

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant’s several instances of false and/or minimizing statements provide a reasonable basis for the Judge to have concluded that Applicant had not demonstrated a level of rehabilitation commensurate with the requirements of the Directive. Adverse decision affirmed.

CASE NO: 11-02234.a1

DATE: 05/15/2013

DATE: May 15, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-02234
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Robert E. Craven, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 31, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).

Applicant requested a hearing. On February 26, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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 issues on appeal: whether the Judge's findings were erroneous; whether the Judge failed properly to apply the pertinent mitigating conditions; and whether the overall adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

During the early 1990s, while Applicant was married to his previous wife, he exposed himself to his nine-year-old niece and rubbed his genitals against her knee. The child started crying and complained to Applicant's wife. Applicant initially denied misconduct, but he stated that he wanted to get help.

Applicant pled guilty to lewd and lascivious conduct, a felony. He was placed under the supervision of the state department of corrections for one year, followed by nine years of probation. He was required to complete a sex offender program, perform 100 hours of public service, refrain from contact with the victim, and to have no contact with persons under 18 without parental supervision. He was also required to abstain from drugs or alcohol as a condition of his sentence and to attend narcotics anonymous (NA) and alcoholics anonymous (AA). Applicant has completed the requirements imposed by the court. He advised that, during his sex offender counseling, he was led to understand that he had repeated behavior that had been done to him over 20 years previously. Applicant has complied with sex offender reporting requirements of the two states in which he has resided since the offense. He no longer has to report his offense in his current state of residence.

Applicant made false statements on his security clearance application (SCA). He stated that he had been laid off from a job in November 2009. In fact, Applicant had been terminated involuntarily due to unsatisfactory duty performance. He also denied currently having any debts over 90 days delinquent, even though at the time he had two credit card accounts that fell within that category.

During his security clearance interview, Applicant initially claimed he had been laid off in 2009 but later admitted that he had been fired. Concerning his criminal offense, he stated that his robe must have been opened when he walked past his niece, denying any contact with her. He claimed that he had pled *nolo contendere* on the advice of an attorney. He eventually admitted that he had knowingly exposed himself to the victim. At the hearing, he acknowledged that he had not been truthful when he denied having contact with his niece. Concerning his debts, he claimed at the hearing that he had been behind in payments only one month. However, he also testified that about 11 months passed between the time he was first contacted by a settlement attorney and the time at which he began making payments, which the Judge found to be inconsistent. Applicant also testified that he had forgotten about the delinquent debts when he completed his SCA.

Applicant has not engaged in subsequent sexual misconduct. He continues to attend NA and AA. He enjoys a good reputation for the quality of his work performance, and he has informed at

least some of his fellow workers about his conviction. He advised one person that he was “very drunk” on the evening in question.¹ Decision at 8.

The Judge’s Analysis

Under Guideline J, the Judge concluded that Applicant’s conviction raised a security concern. In evaluating his case for mitigation, she acknowledged that over 20 years had elapsed since the offense, which is indicative of rehabilitation. However, she noted that he had variously attributed his actions to alcohol as well as to his having been a victim of a similar offense. The Judge concluded that neither of these matters were sufficient to mitigate his intentional act with his niece. She also noted his lack of candor regarding this event. For example, Applicant led a friend to believe that he was so impaired by alcohol that he did not know what he was doing. Neither was he candid with the investigator, initially denying any physical contact and claiming that his plea was on the poor advice of his lawyer. She stated that Applicant’s false statements about his conduct or his efforts to minimize it impaired his efforts to demonstrate rehabilitation.

Regarding the Guideline E allegations of false statements, the Judge concluded that Applicant’s initial false statement to the interviewer concerning the circumstances of his criminal offense raised a security concern. She concluded that Applicant’s omission from his SCA of his delinquent debts and of the true reason for his job termination were deliberate. Concerning the former, she cited to evidence that Applicant was aware that he had not been making payments on either of the delinquent credit cards within the 90 days preceding his completion of the SCA. As to the latter, she noted Applicant’s clearance interview, in which he admitted that he had been fired and should have acknowledged that fact on his SCA. Accordingly, she concluded that these falsifications were deliberate and raised security concerns.

In evaluating Applicant’s case for mitigation, she noted that Applicant had not provided truthful information until pressured by the interviewer. She also noted that Applicant’s claim to have shared his security-significant information with his spouse was not corroborated and that two of his witnesses, with whom Applicant shared some of his past, knew little about the specific charge of which Applicant was convicted. This suggests the extent to which Applicant might still be subject to exploitation or duress. In the whole-person analysis, the Judge noted that Applicant had served the sentence imposed by the court and had not reoffended. However, his false statements and his failing to be immediately forthcoming about his security-significant conduct raised doubts about his willingness to fulfill the fiduciary obligations that come with access to national security information. The positive aspects of Applicant’s record were not sufficient, in the Judge’s view, to outweigh the concerns raised by his criminal conduct and his false statements.

Discussion

Applicant challenges the Judge’s finding that he was terminated for cause from his prior

¹Compare with Applicant’s testimony at the hearing: “Q: Had you had any alcohol that night? A: Yes. Q: How much alcohol had you had? A: One bottle . . . A bottle of beer. Q: A beer? Okay. Were you intoxicated? A: No.” Tr. at 54.

employment. He cites to evidence, such as his receipt of unemployment benefits, which he contends is not consistent with his having been fired. We examine a Judge's findings to determine if they are supported by substantial record evidence, which 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 record." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012). In this case, the Judge based her finding upon the interview summary contained in Government Exhibit (GE) 2, Answers to Interrogatories. Applicant acknowledged that the exhibit accurately represented his answers to the interviewer. Tr. at 71. During this interview, though initially denying that he was terminated for cause, Applicant admitted that "he was fired and would have stayed on the job if he could have done so." Interview Summary at 1. We conclude that the challenged finding is supported by substantial record evidence.

Applicant also challenges the Judge's findings that his false statements and omissions were deliberate. In analyzing an applicant's intent, a Judge must consider the applicant's statements in light of the entire record. *See, e.g.*, ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012). The Judge's treatment of Applicant's intent, summarized above, evidences that she did so. The Judge's findings about the deliberate nature of Applicant's false statements and omissions are supported by substantial record evidence.²

Applicant challenges the Judge's treatment of the mitigating conditions, citing to record evidence which he believes demonstrates that he has met his burden of persuasion. This evidence includes his participation in rehabilitation programs; his compliance with all requirements of his sentence and his satisfactory completion thereof; circumstances that influenced his sexual misconduct, such as alcohol consumption and his own history as a victim of sexual assault;³ and the time that had elapsed since the offense. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-09329 at 3 (App. Bd. Mar. 18, 2013). The Judge made detailed findings about the evidence cited by Applicant and discussed it in the Analysis. She paid particular attention to evidence that Applicant had undergone various types of therapy and counseling following his conviction and that over 20 years had elapsed without reoffense. The Directive provides that a lapse of time since the criminal behavior happened can mitigate concerns under Guideline J. Directive, Enclosure 2 ¶ 32(a). However, a Judge must not apply the mitigating conditions mechanically but in light of the evidence as a whole. In this case, Applicant's several instances of false and/or minimizing statements provide a reasonable basis for the Judge to have concluded that Applicant had not demonstrated a level of rehabilitation commensurate with the requirements of the Directive. *See, e.g.*, ISCR Case No. 11-05079 at 7-8 (App. Bd. Jun. 6, 2012), in which an applicant's failure to report security significant conduct vitiated his case for mitigation, despite a lapse of several years since the conduct occurred. Applicant has not rebutted the

²In any event, Applicant admitted the SOR allegation concerning his deliberate false statement about the circumstances underlying his conviction. Response to SOR, dated Sep. 14, 2012, at 1.

³Applicant states that his "intent to perform the sexual misconduct is reasonably in question." Applicant Brief at 4. The doctrine of collateral estoppel applies in DOHA cases, which precludes Applicant from denying that he had the *mens rea* necessary to effectuate the offense of which he was convicted. *See, e.g.*, ISCR Case No. 11-06937 at 3 (App. Bd. Jan. 10, 2013). We interpret the Brief as drawing our attention to evidence that might tend to mitigate the offense without denying his guilt.

presumption that the Judge considered all of the evidence in the record. Neither has he demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.⁴ Applicant's brief cites to another Hearing Office case which, he contends, is similar to his own and which supports his case for a clearance. We give due consideration to this case. However, it has significant differences from Applicant's. In any event, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-04176 at 3 (App. Bd. Dec. 18, 2012).

In light of the above, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board

⁴To the extent that Applicant is contending that the Judge should have accepted his version of events and his explanations for his false statements, we note that we are required to defer to a Judge's credibility determination. Directive ¶ E3.32.1.