

KEYWORD: Guideline E

DIGEST: Factual errors in Judge’s decision were harmless. The Appeal Board cannot consider new evidence. Judge’s analysis of the mitigating conditions lacked specificity but was sustainable. Adverse decision affirmed.

CASE NO: 12-04565.a1

DATE: 10/28/2013

DATE: October 28, 2013

In Re:)	
)	
-----)	ISCR Case No. 12-04565
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 25, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 9, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to those same provisions.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel raises the issue of whether the Judge erred by not granting her motion to amend the SOR based on evidence developed at the hearing. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found the following: Applicant is 32 years old. Applicant served on active duty in the U.S. Army from July 2003 until July 2006. Applicant served in the National Guard from July 2006 until July 2007. Applicant completed a security clearance application in 2003. He believes he had two interim security clearances after 2003.

Applicant admitted that he used cocaine from July 2007 until at least April 2008. During that time he also purchased cocaine. He used the illegal drug about two or three times a week. Applicant was candid that his frequent use of cocaine affected his daily life. Applicant began employment with a company in the summer of 2007. Applicant was required to take a preemployment drug test. He was informed of the company's no-drug policy. He never reported the use of cocaine to his employer. Applicant stopped using cocaine in April 2008. He did not seek any professional help.

In July 2009, Applicant reenlisted in the military by joining the National Guard. He knew he had a security clearance. He completed his training and in December 2009, he returned home. He left the National Guard due to a disciplinary action. Applicant claimed that he did not know that he had a "full fledged" security clearance. He also explained that he believed the interim clearances had expired in 2006. Applicant was not credible in his denial of having a security clearance. When questioned, he admitted that he had never received notice that his clearance had been denied or revoked. When Applicant completed his January 19, 2012 security clearance application, he noted that he had a security clearance in 2006 and that it had never been denied or revoked.

Applicant admitted that he used marijuana for a period of approximately six months before completing a 2003 security clearance application. The Government established that Applicant omitted material facts from the 2003 security clearance application when he failed to disclose the marijuana use. Applicant denied that he falsified his 2003 application.

During the hearing, Applicant disclosed that he had a pending criminal charge from May 2013. He stated that he was arrested for breaking and entering. He has alerted his security officer of the charge, and has a court date of August 2013.

Applicant testified that he has changed his ways, that he provides for his family, and that he is financially stable. He does not use cocaine, he has changed his friends, and he acknowledges his bad decisions. Letters and testimony from those who know Applicant professionally attest to his judgment, professionalism, and work ethic.

The Judge concluded: Despite his denials, Applicant's omission from his 2003 security clearance application was deliberate. Applicant admitted the use of cocaine and the purchase of cocaine. Applicant had a security clearance during that time. Additionally, Applicant admitted that he used cocaine while working for his employer in 2007 directly in violation of company policy.

He did not report that use to his employer. After considering the mitigating factors, Applicant has not mitigated the personal conduct security concerns under Guideline E. Under the whole-person concept, Applicant's guarded answers about holding a security clearance are self-serving. He was intentionally vague about the dates that he held interim clearances. Applicant acknowledged a pending criminal charge against him. The charge is recent. Applicant does not persuade through his demeanor or testimony that he is using good judgment or is trustworthy and reliable or suitable for holding a security clearance.

Applicant asserts that the Judge made errors in her findings of fact. He challenges the Judge's findings that he reenlisted in the National Guard in July of 2009. He also challenges the Judge's finding that he left the National Guard due to a disciplinary action. Applicant's contentions have merit.

The record reflects that Applicant was in the National Guard from July 2006 until July 2007. Applicant reenlisted in the Army Reserves in May 2008, and began a period of full time training in July 2009. The training period ended in December 2009, but Applicant continued in the Reserves until June 2011. He did not return home and leave the National Guard due to a disciplinary action as the Judge found. Applicant did receive an Article 15 for being absent without leave while in the National Guard, but the Article 15 was administered in October 2006, not 2009. There is no record evidence that Applicant left the National Guard, or any other branch of service, because of disciplinary actions, nor is there any evidence from which the Judge could reasonably infer that Applicant left the National Guard as a result of disciplinary action. However, given the totality of the Judge's fact finding, and the conclusions that support her ultimate decision in the case, the Board concludes that these factual errors are harmless.

Applicant also challenges the Judge's finding that he was not credible in his denial of having a security clearance. Neither the Judge's decision nor the Applicant's brief are particularly clear on this point. Applicant admitted that he had a secret clearance, but only found out about the exact nature of the clearance in 2008. Prior to that date, he stated that he thought he had two interim clearances that had expired and never had a "full-fledged" clearance. The Judge noted that Applicant had indicated on a 2012 security clearance application that he had been granted a secret clearance in approximately March, 2006. A reading of the record and the Judge's decision suggests that the issue is the extent of Applicant's knowledge of his security clearance status during the period he used and purchased cocaine in 2007 and 2008. At the hearing, Applicant denied that he knew he had a clearance at that point.¹ The Judge concluded that Applicant's answers regarding his security clearance were "guarded," "self-serving," and "intentionally vague." After a review of Applicant's hearing testimony and after giving due deference to the Judge's conclusions regarding Applicant's credibility, the Board concludes that the Judge's resolution of this issue is sustainable.

Applicant argues that he did not intentionally give fraudulent information about drug use on his 2003 security clearance application. He states he was being advised during the application process by his military recruiter, who was assisting him with filling out the security clearance

¹Tr. at 36-37.

application. The assertions about the recruiter are not contained in the record below. Thus, they constitute new evidence, which the Board cannot consider. *See* Directive ¶ E3.1.29. On this record, the Judge's conclusion that Applicant intentionally falsified his 2003 security clearance application is sustainable.

Applicant asserts that several Guideline E mitigating conditions apply to his circumstances. He notes that he has not used drugs in more than 5 years, he has stopped associating with friends that use drugs, and his circumstances have changed. He stresses that he is now married with children, he owns his own home, and he is financially stable.

The Judge's decision does not specifically enumerate the Guideline E mitigating conditions that are potentially applicable in this case. Nor does the Judge discuss with specificity the applicability of individual mitigating conditions. It would have been beneficial for the Judge to have listed the applicable mitigating conditions (as she did with the disqualifying conditions) and to have discussed them in more detail. However, Judge's decisions are not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 10-03232 at 4 (App. Bd. May 24, 2011). The Judge does indicate that she considered the mitigating factors under Guideline E and lists several aspects of the case that led her to conclude that the case was not mitigated. These include weekly use of cocaine from July 2007 to at least April 2008, purchase of cocaine during that period, the fact that Applicant had a security clearance at the time of his cocaine involvement, the fact that Applicant used cocaine while working for his employer in 2007 in direct violation of company policy, Applicant's lack of credibility in denying that he gave any fraudulent information concerning the use of marijuana on his 2003 security clearance application, and the fact that he had a recent pending criminal charge against him. We have examined the Judge's decision in light of the record and find no reason to conclude that she weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

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.

Department Counsel cross-appealed on the issue of whether the Judge improperly denied her motion to amend the SOR to include an allegation that Applicant was recently arrested for breaking and entering. While the Judge disallowed the amendment, she did include and consider the evidence of the charge in her decision. Given the Board's disposition of the case, it need not rule on the issue of the Judge's denial of the motion.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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