

KEYWORD: Guideline J; Guideline G; Guideline E

DIGEST: The Judge’s challenged findings are sustainable. The Judge’s adverse conclusion is without error. Adverse decision affirmed.

CASENO: 04-09429.a1

DATE: 07/02/2007

DATE: July 2, 2007

In Re:)	
)	
)	
-----)	ISCR Case No. 04-09429
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Kris E. Durmer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 22, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 8, 2006, after the hearing, Administrative Judge Elizabeth M. Matchinski denied Applicant’s request

for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant has raised the following issues on appeal: whether the Judge's findings that Applicant deliberately falsified his security clearance application and deliberately provided false statements to investigators are supported by record evidence; and whether the Judge's adverse clearance decision is arbitrary, capricious, and contrary to law. Finding no error, we affirm.

The Judge made the following sustainable findings of fact: Applicant is employed by a Department of Defense contractor as an engineer. He graduated from a renowned university in 1977 with a degree in physics. He took graduate courses in physics as well, although he left the university without completing an advanced degree.

In 1994, Applicant was stopped by the police for driving erratically. Arrested for DWI, he failed to appear for his scheduled court date. He was subsequently convicted of the offense and sentenced to a fine and to loss of his driver's license. He was also required to attend an alcohol education program.

In 1996, Applicant was again arrested and convicted of DWI. On appeal he was granted a new trial and was subsequently acquitted of the offense.

In August 2001, Applicant was arrested and charged with DWI and resisting arrest. He had consumed wine at a restaurant with a companion and, after he and his companion had left in separate cars, was stopped by the police after making a U-turn. The resisting arrest charge resulted from his having pulled away from the officer as he was being handcuffed and from his lying prone in the police car, inhibiting proper transportation to the police station. This charge was pending at the time Applicant completed his security clearance application in 2002. He was subsequently convicted of reckless driving and for resisting arrest. Applicant was sentenced to pay a fine of \$1000 for resisting arrest and \$250 for reckless driving.

Question 24 of the security clearance application asked whether Applicant had ever been charged with or convicted of any alcohol or drug offenses. Applicant listed the DWI incidents in 1994 and 1996 but did not mention the 2001 charges. Neither did he mention them in response to Question 23, which asked about pending criminal charges. In May 2003, Applicant was interviewed by a Defense Security Service (DSS) agent. He mentioned the 1994 and 1996 DWI incidents, but in reference to the 2001 charge, stated only that he had been ticketed for making an illegal U-turn. He denied any other alcohol related charges or convictions.

In August 2004, Applicant was pulled over by the police for failing to stop at a red light. Detecting signs of alcohol consumption, the officer performed a field sobriety test on Applicant, which he failed. A subsequent breathalyzer test yielded a blood alcohol content of .18. Applicant was charged with operating under the influence of alcohol (OUI), reckless driving, failure to have a registration card, failure to observe the red light, speeding, failure to stay in the proper lane, and failure to change his drivers license to his state of residence. He subsequently pled guilty to OUI. He was sentenced to a fine, revocation of his license, and alcohol education. He was also fined for not having changed his license. The other charges were dismissed.

Applicant failed to file federal income tax returns for 2001, 2002, and 2006. In 2001, he attempted to obtain authorization from his ex wife to claim their daughter as a dependent. When this authorization was not forthcoming, Applicant took no action to file within the allotted period of time. He stated that he failed to file for the other years because he “had a lot of stuff going on . . .didn’t make it a high enough priority . . .” Decision at 6.

Concerning the challenged findings that Applicant’s omissions on the clearance application and to the DSS were deliberate, we have considered the wording of the question at issue, Applicant’s level of education, his explanations for the omissions, and the record as a whole. We conclude that the Judge’s findings are based upon substantial record evidence.

Turning to the second issue on appeal, we have considered the Judge’s decision in light of the record evidence as a whole. We find no error in the Judge’s conclusion that Applicant had failed to meet his burden of persuasion that it is “clearly consistent with the interests of national security” for him to have a security clearance. Decision at 13; *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Judge’s decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D.. Hipple
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