

KEYWORD: Guideline E

DIGEST: The mere passage of time cannot be viewed in isolation and must be evaluated with reference to all the facts and circumstances of the case. Adverse decision affirmed.

CASENO: 09-03370.a1

DATE: 09/07/2011

DATE: September 7, 2011

In Re:)	
)	
----)	ISCR Case No. 09-03370
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William T. O’Neil, Esq., Department Counsel

FOR APPLICANT

Eric A. Eisen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 30, 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 June 9, 2011, after the hearing, Administrative Judge Rita C. O’Brien 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 erred in her application of the pertinent mitigating conditions and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. He has a bachelor’s degree in mechanical engineering. Married, he has two grown children. He was first granted a security clearance in 1984. In the early 1990s, he held a top secret clearance with access to sensitive compartmented information (SCI). His SCI access was withdrawn in 2004, and his security clearance was suspended in 2006.

In the early 2000s, Applicant took three polygraph examinations. The first was in 2001. Before the exam, concerned about whether certain events from his past would cause him a problem, he researched polygraphs on the internet.

The events he was concerned about included two breaches of classified information. One evening in the early 1990s, intending that his family be able to witness an event associated with his job, he advised his wife to stay up late and to keep the children up. The event was such that it might be expected to draw public attention. The time of the event was classified, however, and Applicant was later concerned that he had breached security.

On another occasion a couple of years later, he was working on a classified project. He called his wife to tell her that he was safe after an accident occurred. By doing so, he gave her a reason to understand that he was working on a classified project.

Applicant had not informed his employer of these disclosures; at the time of the polygraph, he was concerned enough that he tried to manipulate the test results. He attempted to manipulate the test by tensing his leg muscles during the control-question phase, so as to skew the baseline signal that would indicate falsification.¹

In 2002, Applicant entertained house guests, a couple from a foreign country that is friendly to the United States. He had met them during a November 2001 vacation. They stayed with Applicant from April 6, to April 12, 2002. He informed his employer of his interaction with this

¹The Judge found in Applicant’s favor on another SOR allegation that alleged that he took countermeasures during a polygraph exam in 2002.

couple in late April 2002. He had not previously informed his employer of having met the couple five months earlier, because his security clearance was being transferred from one company to another, and he “wasn’t exactly sure where [his] clearance was in the process.” Decision at 4.

Applicant enjoys an excellent reputation among co-workers and friends for his character, integrity, and ability to protect classified information.

In the Analysis portion of the decision, the Judge concluded that Applicant’s circumstances raised Personal Conduct Disqualifying Condition 16(d).² In examining Applicant’s case for mitigation, she said:

Applicant’s adherence to regulations regarding protecting classified information has not been perfect. In [the early 1990s] he disclosed, in general terms, the time of [an event], which was classified. [Later] he disclosed that he was involved in a classified [event]. In 2002, he let five months pass before he informed his security officer that he had met and befriended foreign nationals. The 1990s events might have been mitigated by distance in time. However, when considered with Applicant’s conduct during his 2001 polygraph examination, they contribute to a pattern of willingness to ignore security rules. Decision at 7-8.

She further discussed Applicant’s efforts to influence the results of a polygraph exam and his having conducted research on means of defeating such tests.

These events occurred 9 to 10 years ago; however, the gravity of Applicant’s conduct outweighs the distance in time . . . Applicant knew or should have known that such behavior was prohibited. It cannot be considered minor or insignificant, because it constitutes interference with a Government investigation and goes to the heart of the security clearance process . . . [S]uch behavior raises serious questions about his reliability, judgment, and trustworthiness, especially in light of the fact that he held a top secret security clearance with SCI access at the time. *Id.* at 8-9.

Accordingly, the Judge denied Applicant a security clearance.

Applicant contends that the Judge erred insofar as she failed to conclude that the passage of time mitigated the security concerns in his case. “[S]he offers no ‘reasoned explanation’ of why ten years of penance makes no difference. She says nothing about the likelihood of recurrence . . . She doesn’t say he is a changed man today or that he is not . . . The opinion . . . fails to offer a ‘stated

²Directive, Enclosure 2 ¶ 16(d): “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of (1) untrustworthy or unreliable behavior . . .”

connection' between "available information [that] should be considered[.]" Applicant Brief at 6.

To the extent that Applicant contends that the Judge failed to consider record evidence of his character and current trustworthiness, we note that she devoted an entire paragraph of her findings to that subject. Moreover, in her Analysis, she noted his years of service to the U.S., the excellent quality of his work, and the high esteem he enjoys among friends and co-workers. Decision at 5, 8. Applicant has not rebutted the presumption that she considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-06691 at 3-4 (App. Bd. May 16, 2011).

Concerning Applicant's argument that his security significant conduct is not recent, and therefore mitigated, the mere passage of time cannot be viewed in isolation and must be evaluated with reference to all of the facts and circumstances of the case. *See* ISCR Case No. 08-09163 at 3-4 (App. Bd. Dec. 21, 2010) In the case under consideration here, Applicant engaged in a series of security significant acts, culminating in his efforts improperly to affect the result of his polygraph exam. As he concedes in his Appeal Brief, his use of such countermeasures is the kind of behavior which, according to the Directive, "will normally result in an unfavorable clearance action[.]" Directive, Enclosure 2 ¶ 15.

We also note record evidence that Applicant failed to report his initial contact with the foreign couple for five months, and that he did not report his infractions of the early 1990s until confronted by a polygraph exam. *See* ISCR Case No. 07-14127 at 4 (App. Bd. Aug. 12, 2010) ("A reasonable person might conclude that [the applicant] revealed his past drug use only because he suspected that it would come out during the polygraph exam anyway. The record provides no reason to believe that, had the polygraph not occurred, [the applicant] would still have admitted his drug history"). Evidence of Applicant's delay or failure in reporting his infractions supports the Judge's adverse conclusion as to Applicant's reliability.

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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

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