

KEYWORD: Guideline J; Guideline H

DIGEST: The Board gives due consideration to Hearing Office decisions but each case must be decided on its own merits. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. Adverse decision affirmed.

CASENO: 08-08579.a1

DATE: 07/16/2009

DATE: July 16, 2009

_____)	
In Re:)	
)	
----)	ISCR Case No. 08-08579
)	
Applicant for Security Clearance)	
_____)	

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 October 31, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 7, 2009, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 findings were based upon substantial record evidence; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a 31-year-old engineer working for a defense contractor. In September 2004, Applicant was arrested for “operating under the influence (OUI).” A police officer pulled him over after he drove from a bar where he had been drinking with friends. Applicant’s blood alcohol level tested at .185%. He pled not guilty. In October 2004, while this charge was still pending, Applicant veered his car off the highway while returning home from work. He struck a 28-year-old woman who was changing a tire on the passenger side of her vehicle. Applicant denied that he was impaired by prescription medication or that he had fallen asleep. “He still has no explanation for what led him to drive off the road.” Decision at 5.

The OUI was consolidated with new charges arising from this incident—manslaughter III (a felony), misconduct with a motor vehicle (a felony), failing to drive in a proper lane, and reckless driving. These last two were motor vehicle offenses. At trial, as a result of a plea agreement, Applicant pled guilty to negligent homicide with a motor vehicle,¹ reckless endangerment, assault, and interfering with an officer. He also pled guilty to OUI. Applicant’s sentence included a total of four years in jail (suspended after 100 days) and three years probation, with certain conditions: alcohol evaluation and treatment, suspension of his drivers license, a charitable donation, community service, and random urinalyses. Applicant enjoys an excellent reputation for the quality of his work performance.

Applicant has submitted new matters not contained in the record, which the Board cannot consider. *See* Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board”). *See also* ISCR Case No. 08-06518 at 2 (App. Bd. Mar. 3, 2009). Applicant points to decisions by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case “must be decided upon its own merits.” Directive ¶ E2.2.3. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). After reviewing the record, the Board concludes that the Judge’s material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn

¹Negligent homicide with a motor vehicle is a violation of the state’s motor vehicle laws. This is distinguishable from “criminal negligent homicide,” which, under the pertinent state law, is a class A misdemeanor. Decision at 10.

from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007). Applicant takes issue with the Judge’s conclusion that he has not provided credible explanations for his having run his car off the road and for the charge of having interfered with a police officer. He also takes issue with the Judge’s opinion that he has not been candid with various officials concerning his OUI incident, specifically the amount of alcohol in his blood. After reviewing the record, the Board concludes that the Judge’s statements are reasonable interpretations of the evidence.

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 properly considered the evidence which Applicant submitted in his own behalf, including evidence of his good work performance, the fact that he performed more community service than the court required, and his participation in an OUI program. However, the Judge balanced these matters against record evidence of the circumstances underlying Applicant’s offenses, a reasonable conclusion that Applicant has minimized the seriousness of his offenses, and record evidence undermining Applicant’s credibility, including inconsistent statements.² The Judge’s decision that “it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 17. *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

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin

²In addition to the matters discussed in the findings of fact, the SOR alleged an earlier incident in which Applicant was charged with “evading responsibility” and “leaving the scene” of an accident. Although the Judge found in Applicant’s favor on this matter, she did note inconsistent statements he made concerning the incident and took them into account in evaluating his credibility.

Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board