

KEYWORD: Guideline F

DIGEST: Hearing Office decisions are not binding on other hearing office judges nor on the Appeal Board. Adverse decision affirmed.

CASENO: 09-08023.a1

DATE: 09/06/2011

DATE: September 6, 2011

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In Re: )  
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----- ) ISCR Case No. 09-08023  
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Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

John N. Griffith, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 18, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations)

and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 3, 2011, after the hearing, Administrative Judge Mark Harvey 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's credibility determination was erroneous; whether the Judge erred in finding that Applicant's answers to the security clearance application (SCA) were deliberately false; whether the Judge's application of the mitigating conditions was erroneous; and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a trainer working for a Defense contractor. He served in the Marine Corps from 1995 to 1997, when he received a General Discharge. He is married and has three children.

When Applicant was 18 years old, he and a friend stole \$8,000 from the family of his girlfriend. He was charged with larceny over \$100, a felony. The court sentenced him to 11 days in jail, 36 months of probation, community service, and a fine plus restitution. Although Applicant's parents paid the restitution, Applicant later reimbursed them.

In 1996, while in the Marine Corps, Applicant operated a vehicle while he was impaired by alcohol. As a consequence of this act and his apprehension for it, he missed the next day's formation. Applicant received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice. His commander imposed a forfeiture of \$400 pay, reduction to the grade of E-2 (suspended for six months) and 60 days restriction.

Later that year, Applicant was charged with use of cocaine, and the command referred his case to a special court-martial. This charge was based upon a positive urinalysis for that drug. Applicant pled guilty, advising the military judge during the providence inquiry that he had "snorted" cocaine. The military judge sentenced him to forfeiture of \$300 pay per month for 3 months, 30 days confinement (to run consecutively with 30 days restriction), and reduction to E-2. Subsequently, the Marine Corps discharged Applicant for misconduct, giving him a General Discharge.

Applicant's SCA, completed in June 2007, asked, at question 23, whether he had "ever been charged with or convicted of any felony offense." The question required him to report information even if his case had been sealed or otherwise stricken from the record. Applicant answered the question "no." This answer was not true, in light of his conviction for larceny of \$8,000. Applicant stated that he thought the conviction was going to be "erased" after he completed his sentence. Decision at 5.

Question 23d asked "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered the question "no." This answer was untrue in light of his court-martial conviction for wrongful use of cocaine. "He attempted to remember his thought

process or mental state in 2007 when he completed his [SCA]; however, he concluded that he could not remember why he did not disclose his court-martial conviction.” *Id.*

Applicant enjoys an excellent reputation among supervisors and co-workers for his professionalism, integrity, responsibility, reliability and security compliance. He has received awards for his performance of duty.

In his analysis of Applicant’s case, the Judge concluded that the two answers which Applicant provided in his SCA were deliberately false. He further concluded that Applicant had not mitigated the security concerns arising from these deliberate omissions. However, the Judge entered favorable findings for the Guideline F security concerns and for the Guideline E concerns arising from his underlying criminal conduct. The Judge also entered favorable findings for a Guideline E allegation concerning a false statement on his SCA about the character of discharge Applicant had received from the Marine Corps.

Applicant challenges the Judge’s credibility determination. Specifically, he contends that the Judge erred in making the following evaluation: “I do not believe his initial statement at the hearing that he did not know why he tested positive for the presence of cocaine in his body. His statement under oath at his providence hearing that he snorted cocaine is more credible than his denial of knowing cocaine use.” Decision at 10. However, the challenged statement is a reasonable interpretation of the record evidence. Applicant has not provided a reason to disturb the Judge’s credibility determination. *See, e.g.,* ISCR Case No. 07-17076 at 3 (App. Bd. May 11, 2011).

Applicant challenges the Judge’s findings that his answers to the two SCA questions at issue were deliberately false. In analyzing Applicant’s state of mind at the time he made the statements in question, the Judge was required to examine Applicant’s answers in light of the entire record. *See, e.g.,* ISCR Case No. 08-05637 at 2-3 (App. Bd. Sep. 9, 2010). The Judge stated, “The questions are clear, and his resume and good character evidence . . . show that he is an intelligent and detail-oriented person.” Decision at 11. We also note the Judge’s finding that Applicant could not remember why he left out his court-martial conviction.<sup>1</sup> The record, viewed as a whole, supports the Judge’s findings about the deliberate nature of Applicant’s SCA omissions.

Applicant cites to a Hearing Office decision which he contends supports his case for a security clearance. We give due consideration to this case. However, each case must be decided on its own merits. Directive, Enclosure 2 ¶ 2(b). Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. In any event, the case which Applicant has cited contains significant differences from his own.

Applicant contends that the Judge should have found that he met his burden of persuasion as to mitigation. Among other things, he contends that the four years that have elapsed since his false statements, during which time there has been no other security significant conduct, demonstrate

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<sup>1</sup> “[Q]: “Well, what about the cocaine? Didn’t you say that you had 30 days in the brig for that? [A]: I did. [Q]: Okay. Why wouldn’t you list that, then? [A]: I don’t know.” Tr. at 100.

rehabilitation. However, we note the Judge’s conclusion, referenced above, about the lack of credibility concerning some of Applicant’s hearing testimony. This is a matter that is relevant to the question of whether an applicant has demonstrated rehabilitation. *See, e.g.*, ISCR Case No. 08-09232 at 2-3 (App. Bd. Sep. 9, 2010). Applicant contends that the Judge should have applied several mitigating conditions in Applicant’s favor. The Judge explicitly listed two of the cited conditions and concluded that they do not apply “to a sufficient degree” to mitigate any SOR allegations. We concur. The third mitigating condition pertains to the passage of time which has already been addressed.

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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

### **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: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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