

KEYWORD: Guideline E

DIGEST: The Judge's material findings of fact are sustainable and support his ultimate adverse conclusions. Adverse decision affirmed.

CASENO: 09-00568.a1

DATE: 10/22/2010

DATE: October 22, 2010

In Re:)
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 -----) ISCR Case No. 09-00568
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)
 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 March 18, 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 August 17, 2010, after the hearing, Administrative Judge LeRoy F. Foreman 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 erred in finding that his omissions to his security clearance applications (SCA) were deliberate. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant served in the U.S. Air Force, retiring in 2005. Earlier, in 2000, he had received non-judicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for knowing possession of child pornography. This disciplinary action was the result of evidence found during a search by criminal investigators of Applicant's personal computer.

After the search, Applicant consulted with a psychologist regarding his concerns about his internet viewing habits. Soon after this, Applicant visited a psychiatrist, due to stress and depression regarding the criminal investigation, his father's death, and the breakup of his marriage.

In 2003, Applicant completed a SCA. He answered "no" to a question inquiring if he had consulted a mental health professional within the previous seven years. He also answered "no" to a question inquiring if, within the previous seven years, he had been punished under the UCMJ, to include non-judicial punishment. Both of these answers were false.

In 2004, after his security manager pointed out these omissions, Applicant submitted a document correcting the errors in his SCA. In 2005, anticipating retirement, Applicant applied for jobs as a policeman and as a correctional officer. He was rejected, because he did not disclose his non-judicial punishment to his prospective employers.

Later in 2005, before his retirement, Applicant underwent a psychiatric evaluation. The psychiatrist concluded that (1) Applicant did not have a mental disorder and (2) his records were not sufficient to clearly substantiate knowing possession of child pornography. In September 2008, Applicant submitted another SCA. He answered "no" to a question inquiring if he had consulted a mental health professional during the previous seven years. This answer was false. Applicant's omissions on his 2003 and 2008 SCAs were alleged in the SOR as Guideline E security concerns.¹

In the Analysis portion of the decision, the Judge found that the "no" answers described above were deliberate. The Judge stated that, when he completed the SCAs in question, Applicant was an experienced NCO, had worked through the security clearance process before, and had previously held a clearance. The Judge also considered Applicant's failure to advise his prospective

¹In addition to the false answers described above, the SOR alleged the non-judicial punishment action (¶ 1(a)) and another false statement regarding Applicant's purported addiction to pornography and his having sought psychiatric treatment for the same (¶ 1(c)). The Judge found in Applicant's favor for those allegations.

civilian employers in 2005 about his non-judicial punishment. Although this conduct was not alleged, the Judge stated that he considered it on the issue of Applicant's credibility, among other things. *See, e.g.*, ISCR Case No. 05-03250 at n. 4 (App. Bd. Apr. 6, 2007). Viewed in light of the record as a whole, the Judge's findings of deliberate falsification are sustainable.

The record supports a conclusion 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