

KEYWORD: Guideline F; Guideline E; Guideline M

DIGEST: Conduct not alleged in a SOR may be considered for several reasons, including a credibility determination. Applicant was not denied the due process afforded him by the Directive. Adverse decision affirmed.

CASE NO: 07-16653.a1

DATE: 05/01/2012

DATE: May 1, 2012

In Re:)	
)	
-----)	ISCR Case No. 07-16653
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Timothy Aiken, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 16, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline M (Use of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 1, 2012, after the hearing, Administrative Judge Marc E. Curry 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 consideration of

conduct not contained in the SOR denied Applicant due process and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines F and M are not at issue in this appeal. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is employed in the field of information technology. He has worked for his current employer since March 2011. Applicant served in the Navy during 1997. He did not complete basic training, receiving a general discharge under honorable conditions after a positive urinalysis for marijuana.

Previously Applicant worked for another Defense contractor. During that period of employment, Applicant was alleged to have created directory files and scripts without obtaining permission from the system administrator. Applicant stated that he was not aware that his conduct was wrongful. Although he was found to have been trying to minimize the risk of operator error rather than to have been acting maliciously, the Government client requested that he be removed from the contract. Applicant submitted a resignation in lieu of dismissal due to these allegations. However, his employer rehired him several days later.

In completing his security clearance application (SCA), Applicant denied that he had, within the previous seven years, been fired from a job, quit, or left under unfavorable circumstances. Moreover, in response to questions about his discharge from the Navy, he advised a security clearance investigator that it was the result of a knee injury. He did not disclose his failed drug test. Applicant testified that he had told the investigator about the drug test, but that the investigator had not included it in the summary of Applicant's interview. However, when the summary was presented to Applicant as part of a series of DOHA interrogatories in 2009, Applicant certified that the summary was accurate. This apparent false statement was not alleged in the SOR.

In the Analysis, the Judge concluded that Applicant's SCA omission was intentional. In so doing, the Judge considered the plain language of the question at issue, as well as the uncharged misconduct regarding his failed drug test. The Judge stated that he was considering this misconduct in performing his credibility determination. The Judge ultimately concluded that Applicant had not mitigated the concerns arising from his omission to the SCA.

Applicant contends that the Judge erred by considering the uncharged misconduct. He stated that he had not been placed on notice that this evidence would be considered and that by doing so the Judge had denied him an opportunity to prepare his case. This evidence was contained in Government Exhibit (GE) 2, Answers to Interrogatories, dated January 12, 2010. Applicant did not object to the admission of this exhibit. Tr. at 15. The Directive requires a Department Counsel to provide an applicant with a copy of all documentary evidence to be submitted at a hearing (Directive ¶ E3.1.13). The exhibit is cited several times in the transcript, and there is nothing in the record to suggest that Department Counsel failed to provide Applicant with a copy. *See* ISCR Case No. 07-18324 at 6 (App. Bd. Mar. 11, 2011) (Federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities). Moreover, conduct not alleged in a SOR may be considered for a number of reasons, including assessing an applicant's credibility. *See, e.g.,*

ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).¹ This is the context which the Judge discussed the challenged evidence. Accordingly, we conclude that Applicant was not denied the due process afforded by the Directive.

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: Jean E. Smallin

Jean E. Smallin
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

¹*Cf.* Federal Rule of Evidence 404(b) provides that evidence of uncharged acts may be considered for a number of reasons, including proof of intent, motive, and lack of mistake.