

KEYWORD: Guideline C; Guideline E

DIGEST: The record contains substantial evidence that Applicant's false answers to the security clearance application were deliberate. Applicant failed to rebut the presumption that the Judge considered all of the evidence in the record. The effect an unfavorable decision may have on an applicant's employment is not relevant in a DOHA hearing. Adverse decision affirmed.

CASE NO: 06-23613.a1

DATE: 02/04/2013

DATE: February 4, 2013

In Re:)	
)	
-----)	ISCR Case No. 06-23613
)	
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 May 17, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 2, 2012, after the hearing, Administrative Judge Juan J. Rivera 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 his findings of

fact; whether the Judge failed to consider all of the record evidence; and whether the Judge's decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline C are not at issue in this appeal. Consistent with the following, we affirm.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant is an employee of a Government contractor. Born in Panama, he and his mother moved to the U.S. when he was four years old. The son of a U.S. service member, Applicant was a dual citizen of the U.S. and Panama.

In the late 1970s, Applicant joined the U.S. Marine Corps. In 1980, while on active duty, Applicant and some friends set off fireworks near a bar, in order to intimidate some motorcyclists. Applicant and his friends fled, but they were stopped by a policeman. A search of the car uncovered a plastic gun, pyrotechnics, a nunchaku, a chain, and a bat. Applicant was charged with inciting a riot, fleeing a police officer, possession of pyrotechnics, and carrying a concealed weapon. He pled guilty to a misdemeanor¹ and received a 30 day suspended sentence, 30 days probation, and a \$30 fine.

In 1983, Applicant received nonjudicial punishment under the Uniform Code of Military Justice for the offense of being absent from his place of duty. A year later, Applicant smoked marijuana. This was discovered by means of a urinalysis, which yielded a positive result for the drug. Applicant submitted a request to be administratively discharged in lieu of trial by court-martial. The Marine Corps accepted the request and discharged Applicant with an Under Other Than Honorable Conditions (UOTHC) service characterization.

In August 1987, Applicant attended a party and smoked marijuana. While waiting in his truck for friends, Applicant fled approaching police officers. Applicant threw bags out of his truck which, when recovered by the police, were revealed to contain marijuana. Applicant was charged with possession of marijuana with intent to distribute; possession of a controlled dangerous substance; possession of drug paraphernalia; and conspiracy. Pleading guilty to possession of a controlled dangerous substance, Applicant was sentenced to a year of probation and to a fine.

Applicant held a security clearance while serving in the Marines. In 1987, he began working for a contractor and submitted a security clearance application (SCA). Applicant disclosed his criminal history, as well as his use of marijuana, his positive drug test, and his discharge from the Marines in lieu of court-martial. Applicant acknowledged that his discharge was UOTHC.

The Judge found, however, that on three subsequent SCAs, in 1993, 2005, and 2011, Applicant made false statements. For example, when asked about his discharge from the military, in 1993 Applicant stated that he had received an Honorable Discharge. In 2005, he answered "no" to a question that asked if he had ever received other than an Honorable Discharge. In 2011, he stated that he had received a General Discharge.

¹The Judge found that the evidence is not clear as to the precise offense to which Applicant pled guilty. Decision at 2.

The Judge found that Applicant made other false statements in his SCAs. In 1993, for example, he failed to disclose his uses of marijuana in 1984 and 1987. He also denied that he had ever consulted with a mental health professional, although he had in fact done so in 1984.

In the SCAs completed in 2005 and in 2011, Applicant denied that he had ever been charged with any felony offense or any offense related to drugs, failing to disclose his concealed weapons charge, which was a felony, and failing to disclose his 1987 drug charges. Applicant also denied having ever used drugs while holding a security clearance, which was false in light of his use of marijuana while on active duty.

In interviews conducted in 1994, Applicant stated that he “never possessed [or] sold any illegal substances,” and that he had never used illegal drugs. He also stated that he had been discharged from the Marines with a General Discharge.

Later that year, in conjunction with “a polygraph-assisted interview,” Applicant again stated that he had received a General Discharge from the Marines, denied having received mental health treatment, and denied involvement with illegal drugs. In a post-test interview, he admitted having smoked marijuana prior to his 1984 urinalysis and admitted his UOTHC discharge. He also admitted his use of marijuana in 1987.

In 2011, in response to DOHA interrogatories, Applicant admitted his 1987 use of marijuana but did not mention the earlier incident that had occurred while he was in the Marines. When asked to provide information about his 1987 arrest, he claimed only that the police had found a pipe in his truck containing marijuana residue. He did not mention his having thrown the bags of marijuana from his truck as he fled the police.

Applicant has held a security clearance since 1987. He has over 27 years of Government service and has worked for contractors in support of the U.S. wars against illegal drugs and against terrorism.

Applicant claims that his answers to the SCA questions, interrogatories, and interview questions were honest mistakes, due to poor memory, misunderstanding the questions, or an honest belief that he did not have to disclose information about charges that had been dismissed. He also claims that he had been told that his discharge from the Marines would automatically be upgraded. The Judge found that “Applicant was less than candid and forthcoming at his hearing, sometimes contradicting the evidence and his own testimony.” Decision at 5.

Applicant presented evidence that he is a dedicated professional and an asset to his employer. “He has demonstrated a pattern of loyalty, dedication, competence, and reliability.” *Id.*

In the Analysis, the Judge cleared Applicant of the sole allegation under Guideline C, which pertained to his having possessed a Panamanian passport. He also entered favorable findings regarding one Guideline E allegation, concerning a charge of car theft. However, in analyzing the balance of the Guideline E allegations, the Judge concluded that they set forth security concerns which Applicant had failed to mitigate. Regarding the many false statements that the Judge found Applicant to have made, he concluded that they were deliberate. The Judge stated that this

conclusion was made in light of all of the evidence in the record and in light of Applicant's testimony and demeanor at the hearing. The Judge stated that these false statements demonstrate a lack of judgment and candor and that they evidence Applicant's dishonesty and his unwillingness to comply with rules and regulations. The Judge concluded that Applicant's favorable evidence was not sufficient to mitigate the security concerns in his case.

Applicant contends that the Judge erred in finding that his false answers were deliberate. When, as here, an applicant has denied an intent to deceive, the Government must provide substantial evidence that the false statements or omissions were deliberate. Substantial evidence means "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. *See* ISCR Case No. 09-06218 at 4-5 (App. Bd. Sep. 6, 2011).

Record evidence of (1) the number of Applicant's false statements, which were made over a period of several years; (2) his inconsistent statements; (3) his experience in completing SCAs; (4) the clarity of the questions themselves; and (5) the Judge's credibility determination support the Judge's finding that Applicant intentionally failed to provide truthful information during the processing of his various SCAs. *See* Directive ¶ E3.1.21: "[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge."

Applicant cites to record evidence of his having held a clearance for many years without incident or concern and that he has had prior favorable adjudications despite the presence of some of the adverse information at issue in this case. However, we have held that prior decisions to grant or retain a clearance do not undermine the legal sufficiency of a Judge's decision. The U.S. Government is not precluded from making an adverse clearance decision despite prior favorable determinations. Neither is a good security record a bar to an unfavorable decision. *See, e.g.*, ISCR Case No. 08-05344 at 2-3 (App. Bd. Feb 3, 2010). In this case, the Judge made findings about the evidence that Applicant has cited, but he provided a reasonable explanation for his adverse decision. Applicant has failed to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-02311 at 4 (App. Bd. Nov. 26, 2012).

Applicant notes the effect that a clearance denial may have upon his employment. However, the adverse impact of an unfavorable decision is not relevant in evaluating clearance eligibility. *See, e.g.*, ISCR Case No. 10-03757 at 2 (App. Bd. Sep. 13, 2011).

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 decision is AFFIRMED.

Signed: Jeffrey D. Billett _____
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

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