

KEYWORD: Guideline H; Guideline J; Guideline E

DIGEST: The Judge properly considered the entire record in evaluating the deliberate nature of Applicant’s omissions on his security clearance application. Applicant failed to mitigate security concerns arising from his illegal steroid use and from his failure to mention that use during the security clearance investigation. Adverse decision affirmed.

CASE NO: 08-07998.a1

DATE: 08/12/2009

DATE: August 12, 2009

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In Re:)	
)	
-----)	ISCR Case No. 08-07998
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Greg T. Rinckey, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 2, 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 J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 29, 2009, after the hearing, Administrative Judge Mark Harvey 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 Government had presented substantial evidence of the Guideline E security concern and whether the Judge erred in his application of the pertinent mitigating conditions.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a cost analyst for a defense contractor. He joined the U.S. Marine Corps in 1999. From September 2002 until May 2003, while in the Marines, Applicant used one cycle of steroids. A cycle is a four to six week period of frequent steroid injections. The injections occur during the first half of the cycle; during the second half the injections are less frequent or there is no steroid use at all. He also used steroids from March 2005 to April 2005. He was punished under Article 15, Uniform Code of Military Justice,² for this second cycle of steroid use. On September 13, 2007, Applicant signed his security clearance application (SCA). When asked about drug use he mentioned the steroids injected in 2005, but he omitted the cycle occurring in 2002 to 2003. In a subsequent set of DOHA interrogatories Applicant disclosed the earlier steroid use but omitted the use in 2005.

Applicant argues that the Government has not met its burden of producing substantial evidence of Guideline E security concerns arising out of Applicant's omission of steroid use on his 2007 SCA. In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the Judge must examine the statement or omission in light of the record as a whole. When an applicant claims that a false answer to a SCA question is not deliberate, the Judge should address explicitly any contrary evidence in the record. ISCR Case No. 07-03307 at 5 (App. Bd. Sep. 26, 2008). In this case, the Judge has examined the omission in light of the record as a whole. He paid particular attention to record evidence that Applicant had made subsequent false statements about his steroid use. His conclusion that Applicant's omission on the 2007 SCA was willful is sustainable on this record. After reviewing the record, the Board concludes 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 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 14. *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.'").

Order

¹The Judge's favorable findings under Guidelines H and J are not at issue in this appeal.

²10 U.S.C. § 815. Applicant's DD 214, attached as an exhibit to GE 2, Response to Interrogatories, shows that he left active duty in October 2005.

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