

KEYWORD: Guideline E; Guideline G

DIGEST: It is permissible for the Judge to consider record evidence of uncharged conduct for the limited purpose of evaluating credibility. Adverse decision affirmed.

CASENO: 08-11888.a1

DATE: 07/30/2010

DATE: July 30, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11888
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

James W. Green, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 29, 2009, 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 G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 26, 2010, after the hearing, Administrative Judge Noreen A. Lynch 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 improperly considered misconduct which was not alleged in the SOR; whether the Judge erred in her application of the mitigating factors; and whether the Judge erred in her whole-person analysis.¹ Consistent with the following discussion, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. He served in the U.S. Navy for 23 years, retiring in 2005 as a Commander (O-5). He has held a security clearance since approximately 1983.

In 2006 Applicant’s employer sponsored him for access to sensitive compartmented information (SCI). He underwent a series of interviews and polygraph examinations. During the course of the SCI investigation, Applicant revealed that he had driven a motor vehicle while under the influence of alcohol on numerous occasions, although he had never been charged or convicted. Applicant consumes alcohol presently, a beer and a glass of wine with dinner every other day.

As a consequence of these interviews, Applicant was requested to submit to a complete psychological examination. The psychologist advised Applicant to stop drinking. The psychologist stated that Applicant had “a history of failing to conform his behavior to social norms.” Decision at 3.

Other information obtained during Applicant’s SCI interviews include that Applicant had, on one occasion, leaked information to a member of the news media, due to frustration with his chain of command. The leaked information was not classified. Following the investigation, Applicant was denied access to SCI.² “The decision concluded that Applicant has proven an unwillingness to

¹The Judge made formal findings favorable to Applicant under Guideline E. Those favorable findings are not at issue on appeal.

²The written decision was admitted without Applicant objection as Government Exhibit (GE) 4. Tr. at 17. This document included information pertinent to the Judge’s findings. It also stated that, in the late 1980s, while on active duty, Applicant received psychological counseling for having tortured the family cat over the course of two months because the cat “did not give him much attention.” It stated that Applicant was involved in a motor vehicle accident in a European country after consuming alcohol and that his wife had told him she believed he had a problem with alcohol. Furthermore, the document stated that Applicant “had involvement with marijuana, psilocybin mushrooms, and cocaine in the 1980s after he entered the USN and was aware of the policy prohibiting the use of illegal drugs in the military.” GE 4 summarized the psychological evaluation performed on Applicant: “The risk that [Applicant] will engage in

follow laws, rules, and regulations. It cited him for a long history of questionable decision-making.” *Id.*

During an interview regarding his current security clearance application (SCA), Applicant advised that he had used illegal drugs more than 20 years prior. In a later re-interview, he admitted that he had not disclosed his drug use on previous SCAs. He also stated that he had used illegal drugs while holding a security clearance. Applicant enjoys the esteem of his former Navy colleagues for his trustworthiness and duty performance.

Applicant contends that it was improper for the Judge to have considered his failure to have disclosed his drug use. “There was no mention of this concern in the Statement of Reasons. This should not have been used against him since he did not have the opportunity to present a defense regarding this fact.” Applicant Brief at 6. However, the Judge stated, in the Analysis portion of her decision, that she considered this matter “for the limited purpose of determining whether [Applicant] is credible, whether his pattern of rule violations is mitigated under personal conduct, and as part of my whole-person analysis.” Decision at 14. This limited use was permissible. *See, e.g.*, ISCR Case No. 02-07218 at 3-4 (App. Bd. Mar. 15, 2004). Additionally, evidence underlying these false denials was contained in documents admitted at the hearing with no objection from Applicant. Tr. at 17. We conclude that there was no error in the Judge’s treatment of this issue. *See, e.g.*, ISCR Case No. 06-08598 at 2 (App. Bd. Apr. 24, 2008).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. She discussed in some detail why the disqualifying conduct established under Guideline E was not mitigated. After a review of the record evidence, the Board concludes that the Judge’s ultimate determination that Applicant’s Guideline E conduct was not mitigated is sustainable.

Applicant has cited to other decisions by Hearing Office Judges which, he contends, are similar to his own and in which applicants were granted security clearances. We have given these decisions due consideration. However, they have significant factual differences from Applicant’s case. In any event, decisions by the Hearing Office are not binding on the Appeal Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). Each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b).

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,’” both as to the mitigating conditions and the whole-person factors. *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

behavior indicative of poor judgment, irresponsibility, or impulsivity in the future appears to fall in the high range. This is due to his extensive history of engaging in multiple risky behaviors.”

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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, 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