

KEYWORD: Guideline J; Guideline K; Guideline H: Guideline E

DIGEST: Applicant’s complaint about the time required to process his case is outside the Board’s jurisdiction. Applicant’s claims of denial of due process and erroneous factual findings on the part of the Judge are not persuasive. Adverse decision affirmed.

CASENO: 09-05399.a1

DATE: 01/11/2011

DATE: January 11, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-05399
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 9, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline K (Handling Protected Information), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 4, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr., 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 Applicant was denied due process; whether certain of the Judge's findings of fact were supported by substantial record evidence; and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is a field services technician for a Defense contractor. He has a post-secondary degree in communication maintenance through the National Guard. He served in the Guard from 1984 through 2004 and in the Army Reserves from 2004 through 2007. He is divorced and has no children. He began using marijuana in high school. He used the drug steadily, though his use tapered off after he entered the military. He used marijuana while in the military knowing that it was against the rules to do so. In the 1990s Applicant began using cocaine with his wife. He began using cocaine about once a month. He obtained cocaine for his wife, who came from a family of drug dealers. His wife died in 1998, and he quit using cocaine in 2000. His urine tested positive for cocaine in 2003 while Applicant was in the military. However, no adverse action was taken against him.

In addition to the drug use described above, Applicant has numerous arrests, for such offenses as assault, obscene phone calls, false statement to an employment office, stalking, and threatening language over public airwaves. Some of these charges were dropped, although he was convicted of the false statement. The Judge also found that Applicant was convicted for making harassing phone calls. In the 2000s he was arrested and charged with attempted possession of marijuana, for which he was convicted. Applicant was purchasing the marijuana for a prostitute. He has hired prostitutes, paying them in part with drugs, including cocaine. Additionally, in 2006 he was convicted of making a false report to the police.

Applicant completed two SCAs, in 2007 and again in 2009. He omitted certain required information concerning his criminal record and his drug involvement. Additionally, at the time he answered DOHA interrogatory questions in 2009, he had in his possession classified material (technical manuals) despite his having had a security clearance withdrawn previously that year.

Applicant contends that DOHA took too long in adjudicating his SCA. He states that his omissions to the 2009 SCA were attributable to this delay. He also asserts that Department Counsel presented the Judge with personal information pertaining to other applicants. He further asserts that DOHA was violating his rights and the rights of others. He expresses concern that his personal information was mistakenly sent to other persons. Applicant's complaint about the length of time it took to process his case is beyond our jurisdiction. *See, e.g.*, ISCR Case No. 02-20947 (App. Bd. Jun. 18, 2004). Regarding the other issues, the Judge had requested Department Counsel provide him with Appeal Board precedent concerning the use of urinalysis results in DOHA hearings. Department Counsel had made reference to this precedent in his closing argument. Department Counsel subsequently provided the Judge with two cases, appropriately redacted, addressing this issue. The Judge was not seeking, and did not receive, personal information about Applicant or the applicants in the other cases, and his consideration of these cases was legitimate. The record demonstrates that Applicant was not denied due process.

Applicant contends that some of the Judge's factual findings were incorrect. For example, he claims that he did not have classified information in his possession, that in his interrogatory response he simply referred to his knowledge of classified information. He also argues that he was widowed rather than divorced, that he received his degree while in the Regular Army rather than the Guard, that he had not been convicted of the offense of making harassing phone calls, and that his urinalysis had not been positive for cocaine but, rather, for "the presents [sic] of cocaine." Brief at 1. Applicant is correct that he was not convicted for making harassing phone calls. This charge was dismissed. Government Exhibit 7, Criminal Record, at 2. However, this error is harmless. Otherwise, the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g., ISCR Case No. 08-11735 at 3 (App. Bd. Sep. 21, 2010).*

The record supports a conclusion 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 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: 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