

KEYWORD: Guideline E

DIGEST: The Board has no authority to direct another agency to produce items for Applicant. Applicant is entitled to receive a copy of the transcript. There is no requirement that he be furnished with an audio tape of the hearing. Adverse decision affirmed.

CASENO: 10-04325.a1

DATE: 08/15/2013

DATE: August 15, 2013

In Re:)
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 -----) ISCR Case No. 10-04325
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 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 12, 2012, DoD 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 May 9, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether Applicant was denied due process owing to the Government’s failure to provide certain magnetic tape recordings; (2) whether the Judge erroneously relied on another DOHA decision in deciding this case; and (3) whether the Judge disregarded evidence presented by Applicant. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge found: Applicant is 48 years old. He was interviewed in conjunction with a polygraph for another government agency (AGA). AGA reported that Applicant initially provided no information of adjudicative significance. After further questioning, however, he admitted intentionally puckering his anal sphincter on certain questions throughout the polygraph test in an effort to manipulate the test results. He manipulated his physiology in this manner to avoid admitting he had taken three pills of his wife’s narcotic prescription pain medication to get high or “not feel anything.” He was aware of the drug policies for the military and for maintaining security clearances and chose to use the drug anyway to escape. Applicant learned of the polygraph countermeasure technique through an unrecalled temporary coworker at his present work site.

After his access to sensitive compartmented information (SCI) was denied by AGA, Applicant appealed that decision. In his appeal, he denied using his wife’s pain medication, and he denied he used countermeasures to fool the polygraph. AGA ultimately denied Applicant’s appeal. Subsequently, Applicant submitted a security clearance application. He discussed the actions by AGA. He denied ingesting his wife’s pain medication, and he denied employing countermeasures to the polygraph. Based upon the determination by AGA, Applicant’s DOD security clearance was suspended. He later had an interview with an OPM investigator. He again denied ingesting his wife’s pain medication and, and he denied employing countermeasures to the polygraph.

Substantial evidence establishes that Applicant ingested his wife’s prescription pain medication. It also supports a finding that Applicant utilized countermeasures in an attempt to alter the results of the polygraph. The evidence also establishes that he intentionally provided false information about those matters in his statement to AGA, in his subsequent security clearance application, in his later OPM interview, and during his DOHA hearing testimony.

The Judge concluded: While holding a security clearance, Applicant ingested his wife’s prescription pain medication. He utilized countermeasures in an attempt to alter the results of the polygraph. That conduct showed poor judgment and an unwillingness to comply with rules and regulations. It also created a vulnerability to exploitation, manipulation, and duress. During his interview in conjunction with the polygraph, Applicant admitted to taking his wife’s prescription pain medication and to utilizing countermeasures in an attempt to alter the results of the polygraph.

He has been untruthful about those matters ever since. There are no applicable mitigating conditions.

Applicant asserts that his “appeal request” relies upon a copy of the original recording which was used by AGA as the basis for the revoking of his access to SCI. He also states that his appeal request relies upon his receipt of a magnetic copy of the original recording tapes created at his DOHA hearing and used to prepare the transcript of the proceedings. He states that the transcript of the hearing is not complete as it does not contain all of the conversations which took place between the Judge, Department Counsel, and himself during the proceedings. He states that without copies of the recording tapes, he cannot state with accuracy statements made during the hearing and cannot state with accuracy what was asked of him and how he responded during the interview process for access to SCI.

The Board construes Applicant’s argument as a claim of denial of procedural due process as he seems to assert that he cannot adequately craft an appeal absent the recording tapes. Applicant is requesting relief that cannot be granted by the Board. The Board has no authority or power to direct AGA to produce items within its dominion or control for Applicant. Regarding the tapes of the DOHA hearing, the Board has reviewed the transcript, and it appears to be proper on its face. There are no obvious gaps in the transcript that lead us to conclude otherwise. Under the Directive, Applicant is entitled to receive a copy of the transcript. Directive ¶ E3.1.24. There is no requirement that he be furnished with a copy of the magnetic audio tape. *See* ISCR Case No. 04-07513 at 2 (App. Bd. Jul. 18, 2006).

Applicant argues that the Judge based his decision on an Appeal Board decision that was referenced by Department Counsel in closing argument, and that the Judge did not listen to his testimony or read any statements made by him or made on his behalf. Applicant continues his assertions, made below, that he did not make admissions that he ingested his wife’s prescription pain medication and employed countermeasures during the polygraph. He states that the investigator from another government agency used his own interpretation of what Applicant said and misrepresented the truth.

A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant does not overcome that presumption here. The Judge’s decision includes a full exposition of Applicant’s version of events. There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). There is no indication that the Judge substituted the result in the Appeal Board case for a thorough review and analysis of the evidence in this case. Additionally, the record contains no evidence suggesting a motive for the investigator from another government agency to have intentionally misrepresented Applicant’s statements. We note that denial of Applicant’s SCI was upheld upon appellate review within AGA. Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See, e.g.*, ISCR Case No. 10-11076 at 4 (App. Bd. Feb. 9, 2012). There is no record evidence that calls into question the accuracy of the AGA investigator’s reporting of Applicant’s statements.

The record contains substantial evidence that Applicant admitted to the AGA investigator that he ingested his wife's prescription medications and that he had employed countermeasures in an attempt to successfully complete the polygraph. The statements are such that a reasonable person would not be expected to have made them unless he believed that they were true.¹ Accordingly, the record contains substantial evidence of the SOR allegations at issue in this case.

Applicant's principal complaint appears to be that the Judge did not accept his version of the facts. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Applicant's testimony and earlier statements are evidence that the Judge was required to consider. However, Applicant's explanations were not binding on the Judge. Rather, the Judge had the obligation to consider Applicant's explanations in light of the record as a whole. *See, e.g.,* ISCR Case no. 00-0044 at 3 (App. Bd. Dec. 22, 2000). The Judge found Applicant's explanations to be unpersuasive. Applicant's appeal arguments do not demonstrate that the Judge's findings and conclusions were not supported by the record evidence.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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 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.

¹See Federal Rule of Evidence 804(b)(3), which permits the introduction into evidence of a "statement which was at the time of its making . . . to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." The Federal Rules of Evidence serve as a guide in DOHA proceedings. Directive ¶ E3.1.20.

Order

The decision of the Judge 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board