

KEYWORD: Guideline E

DIGEST: The record contained sufficient evidence to support the Judge's finding that Applicant was not truthful. Adverse decision affirmed.

CASENO: 09-00266.a1

DATE: 01/26/2012

DATE: January 26, 2012

In Re:)
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-----) ISCR Case No. 09-00266
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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

Roderic G. Steakley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 7, 2010, 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 October 26, 2011, after the hearing, Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge’s conclusion that Applicant deliberately falsified an answer on his security clearance application was erroneous, and whether the Judge also erred by concluding that Applicant had not mitigated the security concerns brought on by his answer to the security clearance application. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 50 years old and has a bachelor’s and a master’s degree. He has worked in the defense industry for about 20 years and, for most of that employment, has held a security clearance without committing any security violations. Applicant worked for Company A from June 2003 to June 2005. After resigning from that job, he began working for Company B in September 2005. While working for Company B, he became the subject of a Federal Bureau of Investigation (FBI) investigation, which involved his handling of work-related materials while employed by Company A. In his Answer to the SOR, Applicant related the following: (a) that the FBI visited him at his home in February 2006; (b) the FBI was investigating claims made by Company A that he had taken certain confidential, proprietary and trade secret information upon resignation from Company A; (c) the same day, Applicant advised his manager at Company B about what had happened with the FBI; (d) Applicant remembered being placed on administrative leave at that time, and believes that he received a letter from Company B shortly thereafter indicating that Company B and he should “go our separate ways”; (e) Applicant received this letter while the FBI investigation was ongoing; (f) he was eventually exonerated of any wrongdoing relating to the FBI investigation.

At the hearing, Applicant testified that Company B immediately placed him on administrative leave for a couple of days after he notified the company of the FBI investigation. Immediately following the administrative leave, he was presented with an employment termination letter. The termination letter, dated February 3, 2006 stated, “We appreciate your contributions and service during the time you have spent with [Company B]. Confirming your discussion with [your supervisor], your employment with the firm is being terminated due to lack of appropriate work matching your skills and abilities. We regret that we are unable to avoid this result.” An OPM ROI indicates that Applicant’s employment with Company B was terminated because there was no billable work and was not the result of any problems or issues related to Applicant. Applicant testified that before receiving the termination letter, his supervisor advised him the reason for his termination was the same as that stated in the termination letter. Applicant specifically stated that he was never informed that he was being terminated because of the ongoing FBI investigation.

Applicant signed a security clearance application on March 6, 2008. Applicant listed his employment with Company B in Section 11 (Your Employment Activities), and submitted the following additional comments: "I joined [Company B] in summer of 2005 to work on the GMD [ground missile defense] program. I left this position by Apr 2006 for personal reasons. My departure was by mutual agreement with the company." In Section 22 (Your Employment Record), he was asked whether any of the following had happened to him in the past 7 years: (1) fired from a job; (2) quit a job after being told you'd be fired; (3) left a job by mutual agreement following allegations of misconduct; (4) left a job by mutual agreement following allegations of unsatisfactory performance; and (5) left a job for other reasons under unfavorable circumstances. Applicant answered "no" to that question and submitted the following additional comments: "I left (resigned) [Company A] in 2005 to start work with [Company B]. I left [Company B] in 2006 (by mutual agreement) for personal reasons. None of the above apply." At the hearing, Applicant testified that he responded "no" to Section 22 because none of the five situations in that question applied to him. Specifically, he interpreted the word "fired" to have a negative connotation. He did not believe he was fired. He also testified that, in retrospect, he should have indicated he was fired because he was terminated from his job. He also stated that he did not leave his job with Company B for personal reasons or as a result of mutual agreement. Applicant indicated his additional comments in Section 11 were not stated well, and his additional comments in Section 22 about leaving Company B by mutual agreement for a personal reason was a misstatement.

Overall, Applicant is not a credible witness. During his testimony, he was asked if he thought the termination of his employment with Company B was because the FBI was investigating him. It was pointed out to him that he was placed on administrative leave for a couple of days immediately following his report of the investigation and was terminated immediately following the administrative leave. Nonetheless, he testified that he did not believe these events were connected. Applicant's claim is contradicted by statements he made in responding to interrogatories and in his Answer to the SOR. In responding to the interrogatories, he stated: "I still believe (now 2010) that it was fundamentally unfair to terminate my employment while I volunteered all information and no one had any information at the time regarding the FBI investigation." In his Answer, Applicant stated, "It is my understanding that [Company B] and I were simply going our separate ways based on allegations which I believed to be at the time and which were ultimately proved to be baseless." Such statements show that he believed there was a connection between the FBI investigation and his termination. The FBI eventually informed Applicant that there was no indication that he engaged in any impropriety.

The Judge reached the following conclusions: For a finding of falsification to be sustainable, an applicant must have had a culpable state of mind at the time the information was submitted. A falsification must be made deliberately—knowingly and willfully. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence that an applicant had a culpable state of mind at the time of the submission. Based on the circumstances surrounding his termination, Applicant's interpretation of the question in Section 22 and its subparts was not unreasonable. Applicant did not deliberately falsify his security clearance by checking the "no" block in Section 22. However, in responding to section 22, Applicant did more than check the "no" block. He provided additional comments that were false and misleading.

He did not leave his employment with Company B by mutual agreement or for personal reasons. When he made those additional comments, he knew that Company B terminated his employment and that he had no input in that decision. He provided deliberate false statements in both Section 22 and Section 11. Sufficient circumstantial evidence exists to establish that Applicant believed Company B terminated his employment, in whole or part, because the FBI was investigating whether he took proprietary and trade secret information from a former employer. Applicant's statements that he did not believe there was a connection between his reporting of the FBI investigation and his termination are not credible. Throughout the security clearance adjudicative process, Applicant denied that he falsified his security clearance application. He has not accepted responsibility for his misconduct. None of the mitigating conditions apply to the security concerns arising under Guideline E. Applicant has worked in the defense industry for about 20 years and held a security clearance for most of that time. Nevertheless, his deliberate false statements are serious, recent, and not mitigated.

Applicant argues that the Judge's conclusions were inappropriately based on speculation as opposed to appropriate circumstantial evidence and were not supported by the record. He asserts that the evidence does not support a conclusion that Applicant attempted to deliberately mislead when he provided answers related to his past employments on the security clearance application. Applicant states that the Judge erroneously believed, based on highly speculative, circumstantial evidence, that Applicant's termination from Company B was related to the FBI purportedly investigating him, and that this conclusion permeates the entire decision. Regarding mitigation, Applicant argues that the great weight of the evidence established that he has not engaged in actions which ultimately should be determined to compromise his reliability, trustworthiness, and judgment. He asserts that his life-long conduct weighs most heavily in favor of granting the security clearance, as the incident in question is the only time and matter concerning which he has ever been questioned, and this does not involve an actual security breach or misconduct with regard to classified information. Applicant has failed to establish error on the part of the Judge. After a review of the entire record, the Board concludes that the Judge's finding that Applicant engaged in deliberate falsification is sustainable.

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—"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." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's findings, we defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Given the fact that Applicant denied willful falsification of his responses on his security clearance application, the Judge, by necessity, relied on circumstantial evidence to make findings of fact regarding Applicant's state of mind at the time he provided answers and explanations about his prior employment. There was sufficient evidence to support the Judge's finding and conclusion that Applicant was not truthful. Among the facts explicitly discussed and considered by the Judge,

were: (a) the proximity in time between the point at which Applicant informed Company B of the FBI investigation and the placing of Applicant on administrative leave (a step the necessity of which is unclear if Applicant were being terminated for mere lack of work appropriate to Applicant's skills and abilities) and the ultimate termination of Applicant; (b) Applicant's testimony at the hearing that his answers in Sections 11 and 22 of the application were "misstated," and that he should have indicated that he was fired; (c) Applicant's statement in response to interrogatories that when describing the FBI investigation and insisting that it had no basis to Company B, he felt he should be believed, but Company B thought otherwise; (d) Applicant's statement in response to interrogatories that Company B and he agreed to go their own ways, but he would not resign and was therefore terminated; (e) Applicant's statement in response to interrogatories that he believed that it was fundamentally unfair for Company B to terminate his employment when he had volunteered all information concerning a pending FBI investigation; and (f) Applicant's statement in response to interrogatories that Company B should have let him continue to work normally pending the outcome of the FBI investigation. These facts provide a reasonable basis for the Judge to conclude that Applicant believed Company B terminated his employment because the FBI was investigating whether he mishandled proprietary information. The facts also provide a reasonable basis for the Judge to conclude that Applicant's later statement that he did not believe there was a connection between his reporting of the FBI investigation, and his statement that he left Company B by mutual agreement for personal reasons were not credible. These conclusions support the Judge's ultimate conclusion that the information Applicant provided on his security clearance application was false and was the product of a deliberate intent to conceal. Applicant's assertion that the Judge engaged in improper speculation in reaching his findings and conclusions is without merit.

The Judge based his findings and conclusions, in part, upon an unfavorable assessment of Applicant's credibility. Given the inconsistencies in Applicant's description of events that have developed over time, the Judge's credibility determination is sustainable.

Applicant also argues that the overall record demanded the favorable application of numerous mitigating conditions. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He adequately discussed why the disqualifying conduct established under Guideline E was not mitigated. Notwithstanding Applicant's long and successful career and his unblemished track record regarding the handling of classified information, the Judge reasonably concluded that Applicant's failure to accept responsibility for his falsification misconduct perpetuates doubts about his trustworthiness and reliability and his current willingness to comply with laws, rules, and regulations.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for

his 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 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). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance 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 _____
James E. Moody
Administrative Judge
Member, Appeal Board