

KEYWORD: Guideline G; Guideline E; Guideline J

DIGEST: Prior decisions to grant or retain a clearance do not undermine the legal sufficiency of a Judge's subsequent adverse decision. The government is not estopped from making an adverse decision when there were prio favorable adjudication. Adverse decision affirmed.

CASENO: 07-17383.a1

DATE: 02/12/2009

DATE: February 12, 2009

In Re:)	
)	
-----)	ISCR Case No. 07-17383
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Herbert M. Silverberg, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 23, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 25, 2008, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant has a history of consuming alcohol to excess. In 1990, while on active duty with the Air Force, Applicant received a letter of admonishment for setting off a fire extinguisher as a joke. In October 1996 he was arrested on an Air Force base for Driving While Intoxicated (DWI). He completed an alcohol awareness program and attended a victim impact panel, following which the charges were dismissed. In April 2002, Applicant was arrested for DWI, resulting in a plea of guilty. He completed an alcohol screening, attended both a DWI school and a victim impact panel, and paid court costs. In May 2002, Applicant submitted a SF 86, Security Clearance Application (SCA). In response to a question about alcohol-related charges or convictions, Applicant listed the 1996 DWI but did not mention the 2002 offense. In the Analysis section of her decision, the Judge stated of the omission, “[Applicant] decided . . . that since the arrest had just occurred, he would wait to see the legal outcome. Although he stated, he did not intend to conceal his arrest, that is exactly what he did. The question is clear. He deliberately omitted information that would have impacted his clearance.” Decision at 9. Subsequently, in August 2005, Applicant was again arrested for DWI. He was sentenced to 30 days house arrest, fined, and required to perform community service. In addition, he was required to install an ignition interlock system on his car, to attend Alcoholics Anonymous, and to undergo a year of supervised probation. He successfully completed the probation.

Applicant contends that the Judge erred in concluding that his omission of the 2002 DWI was of security significance. He states that “no action was taken against his clearance . . . when the transgression was fresh . . . He was allowed to keep his clearance . . . despite this concern.” Applicant’s Brief at 1. However, prior decisions to grant or retain a clearance do not undermine the legal sufficiency of a Judge’s subsequent adverse decision. “The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications.” ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). *See also* ISCR Case No. 04-01961 at 4 (App. Bd. Jul. 12, 2007). The Judge’s decision, viewed in light of the record as a whole, draws a rational connection between the facts found and its ultimate denial of a security clearance for Applicant. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). *See also Motor Vehicle Mfrs. Ass’n of the*

¹The Judge’s favorable findings under Guidelines G and J, as well as her favorable finding as to paragraph 2(b) under Guideline E, are not at issue in this appeal.

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 decision that “it is not clearly consistent with national security to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 12. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge’s adverse security clearance 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