

KEYWORD: Guideline J; Guideline H; Guideline F; Guideline E

DIGEST: The cited Appeal Board case is factually different from Applicant's case. Adverse decision affirmed.

CASENO: 10-04182.a1

DATE: 07/05/2012

DATE: July 5, 2012

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In Re:)	
)	
-----)	ISCR Case No. 10-04182
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 26, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 17, 2012, after the hearing, Administrative Judge Elizabeth M. Matchinski 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’s adverse security clearance 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: In 2006, while driving in a car with three friends, Applicant was stopped by police. During a search, the police discovered cocaine and drug paraphernalia. Applicant and his companions were arrested. Applicant was charged with felony possession of cocaine and misdemeanor possession of paraphernalia. He pled guilty to the charges, and they were dismissed.

Applicant received citations for several motor vehicle infractions—speeding, improper lane change, operating a vehicle in an unsafe condition. In 2007, he was charged with failure to appear in court, which related to a prior speeding violation. In 2008, Applicant was found by a police officer smoking a marijuana cigarette. He was arrested and charged with possession of marijuana, pleading no contest. Later that year, he received a citation for speeding and for driving on a suspended license.

Applicant has accrued delinquent debts, for medical expenses, fitness club membership, a credit card, etc. The Judge noted that one of the debts alleged in the SOR was actually a repeat of another. She also noted that his claim to have resolved other debts was not supported by corroborating evidence. Applicant stated that he was currently negotiating with creditors and that he had a repayment plan for a large credit card account.

In completing his security clearance application (SCA), Applicant disclosed his 2008 drug arrest. However, he did not disclose his felony arrest for cocaine possession, his having smoked marijuana, and his debts that were currently delinquent for over 90 days.

A clearance investigator conducted an interview with Applicant concerning his undisclosed arrests and his credit history. Applicant stated that he had been in a car with another person on the evening of his 2008 arrest and that the marijuana had been discovered on the floor of the passenger side of the car. He admitted that he had not made payment on any of the debts. Moreover, he stated that he had consulted an attorney concerning his earlier arrest for cocaine and that the attorney had advised him that he did not need to disclose it, because the conviction had been expunged.

At the hearing, Applicant reiterated that an attorney had advised him not to list the cocaine arrest. Concerning his debts, he stated that he had heard about others whose credit problems affected their security clearances.

Applicant enjoys a good reputation for his integrity, enthusiasm, trustworthiness, and reliability. He encouraged his younger brother to join the military because of the importance and dignity of military service.

In the Analysis, the Judge concluded that Applicant had mitigated the Guideline H security concerns. However, she reached opposite conclusions for the other Guidelines. For example, regarding Guideline J, she concluded that there is reason to doubt the credibility of his account of the 2008 arrest. She also stated that Applicant's admission of having smoked marijuana was belated. Under Guideline F, she concluded that the debts were ongoing;¹ that he had not shown responsible behavior in regard to his debts;² that, though Applicant had inquired about a repayment plan, the likely success of such a plan was not apparent;³ and that he did not substantiate his dispute of the validity of one of the debts.⁴ Although she gave Applicant credit for resolving some debts not alleged in the SOR, she concluded that he had not demonstrated mitigation for any of the SOR debts except one. Under Guideline E, the Judge addressed, among other things, Applicant's evidence that he had relied upon the advice of an attorney in answering the SCA question about his 2006 arrest.⁵ She stated that there was no evidence that the attorney understood that the SCA explicitly required Applicant to disclose arrests and convictions that had been expunged; therefore, she could not find Applicant's testimony sufficient to establish mitigation.

Applicant cites to some other decisions, by the Appeal Board and by the Hearing Office, which he contends support his case for a clearance. We give these decisions due consideration as persuasive authority, but conclude that they do not demonstrate that the Judge's decision was in error. Hearing Office decision are not binding on other Hearing Office Judges or on the Board. *See, e.g.,* ISCR Case No. 10-00218 at 4-5 (App. Bd. Oct. 17, 2011). We note the Appeal Board case

¹Directive, Enclosure 2 ¶ 20(a): "the behavior happened so long ago . . . that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

²Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances[.]" The Judge addressed this mitigating condition in evaluating Applicant's medical debts.

³Directive, Enclosure 2 ¶ 20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

⁴Directive, Enclosure 2 ¶ 20(e): "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue[.]"

⁵Directive, Enclosure 2 ¶ 17(b): "the . . . omission was caused or significantly contributed to by improper or inadequate advice of authorized . . . legal counsel advising or instructing the individual specifically concerning the security clearance process[.]"

which Applicant has cited but find that it contains significant factual differences from his own. Each case must be decided on its own merits. Directive, Enclosure 2 ¶ 2(b).

Applicant contends that the Judge erred by not extending mitigating effect to Applicant's testimony about his reliance upon the advice of an attorney in completing his SCA. However, examined in light of the entire record, the Judge's analysis is sustainable. Given the totality of the record evidence, we conclude that the Judge's application of the mitigating conditions and the whole-person factors is 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). *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