

KEYWORD: Guideline J; Guideline E

DIGEST: The Board gives deference to a Judge’s credibility determinations. Neither the pleadings nor the statements of adversarial counsel are the basis for the Board’s review. Adverse decision affirmed

CASENO: 07-07144.a1

DATE: 10/07.2008

DATE: October 7, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-07144
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jamesa B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Romeo G. Lumaban, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 16, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested that the case be decided on the written record. On July 10, 2008, after considering the record, Administrative Judge Joseph Testan denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings of fact regarding Applicant's deliberate falsification were supported by the record evidence; whether the Judge properly applied the disqualifying and mitigating conditions; and whether statements by Department Counsel or the Chief of the Personnel Security Division improperly affected the disposition of the case.

The Judge made the following pertinent findings of fact:

Applicant is 54 years of age. He has worked for the same defense contractor employer since 1993.

In 1976, Applicant was charged with Brandishing a Firearm. He was convicted of the charge, fined, and sentenced to 60 days in jail. The jail sentence was suspended. In 1985, Applicant was charged with (1) Felony Possession of Marijuana and (2) Conspiracy to Distribute and Possession With Intent to Distribute a Controlled Substance (Marijuana). He was convicted of the latter charge and sentenced to five years in prison. He served over one year in prison.

In 1996, Applicant was arrested and charged with Possession of Marijuana. The charge was dismissed. In 1997, Applicant was arrested for Assault and Battery on a Family Member. The charge was dismissed.

Applicant falsified material facts about his criminal history in response to three separate questions on an Electronic Personnel Security Questionnaire (EPSQ) he executed on October 18, 2006. In response to Question 21, which asked: "Have you ever been charged with or convicted of any felony offense?" Applicant responded "no." This response was false. In response to Question 22, which asked: "Have you ever been charged with or convicted of a firearms or explosives offense?" Applicant responded "no." This response was false. In response to Question 24, which asked: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant responded "no." This response was also false.

In his response to the SOR, Applicant admitted that he falsified material facts on the EPSQ, but offered the following statements in explanation. With respect to Question 21, he stated: "[the falsification] was not intentional as it had been more than twenty years and as I understood it, it was to go back ten years." With respect to Question 22, he stated: "This occurrence happened thirty-one years ago and I did not realize I had to disclose it." With respect to Question 24, he stated: "I did

not realize it had to be disclosed as it happened more than twenty years ago.” In view of the straightforward nature of the questions, and Applicant’s failure to offer any evidence as to how he allegedly came to believe he was “to go back ten years,” his denial of an intent to deceive is not credible.

(1) Applicant argues that the Judge’s findings of fact regarding Applicant’s deliberate falsification were not supported by the record evidence. The Board does not find this argument persuasive.

The Judge included Applicant’s explanations for his falsifications in his decision, although it is clear from the decision that the Judge did not find Applicant’s explanation credible. Under the Directive, the Board must give deference to the Judge’s credibility determinations. *See* Directive ¶ E3.1.32.1.

The Judge found that Applicant was involved in multiple criminal offenses between 1976 and 1997 and that he falsified his EPSQ. The Judge had the opportunity to consider Applicant’s explanation for his failure to disclose the requested information. The Judge was not bound, as a matter of law, to accept Applicant’s explanation. *See, e.g.*, ISCR Case No. 05-01676 at 2 (App. Bd. Jun. 11, 2007). The Judge considered Applicant’s explanation in light of the evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omissions were deliberate and intentional. On this record, the Judge’s findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1. Applicant has not demonstrated that the Judge’s decision is arbitrary, capricious, or contrary to law.

(2) Applicant argues that the Judge did not properly apply the disqualifying and mitigating conditions. The Board does not find this argument persuasive.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. 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.

The Board does not review a case *de novo*. 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)). “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). Accordingly, the Judge’s adverse decision under Guidelines E and J is sustainable.

(3) Applicant argues that statements by Department Counsel or the Chief of the Personnel Security Division improperly affected the disposition of the case. The Board does not find this argument persuasive.

On appeal, under the heading “Specific Claims of Factual and/or Legal Error,” Applicant cites to language in the SOR signed by the Chief of the Personnel Security Division and in the File of Relevant Material prepared by Department Counsel. Neither the pleadings nor the statements of adversarial counsel are the basis for the Board’s review of an ISCR decision. The Board has authority to review the Administrative Judge’s decision to determine whether harmful error occurred. *See Directive ¶¶ E3.1.28-E3.1.35*. Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

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

Signed: Michael Y. Ra’anan
Michael 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