

KEYWORD: Guideline E

DIGEST: The Judge's conclusion that Applicant false statement to the investigator was deliberate is sustainable on this record. Adverse decision affirmed.

CASENO: 14-01056.a1

DATE: 08/17/2015

DATE: August 17, 2015

In Re:)	
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Applicant for Security Clearance)	
)	ISCR Case No. 14-01056

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James E. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brian Barke, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 29, 2014, 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 May 29, 2015, 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 Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in finding that his statement to an investigator was deliberately false and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant works for a Defense contractor. He served in the U.S. military from 1974 to 1994, receiving an honorable discharge. While on active duty he received disciplinary action for wrongful appropriation of Government tools. He has worked for his current employer for a year and a half. He has held a security clearance since 1975 and has undergone various clearance reviews.

In 2008, Applicant submitted to polygraph testing under the auspices of another Government agency (AGA). In 2009, Applicant received a letter from AGA advising that he had been disapproved for access to classified information. The letter stated the following as the reasons for the disapproval: (1) Applicant had admitted to taking items and tools from 1997 to the present; (2) he admitted to having inappropriately touched his daughter in 1985; (3) he withheld information during security clearance processing in 1997; and (4) he collected benefits from the military on behalf of his son, who was not his biological son.

Applicant appealed this decision, denying having taken tools from employers. He claimed that it was standard practice to keep tools and items that the customer did not need. He stated that he did not remember the incident with his daughter during clearance processing in 1997. He stated that he had been drunk and pushed the incident out of his mind until 2008.¹ He also stated to AGA that if he had remembered it he might not have brought it up due to embarrassment.

In 2012, Applicant was interviewed pursuant to the current security clearance application. The Judge stated that Applicant “lied to the investigator in that he stated that he did not know the reasons why he was denied a full-scope polygraph clearance.” Decision at 3.

¹Applicant testified that he may have been drunk at the time he touched his daughter, or that the incident may simply have been a dream. “At the time, when I had the dream or around this time when this incident may have happened . . . I was drunk, or may have been drinking.” Tr. at 59. Later in the hearing he testified to his belief that another person had molested his daughter and that his memory of having done so himself was due to guilt over his failure to have protected her. Tr. at 71.

The Judge's Analysis

The Judge cleared Applicant of allegations concerning his taking employers' tools, inappropriately touching his daughter, and wrongful appropriation of Government tools. Among other things, she stated that the allegation about the daughter was not corroborated. She reached the opposite conclusion, however, concerning an allegation that he had made a false statement to the investigator in 2012 when he claimed that he did not know why he had been denied a clearance following the 2008 polygraph. Noting that Applicant had received a written explanation from AGA listing the reasons for the denial and that he had appealed, addressing each reason in detail, she concluded that it was not reasonable to believe that he had simply forgotten the reasons at the time of his 2012 interview. She further concluded that Applicant had not mitigated the concerns arising from this deliberately false statement. She found his explanations for this denial to be inconsistent.

Discussion

Applicant challenges the Judge's finding that his statement to the investigator in 2012 was deliberately false. We examine a Judge's findings of fact to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. In evaluating an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the totality of the record evidence. *See, e.g.*, ISCR Case No. 14-01607 at 3 (App. Bd. Apr. 9, 2015).

In this case, the challenged finding is consistent with the record that was before the Judge. Applicant underwent polygraph testing with AGA in an effort to receive a clearance. In 2009, he was notified of the specific reasons for the subsequent denial, addressing each in his appeal letter. We agree with the Judge's conclusion that it is not reasonable to suppose that he would not know, or would not remember, the basis for this denial, especially his admission to have molested his daughter, a mere three years after the date of the denial and of his appeal.² Furthermore, the Judge's comment that Applicant had made inconsistent statements concerning what happened to his daughter is supported by the record. *See* note 1, *supra*. We defer to a Judge's credibility determinations (Directive ¶ E3.1.32.1), and inconsistent statements can undermine an applicant's credibility. *See, e.g.*, ISCR Case No. 13-00596 at 6 (App. Bd. Jun. 26, 2015). The challenged finding is based upon substantial evidence.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. Under Guideline E, "any failure to provide truthful and candid answers during the security clearance process . . . will normally result in an unfavorable clearance action[.]" Directive, Enclosure 2 ¶ 15. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"

²Applicant argues that he told the investigator that he did not remember why he was turned down for a clearance, not that he did not know the reasons, as the Judge stated in her findings of fact, arguing that the statement to the investigator was not objectively false. We conclude that, under the facts of this case, there is no material difference between a claim not to know the reasons for the denial and a claim to have forgotten them.

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 Decision is **AFFIRMED**.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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