

KEYWORD: Guideline E; Guideline D

DIGEST: The party challenging a Judge’s credibility determination has a heavy burden on appeal. Applicant has not met that burden. Adverse decision affirmed.

CASENO: 11-10107.a1

DATE: 08/28/2013

DATE: August 28, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-10107
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 20, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested a hearing. On June 19, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge committed harmful error in making erroneous findings of fact; (2) whether comments by the Judge prejudiced Applicant's due process rights by causing him to refrain from submitting evidence; and (3) whether the Judge failed to consider evidence submitted by Applicant. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 48 years old. In 2008 while in the military, Applicant invited a female subordinate to his room to watch movies and drink alcohol. Applicant performed oral sex on the female without her consent. After the female reported the incident, an investigation ensued, and Applicant was offered nonjudicial punishment (NJP) under Article 15 of the UCMJ, for committing the offenses of forcible sodomy, cruelty and maltreatment to a subordinate, and making a false official statement (Applicant had initially failed to reveal the full extent of his acts of sodomy to Army investigators).

In 2011, Applicant completed his security clearance application (SCA) in conjunction with his current employment. He was asked if he was ever charged with a felony offense. He answered "no" and did not include information about the forcible sodomy charge or the resulting Article 15. He also did not include a 1982 charge of burglary of a vehicle, although he had included this charge in an earlier SCA he completed in 1990. Applicant was also asked if he had ever been charged with a drug or alcohol offense. He answered "yes" and listed a 1992 DUI. He did not list two DUI offenses dating from 1986 and 1987, although the 1987 DUI had been listed on a 2003 SCA. In a follow-up interview conducted by a defense investigator, Applicant admitted that there were two other unreported DUI offenses that he was charged with in the summer of 1987. He told the investigator that he failed to list these offenses because he believed they would affect his ability to receive a security clearance. He had not listed them on any earlier SCA. During his hearing testimony, Applicant gave conflicting information. Initially, he agreed with his earlier statement to the investigator that he didn't list the DUI offenses because he was concerned about his security clearance. Later, he testified that he was confused by the question, and thought he only had to list offenses within the last seven years. The testimony was contradictory and inconsistent.

In an April 2011 interview, when asked about his Army NJP, Applicant told the investigator that he received the NJP for "conduct unbecoming a noncommissioned officer." He described the specific conduct as having a female in his room, which was against Army policy. He told the current investigator that he had told the Army investigators that the female had not been in his room, which was a false statement. He also told the current investigator that he did not engage in sodomy or sexual activity with the female. During a subsequent April 2011 interview with the same investigator, Applicant stated that he had lied earlier and that he did have sexual contact with the female soldier in 2008.

Applicant claimed his company's security officer told him it was alright to describe his various actions with the female soldier as "conduct unbecoming a noncommissioned officer." He could not give the name of the security officer, nor did he supply it later when given the opportunity to do so. He also claims that he initiated the contact with the defense investigator in April 2011 that led to his revealing the true facts about his prior NJP. A summarized interview, which Applicant swore under oath was true and accurate, indicated that the investigator made the contact to follow-up on information he requested from Applicant. Applicant's testimony on these points is not credible.

Applicant supplied his Army evaluation reports and produced awards and decorations he received. Applicant offered the character letter of a co-worker who attests to his leadership, dedication, loyalty, integrity, and experience.

The Judge concluded: Applicant deliberately provided false information on his SCA by not listing previous DUI offenses and by providing false information to a defense investigator concerning the true circumstances behind his 2009 NJP. His failure to list the 1982 burglary charge and his failure to list that he was charged with a felony are not disqualifying as he had previously disclosed the burglary offense, and under Article 15 of the UCMJ, the NJP did not constitute a "charge" as that term of art is used in military law. Nevertheless, none of the Guideline E mitigating conditions apply. Applicant's sexual behavior with the female soldier is mitigated under Guideline D.

Despite Applicant's Army record and his supportive character evidence, he failed to provide sufficient evidence to mitigate security concerns under Guideline E.

Applicant argues that the Judge erred when he found that Applicant was not credible when Applicant stated that he had contacted the defense investigator in April 2011 for a follow-up interview. He argues that the Judge erred when he found that the investigator had made the contact. Applicant asserts that the investigator's notes in Government Exhibit 4 corroborate his testimony that he initiated the contact for the follow-up interview. After a review of the pertinent record evidence, the Board concludes that Applicant fails to demonstrate that the Judge erred, and that there is substantial record evidence to support his finding that the investigator initiated the contact. Government Exhibit 4 contains the following notations from the investigator: "Subject was re-contacted by telephone on 04/21/2011 to obtain information that was requested during the PRSI. . . . Subject volunteered information that he wanted to discuss further information regarding the forced sodomy charge and he wanted to 'come clean.'" The note goes on to state that Applicant was recontacted in person the next day "at the request of the subject" to provide further information. Thus, Government Exhibit 4 indicates that Applicant requested a further interview to volunteer additional information, but only after the investigator made the initial telephone contact, and Applicant's request was part of that telephone conversation. The Judge's finding that Applicant was not credible when claiming that he initiated the contact is reasonably supported by the evidence. Moreover, a Judge's credibility determinations are entitled to deference on appeal. Directive ¶ E3.1.32.1. The party challenging a Judge's credibility determination has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-08882 at 3 (App. Bd. Jan. 12, 2009). Applicant has not met that burden.

Applicant denies that he ever testified that he spoke with a security officer while he was filling out his SCA, and he challenges the Judge's finding that he stated that a security officer told him to describe all criminal conduct as "conduct unbecoming a noncommissioned officer." The Judge made the following finding: "He also claimed that his company's security officer told him it was alright to describe his actions this way." The record evidence, in the form of Applicant's hearing testimony, indicates that after Applicant listed "conduct unbecoming a noncommissioned officer" as the reason for his NJP, the security officer told him that he didn't lie, that the various charges he had received fell under "conduct unbecoming a noncommissioned officer." The Judge's finding is not time specific, and does not include a finding that Applicant testified that the security officer told him to fill out the SCA in a certain way. The finding states only that the security officer at some point indicated his agreement with the way Applicant described his various military offenses included in the NJP. This finding is supported by Applicant's testimony.¹

Applicant asserts that the Judge erred by concluding that he deliberately provided false information on his SCA by not listing certain previous DUI offenses. He states that he never intentionally left out information concerning the DUIs since he had reported this information on his Initial Entry Form into the military in 1990, and therefore assumed that the DOD already had the information. Applicant testified to this effect at the hearing. Applicant's testimony was evidence that the Judge was required to consider. However, there is other record evidence that contradicts Applicant's testimony. Applicant admitted to a defense investigator that he omitted DUI offenses from his 2011 SCA, and Applicant did not assert that he did so because he had included the information on a previous form.² Rather, he omitted the information because he was concerned about his security clearance. Also, an SCA completed in 1990 reveals that Applicant listed only one DUI on the government form. This SCA is the SCA that Applicant completed upon entry into the military. If there is a separate "Initial Entry Form" that Applicant is referring to, it is not in evidence. The Board concludes that the evidence supports the Judge's conclusion on this point.

Applicant states that the Judge told him at the hearing that he was not required to provide his security officer's name for corroborative purposes, so he did not do so. He claims he would have provided the information if he had been advised that it was necessary. Applicant states that he feels the Judge unfairly held his failure to provide the security officer's name against him. The hearing transcript reveals that the Judge did not tell Applicant that providing the name of the security officer was "necessary," but he invited Applicant to provide the information, and described in detail the procedure to be followed. The failure to state that such a submission was *necessary* did not deprive Applicant of his due process rights. When making a credibility determination, the Judge commented upon Applicant's failure to provide additional evidence after being given the opportunity to do so, but there is no indication that the Judge gave undue weight to this matter, or that he was unduly prejudiced or biased toward Applicant as a result. Applicant has not established that failure to

¹The Judge points out in his decision that "conduct unbecoming a non-commissioned officer" is not covered under any specific article of the UCMJ.

²Govt. Exhibit 4.

provide this information, or the Judge's comments about it, affected the ultimate disposition of the case.

Applicant asserts that the Judge did not consider all the record evidence. He submitted five letters from supervisors and co-workers. He points out that, in his findings of fact, the Judge mentioned only one letter from a co-worker.³ A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Additionally, a Judge is not required to discuss each and every piece of record evidence in making a decision. *See*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). In this case, the Judge also makes a general reference to Applicant's character evidence in his whole-person analysis. Applicant has failed to overcome the presumption that the Judge considered all the record evidence.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge

³Four of the letters were submitted with Applicant's answer to the SOR. The fifth was submitted as Applicant's Exhibit G.

Member, Appeal Board

Signed: James E. Moody_____

James E. Moody

Administrative Judge

Member, Appeal Board