

KEYWORD: Guideline J

DIGEST: The fact that criminal charges were dismissed does not preclude a Judge from finding that an applicant engaged in the underlying criminal conduct. The Board does not authority to waive provisions of the Directive. Adverse decision affirmed.

CASENO: 08-08606.a1

DATE: 12/04/2009

DATE: December 4, 2009

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In Re:)	
)	
-----)	ISCR Case No. 08-08606
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Randi B. Walker, Esq., Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 1, 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 September 14, 2009, after the hearing, Administrative Judge David M. White 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 certain of the Judge’s findings of fact are supported by substantial record evidence and whether the Judge’s decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a 46-year-old employee of a defense contractor. He served in the military from 1984 until 1989, during which time he held a security clearance.

Between 1994 and 2007 Applicant was charged with several instances of criminal conduct, including domestic violence, DWI, assault, and violation of a no-contact order. The domestic violence charges arose from Applicant’s interactions with his girlfriends. Although many of the charges were dismissed prior to trial, or reduced to lesser offenses, the Judge concluded that the evidence presented by the Government was sufficient to establish Guideline J disqualifying conditions. The Judge went on to conclude that “Applicant did not establish persuasive mitigation of the concerns arising [from the alleged misconduct]. His domestic violence arrests after physical arguments with multiple women over 12 years, for the most recent of which he remains on probation, preclude substantial mitigation[.]” Decision at 8.

Applicant argues that the dismissal of some of the charges demonstrates that the alleged incidents did not occur. However, after examining the record, we conclude that the Judge’s findings are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is “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.”). “[T]he fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges.” ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999).

Applicant requests that the Board waive the one-year bar on reapplication mandated by Directive ¶ E3.1.37. The Board does not have authority to waive provisions of the Directive. *Compare* ISCR Case No. 04-01961 at 2-3 (App. Bd. Jul. 12, 2007); ADP Case No. 07-06039 at 3 (App. Bd. Jul. 8, 2008).

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 interests

of national security 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: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

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

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