

KEYWORD: Guideline J

DIGEST: The Judge's conclusion that Applicant and wife made inconsistent and otherwise unbelievable statements, including Applicant's statement to the OPM investigator, is supported by the record. Adverse decision affirmed.

CASENO: 06-25528.a1

DATE: 11/13/2009

DATE: November 13, 2009

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In Re: )	
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) )	
) )	ISCR Case No. 06-25528
) )	
) )	
Applicant for Security Clearance )	
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**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 April 10, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 28, 2009, after the hearing, Administrative Judge Edward W. Loughran 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 denied him due process; whether the Judge's credibility determination was erroneous; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge found that Applicant is currently employed by a Defense contractor. He served in the U.S. military from 1984 until 2004, retiring as an E-7. Between 1988 until 2007, Applicant engaged in six instances of domestic violence, though none resulted in prosecution or other disciplinary action beyond referral to the military Family Advocacy Program at his station or some anger management classes. The first instance occurred in July 1988 in a foreign country where Applicant was assigned, along with his family. Applicant and his wife argued on the side of a highway. Applicant hit, pushed, kicked and shoved his wife, who was pregnant at the time, causing her to fall to the ground. He then grabbed her jacket and dragged her along the side of the road. On another occasion he shoved her on the ground and pushed her against the house. In some of the incidents cited by the Judge, Applicant's wife was an active participant in the affrays.

Applicant received numerous awards during his military service, to include the Meritorious Service Medal, two Commendation Medals, six Good Conduct Medals, and the Bronze Star.

Applicant takes issue with the Judge's credibility determination. Specifically, he disagrees with the Judge's conclusion that Applicant made an inconsistent statement to the OPM investigator. The Board has examined the Judge's evaluation of Applicant's credibility in light of the record as a whole and finds no reason to disturb it. The Judge's conclusion that Applicant and his wife made inconsistent and otherwise unbelievable statements, including Applicant's statement to the OPM investigator, is supported by the record.<sup>1</sup> *See* Directive ¶ E3.1.32.1. Applicant contends that the Judge improperly denied him the opportunity to question a witness about the Lautenberg Amendment,<sup>2</sup> which forbids gun ownership or use by persons convicted of domestic violence. The Board construes this to be a contention that the Judge denied Applicant due process. The record demonstrates that the Judge admitted a document summarizing the Amendment and its application

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<sup>1</sup>"Applicant's testimony was evasive and inconsistent at times. . . . find that some of his testimony was intentionally false. Of particular note was the testimony of Applicant and his wife that they had no memory of the 1988 incident in [Foreign Country] . . . It is not believable that neither party could remember [Applicant] striking his pregnant wife while she was holding their two-year-old child, causing her to fall to the ground, and dragging her along the side of the road." Decision at 6. Additionally, the Board has considered Applicant's description of an incident in 2007, given to a policeman on the scene, and compared it with Applicant's later description of the same incident to the OPM investigator. These documents support the Judge's conclusion about the mendacity of Applicant's statement to the OPM official. Government Exhibit 2, Personal Subject Interview dated September 5, 2008; GE 4, Incident Report dated September 16, 2007.

<sup>2</sup>18 U.S.C. § 922(g)(9).

to the military. However, the Judge did not permit Applicant to read it aloud during his questioning of a witness due to lack of relevance. Tr. at 34. The Judge's ruling is sustainable. Even if there were error in this ruling, it would be harmless.

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 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 the national interest to grant Applicant eligibility for a security clearance" is sustainable on this record. Decision at 10. "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).

### **Order**

The Judge's adverse security clearance 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