

KEYWORD: Guideline E

DIGEST: Statements by counsel are not binding on the Judge, who must make an independent determination of an applicant’s eligibility for a clearance. Applicant had previously been granted a clearance by another agency. However, since that time he engaged in other security-significant conduct. Therefore, he was not entitled to reciprocity. Adverse decision affirmed.

CASENO: 08-10088.a1

DATE: 07/19/2010

DATE: July 19, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-10088
)	
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 29, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 27, 2010, after the hearing, Administrative Judge Erin C. Hogan 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 Department Counsel improperly characterized the evidence; whether Applicant's prior grant of a clearance by a Federal agency should be given reciprocity; 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 a software engineer for a Defense contractor. He served in the Navy from 1997 to 2005 and has held a security clearance since 1998.

While in the Navy, he received non-judicial punishment for failure to obey an order or regulation and for assault.¹ Applicant testified that he was investigated for sexual harassment and fraternization. He denied guilt.²

After leaving the Navy, Applicant worked for a Defense contractor, Company A. However, he lost his job when his employer lost its contract. In searching for a new job, Applicant stated on his resume that he was a Certified Information System Security Professional (CISSP). In fact, he was not so certified but was studying to take the exam. After he was hired by a different company, Company B, he did not inform his new employer that he in fact was not a CISSP. When asked to present a copy of his certification, Applicant obtained a false one from a web site that generated false diplomas and certificates. He gave this document to the program manager but, realizing that he had done wrong, resigned the next day.

He found other employment, but this company, Company C, also lost its contract. He went back to work for Company A. While employed there he took a second job with Company D. In August 2009, Applicant was terminated from this second job for inaccurate time keeping. He had taken time off to attend classes, but he had certified to Company D that he was at work.

Applicant enjoys a reputation for being hard-working, conscientious, and trustworthy. While on active duty, his performance reports stated that he met or exceeded standards. He also received several awards, including the Navy and Marine Corps Achievement Medal.

Applicant contends that Department Counsel characterized the record evidence in an impermissible manner, thereby resulting in the Judge rendering an unfavorable decision. For example, he argues that Department Counsel wrongly stated that he had been discharged from the Navy for assault. We have examined the record, noting that Applicant's DD Form 214 merely states that he was discharged for having committed a "serious offense," without going into detail. GE 4. However, Applicant admitted on cross examination that he had been discharged as a result of his

¹10 U.S.C. § 815. A commander may impose non-judicial punishment on a member subject to his command for violations of the Uniform Code of Military Justice. A member may refuse non-judicial punishment and demand trial by court-martial.

²Government Exhibit (GE) 5, Court Memorandum, states that Applicant was offered non-judicial punishment under Article 15, Uniform Code of Military Justice, for six specifications of failure to obey an order or regulation and one specification of assault. This exhibit states that Applicant was notified of his right to decline non-judicial punishment. He accepted non-judicial punishment after having consulted an attorney.

non-judicial punishment, which included assault as one of the alleged offenses. Tr. at 78; GE 5. He further argues that Department Counsel erred by making his false statement regarding CISSP appear to be more serious than it actually was. He also contends that Department Counsel erred in arguing that his violation of Company D policy concerning second jobs was knowing and willful.

We have examined Applicant's contentions in light of the record. We see no reason to believe that Department Counsel impermissibly characterized the evidence, either while questioning Applicant or during her closing argument. In any event, comments by Department Counsel are not binding on the Judge. In this case, the Judge's findings and analysis are consistent with the evidence and reflect her own independent interpretation of the record.

Applicant states that he was previously granted a clearance by another agency and that DOHA should extend reciprocity to that earlier adjudication. This issue was raised at the hearing, and the Judge held the record open, providing both sides an opportunity to submit matters addressing reciprocity. In her decision, the Judge properly concluded that Applicant was not entitled to reciprocity, because his most recent job termination for cause, in August 2009, had not been included in the prior adjudication. See DoD 5220.22-M, National Industrial Security Program Operating Manual, February 28, 2006 ¶ 2-204.

Applicant contends that the Judge either ignored or mis-weighed record evidence, for example his having held a clearance without incident or concern and his evidence of good character and devotion to duty.

A Judge is presumed to have considered all the evidence in the record. See, e.g., ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). In this case, the Decision demonstrates that the Judge considered the evidence cited by Applicant but that she reasonably explained why she concluded that he had failed to mitigate the Government's security concerns. Furthermore, Applicant has not provided a reason to believe that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009). After considering the record, we find no error in the Judge's application of the mitigating conditions or whole-person factors.

Applicant states that he is willing to undergo "any probationary periods the [B]oard may want to set in place." Applicant Brief at 2. However, we have no authority to grant a conditional or probationary clearance. See, e.g., ISCR Case No. 08-04889 at 2 (App. Bd. Apr. 23, 2009).

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 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: Jean E. Smallin

Jean E. Smallin
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