

KEYWORD: Guideline J

DIGEST: The Judge's material findings of security concern are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 08-00632

DATE: 03/02/2009

DATE: March 2, 2009

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In Re: )  
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 ----- ) ISCR Case No. 08-00632  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 14, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department

of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 23, 2008, after the hearing, Administrative Judge Paul J. Mason 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 issues on appeal: whether certain of the Judge's findings of fact were supported by substantial record evidence and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is field engineer for a defense contractor. He was honorably discharged from the Air Force in 2000.<sup>1</sup> While on active duty, in the mid-1980s, Applicant "[o]n two or three occasions . . . entered the shower area of the female barracks . . . for the purpose of secretly watching women take showers." Decision at 3. He subsequently received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ).<sup>2</sup> The punishment consisted of a suspended reduction in grade, forfeiture of \$200 pay per month for two months, and thirty days of correctional custody. In October 2005, after his retirement from active duty, Applicant was arrested on an Air Force base for the offenses of invasion of privacy (looking into the window of a female's on-base guestroom without her knowledge) and resisting arrest. He pled guilty to invasion of privacy and the second charge was dropped. He was fined \$375.

After the case, Applicant attended a fellowship sponsored by his church, the content of which was sexual contact temptations. It did not specifically address voyeurism, nor was it part of a court-ordered treatment program. Among other things, the program addressed ways of avoiding such temptations. Applicant discussed his misconduct with his fellow attendees. Applicant's supervisors and fellow workers rate his job performance highly. In evaluating Applicant's documentary evidence of good character, the Judge stated that these documents do not reflect that the persons writing them were aware of Applicant's misconduct.

The Board concludes that the Judge's material findings of security concern are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "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.") Applicant argues that the Judge mistakenly believed that the church program he attended was mandatory rather than voluntary. However, neither the record nor the Judge's decision provides a basis to conclude that the Judge erred in his treatment of this matter. The Judge found that Applicant's testimony concerning this program was confusing, citing, for example, Applicant's apparently contradictory statements as to whether he had informed his fellow congregants of his conviction. The record provides no basis to conclude that the Judge mis-weighted the evidence. *See* ISCR Case No. 08-07005 at 2 (App. Bd. Feb. 9, 2009) ("As the trier of fact, the

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<sup>1</sup>Applicant Exhibit E, DD Form 214, reflects that Applicant retired from the Air Force after 21 years of service.

<sup>2</sup>10 U.S.C. § 815.

Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*”). The facts and circumstances of the fellowship meeting, contradictory testimony by Applicant concerning it, and Applicant’s demeanor while testifying are proper matters for the Judge to consider, both as to a credibility determination and to the question of rehabilitation. See Directive ¶ E3.1.32 (The Board defers to the Judge’s credibility determinations); and Directive ¶ E2.32 (d) (Guideline J security concerns can be mitigated by an Applicant’s demonstrating that “there is evidence of successful rehabilitation”).

The record demonstrates that the Judge has considered the entire record, including the matters submitted by Applicant. The Judge has drawn a rational connection between the facts found and his ultimate adverse security clearance decision, both as regards the mitigating conditions and the whole-person factors. See ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). See also *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 decision that “it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 8. See also *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security’”). The Board has no authority to extend Applicant’s security clearance until the beginning of the next year due to national economic conditions, as requested by Applicant.

### Order

The Judge’s adverse security clearance decision 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