

KEYWORD: Guideline E; Guideline J

DIGEST: The Judge found that Applicant had deliberately falsified his two security clearance questionnaires. After the government presents evidence raising security concerns the burden shifts to the applicant to rebut or mitigate those concerns. Adverse decision affirmed.

CASENO: 07-05304.a1

DATE: 05/23/2004

DATE: May 23, 2008

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In Re:)	
-----)	ISCR Case No. 07-05304
)	
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 September 21, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 12, 2008, after the hearing, Administrative Judge Robert J. Tuiden denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision is arbitrary, capricious, and contrary to law. Finding no error, we affirm.

The Judge found that Applicant had deliberately falsified his two security clearance questionnaires. On a questionnaire submitted in 1994, Applicant had deliberately failed to disclose that he had used marijuana prior to 1994. On a questionnaire submitted in 2005, Applicant had deliberately failed to disclose that he had used marijuana, with varying frequency including three to four times a week, from about 2000 to about July 2003. He had also deliberately failed to disclose that he had used marijuana in April 2004 and while holding a security clearance in 1994 on that latter application. Applicant had subsequently admitted to the falsifications. However, in reaching his adverse clearance decision, the Judge noted that although Applicant’s subsequent disclosure “. . . may have been forthright, it cannot be considered prompt. While [he gave] Applicant some credit for coming forward, that credit [was] diluted by several factors.” Decision at 7.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15.

The Board has examined the decision in light of the record as a whole. Given his sustainable findings, the Judge’s conclusion that Applicant had not met his burden of persuasion that it is “clearly consistent with the interests of the national security” for him to have a clearance is likewise sustainable. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Judge examined the relevant data and articulated a satisfactory explanation for his 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)).¹ Accordingly, the Judge’s ultimate unfavorable security clearance decision under Guidelines E and J is not arbitrary, capricious or contrary to law.

¹Applicant asserts the Judge failed to analyze his case under the whole person concept. In fact, the Judge discussed Applicant’s case in light of the whole person concept in an entire page of his decision. *See* Decision at 9.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board