

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 6, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2011, after the hearing, Administrative Judge LeRoy F. Foreman 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 issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: In 1999, Applicant was in college. He and two roommates found a backpack containing books, personal articles and a checkbook. They did not attempt to locate the owner. In April 2000, they tried to use one of the checks to pay for a pizza. Applicant did not write the check, but he handed it to the person delivering the pizza. In July 2000, he was charged with conspiracy to commit a felony. In August 2000, he pleaded guilty to acting under false pretenses, a misdemeanor, and he was sentenced to probation for one year, which he successfully completed.

In February 2010, Applicant was charged with selling bootleg video discs, a felony. He purchased about 20 DVDs on the street that he knew were bootleg copies. He appeared in court and the disposition of charges was deferred for one year. He was required to pay court costs of \$400, but he had not paid them as of the hearing date.

In July 2010, Applicant, a prior gun owner, tried to purchase a firearm at a gun show. As part of the purchase, he was required to complete a statement of criminal history. Applicant answered “no” to questions on the form, one of which inquired about whether he had ever been convicted of a felony. Applicant was arrested and charged with falsifying the criminal history form. He told the arresting officer that he had not falsified the form because he had not been convicted of a crime. He told a security investigator that he answered “no” to all the questions because he had never been convicted of a felony. At the hearing, Applicant admitted he should have answered “yes” to one of the questions. In November 2010, Applicant appeared in court with counsel and pleaded guilty to obstruction of justice, a misdemeanor. He received a 12-month suspended jail sentence, and he was placed on probation for three years. He testified that he did not report this conviction to the court that deferred disposition on the bootleg DVD case, and he did not know if he was required to report it.

The Judge reached the following conclusions: The circumstances of the arrests in April 2000 and February 2010 are well-documented in the record. The circumstances of the July 2010 arrest are less clear because there is no documentary evidence of the questions on the document Applicant was alleged to have falsified. Applicant’s explanation for answering “no” to all the questions on the criminal history form is unconvincing. He is an intelligent, educated adult. He had completed the criminal history form on several previous occasions in connection with previous gun purchases. He

was pending trial for a felony offense when he completed the criminal history form. Either he intentionally falsified the form or he was grossly negligent in completing it. Either explanation raises serious questions about his ability to adhere to rules and regulations pertaining to classified information.

Applicant's arrest in April 2000 occurred when he was an immature college student. He had no further criminal involvement for 11 years. During that time he found gainful employment, completed a challenging apprenticeship program, obtained two associate's degrees, and earned additional college credits toward a bachelor's degree. On the other hand, his two felony arrests in 2010 are recent. His February 2010 arrest is still pending disposition, and he is on probation for his July 2010 offense. None of the offenses occurred under unusual circumstances making them unlikely to recur. Mitigation is established for the April 2000 arrest, but not for the others. Applicant has an impressive employment record and has made significant strides in furthering his education, but he is still under court supervision for his two arrests in 2010. Insufficient time has passed to determine if he is rehabilitated. Applicant has not mitigated the security concerns based on criminal conduct.

Applicant makes a number of assertions concerning the Judge's conclusions on the issue of Applicant's filling out of the criminal history form at the time of his attempted purchase of a firearm in July 2010. Applicant states that "[t]he Judge made it seem like I wasn't being honest." He also states that he is not to blame for the fact that the circumstances of the July 2010 arrest were not clear. Applicant then provides explanations as to why he filled out the form the way he did. These explanations essentially track the explanations he gave at the hearing below. Applicant concludes by asserting that the circumstances surrounding his completion of the criminal history form should not call into question his ability to obey rules and regulations relating to classified information. The Board construes Applicant's various arguments as questioning the Judge's conclusions as to his state of mind at the time he completed the criminal history form.

The gravamen of both the offense for which Applicant was charged (False Statement on Criminal History on a Consent Form) and the offense on which he was convicted (Obstructing Justice) is providing false information to a governmental authority. In this setting, it was appropriate for the Judge to articulate his conclusions about Applicant's honesty in completing the criminal history form, even if the SOR makes no allegation of falsification. To the extent Applicant argues that the Judge's comments about his honesty were improper, such an argument lacks merit. The Judge concluded that either Applicant intentionally falsified the form or he was grossly negligent in completing it. Either interpretation is reasonably supported by the record evidence, and the Judge correctly concluded that either interpretation raises serious questions about Applicant's ability to adhere to rules and regulations pertaining to classified information. Applicant's assertion that the manner in which he completed the criminal history form bears no relation to his ability to handle classified information properly is also without merit.

The Board does not review a case *de novo*. Applicant's representations concerning his state of mind are not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. 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: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board