



The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 16, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 24, 2012, after the hearing, Administrative Judge Thomas M. Crean 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 his application of the pertinent mitigating conditions and whole person analysis, and whether the Judge erred in concluding that the record supported the Judge’s adverse findings and conclusions regarding child pornography. The Judge’s favorable conclusions of the Guideline G allegations and two of the Guideline E allegations are not at issue in this appeal. Consistent with the following, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant was honorably discharged from the Marine Corps in the late 1990's after six years of service. Applicant received an Associates degree in 2003 and a Bachelor’s degree in 2010. Over a ten year period ending in 2006, Applicant had multiple convictions for offenses committed while operating a vehicle, many of which were alcohol-related. In the context of one such incident, Applicant also pled guilty to a charge of possession of cocaine and was sentenced to attend an 18-month drug program. A later alcohol conviction led to a requirement that he complete the drug program.<sup>1</sup> Applicant last drank alcohol in 2006.

In 2009, Applicant’s internet service provider reported to a third party that Applicant’s internet address was being used to access child pornography. Some weeks later, police obtained a search warrant, seized Applicant’s computers and other devices and arrested Applicant. Applicant’s employer terminated him. The information which formed the basis of the search warrant included images of children engaged in sexual acts with adults. The images had been captured by the internet service provider. The police observed that the internet connections in the property were all hard wired and there were no wireless routers. The police have not received a forensic analysis of the seized property and charges were dismissed without prejudice in 2011. A police officer involved in the search testified at the hearing and was cross-examined by Applicant’s counsel.

In the Analysis, the Judge concluded that the multiple offenses while operating a vehicle and the child pornography allegation raised security concerns under Guideline E. The Judge concluded

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<sup>1</sup>To the extent that the Judge’s decision can be read as finding that Applicant did not commit the offense, the Board notes that, in DOHA proceedings, the doctrine of collateral estoppel is applicable to felony convictions. *See, e.g.*, ISCR Case 04-05712 at 7 (App. Bd. Oct 31, 2006). Government Exhibit 12 contains the 2004 plea agreement, under which Applicant pled guilty to possession of cocaine, the Assistant District Attorney proposed a five year term of imprisonment, and Applicant was to enroll in and complete a drug program. If he successfully completed the program, Applicant could come back to court to request the plea be set aside. The agreement noted that should Applicant fail to complete the program, he would be sentenced in accordance with the plea agreement. The exhibit also contains the 2008 Motion to set aside the guilty plea after Applicant completed the program. The motion was granted in 2010.

Applicant had accessed the child pornography. The Judge discussed three mitigating conditions but ultimately concluded that the conduct was not mitigated. The Judge’s whole-person analysis discussed favorable evidence but also concluded that the conduct of security concern was not mitigated.

Applicant contends that the Judge’s conclusions regarding mitigation and the whole person analysis were not reasonable given the favorable record evidence. Applicant’s contention is not persuasive. Even if one removes the child pornography allegations, the disqualifying conduct proved by multiple convictions (with a guilty plea for cocaine possession) is sufficient to sustain the Judge’s ultimate adverse conclusions.

Applicant contends that the evidence did not establish culpable conduct with regard to the child pornography allegations. We note the unusual state of the record before us: there was enough evidence to obtain a search warrant<sup>2</sup> and a concomitant search was conducted in 2009, but the evidence seized by the police has yet to produce a forensic analysis. However, the Board need not resolve the problem. Given the adverse information in this record, as discussed above, the Judge had sufficient basis to reach adverse conclusions under Guideline E.

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: Michael Y. Ra’anan

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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<sup>2</sup>In a DOHA hearing, the Government must present substantial evidence of any controverted allegation. Substantial evidence is “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. *See, e.g.,* ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 29, 2010).

Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board