

KEYWORD: Guideline H; Guideline E; Guideline J

DIGEST: An SOR allegation may be included under multiple guidelines and given independent weight under each guideline. Lack of truthfulness or candor in the security clearance process is at the heart of Guideline E. Adverse decision affirmed.

CASENO: 08-07575.a1

DATE: 10/08/2010

DATE: October 8, 2010

In Re:)
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 -----) ISCR Case No. 08-07575
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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

Michael F. O'Connor, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 14, 2009, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), 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 July 14, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr., denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision under Guideline E was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is a systems analyst working for a Defense contractor. He has a history of significant drug abuse, including the abuse of marijuana, cocaine, opiates, heroin, and Percocet (without a prescription). This conduct continued after Applicant had been granted a security clearance in 2006. His last instance of drug abuse was in 2007. Applicant received in-patient drug abuse treatment and, upon his successful completion, was discharged with a recommended plan for continued out-patient care. He has followed that plan, receiving counseling from a psychologist. He has also attended Alcoholics Anonymous meetings to address difficulties with alcohol consumption.

When he completed his security clearance application (SCA), Applicant answered “no” to a question inquiring if he had illegally used controlled substances within the previous seven years. This answer was false, due to the drug abuse described above. The Judge found that, under the circumstances of this case, this false answer was deliberate.

Applicant’s false answer to the SCA was alleged under Guideline E and also under Guideline J. The Judge found against Applicant under the former, but he cleared him under the latter. Applicant contends that the Judge’s adverse decision is inconsistent, in that, having found the false answer to have been mitigated under Guideline J, the Judge should have reached a similar conclusion under Guideline E.

However, previous decisions by the Appeal Board have stated that an SOR allegation may be included under more than one Guideline and may be given independent weight under each. Furthermore, a finding of mitigation under one Guideline does not compel a similar finding under another. *See, e.g.*, ISCR Case No. 03-05072 at 6 (App. Bd. Jul. 14, 2005); ISCR Case No. 04-90251 at 3 (App. Bd. Mar. 27, 2007). In considering an applicant’s claim that a Judge has treated two Guidelines inconsistently, we will examine the record and the Directive to determine if there is a rational basis for the Judge’s decision.

The Guideline E security concern includes the following language: “Of special interest is any failure to provide truthful and candid answers during the security clearance process . . .” Directive, Enclosure 2 ¶ 15. Similar language does not appear in the security concern under Guideline J. *See* Directive, Enclosure 2 ¶ 30. This language places an applicant’s lack of truthfulness or candor *in the security clearance process* at the heart of Guideline E, and the Judge cited it in his decision. Applicant’s false statement about his drug use (which use was, at the time he completed the SCA,

an ongoing course of conduct), was of a nature to frustrate the proper functioning of his clearance investigation. This is a sufficient reason for the Judge to evaluate the false statement differently under Guideline E than he did under J. Additionally, we note record evidence that he had made false statements to his wife.¹ These statements do not appear to constitute criminal conduct, but they are relevant to a whole-person evaluation of Guideline E and, therefore, provide another reason for the Judge to have examined that Guideline in a different context from the way he treated Guideline J.

After reviewing the record, we conclude 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed James E. Moody _____

¹Applicant testified that he had attended AA meetings even prior to his entry into the drug treatment program. He stated that, upon occasion, he would tell his wife that he was going to an AA meeting when in actuality he would join up with an acquaintance and use illegal drugs. “It wasn’t every time, but it was certainly convenient for me to . . . say I’m going to an AA meeting, and that would give me an hour to go use drugs, and then return.” Tr. at 49-50. *See also* Applicant Interview Summary, included in Answers to Interrogatories: “While attending AA meetings, [Applicant] met a guy who . . . was not clean. The guy started offering him drugs . . . He was skipping AA meetings to do drugs with this guy. He would tell his wife he was going to an AA meeting, but was actually hanging out with this guy and using drugs.”

James E. Moody
Administrative Judge
Member, Appeal Board