented by Applicant on appeal, it need not address the assignment of error proffered by Department Counsel.

“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). Under this standard, the Judge’s ultimate unfavorable security clearance decision under Guideline E is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board