

KEYWORD: Guideline J

DIGEST: The Judge's challenged finding is consistent with the record viewed in its entirety.
Adverse decision affirmed.

CASENO: 11-03025.a1

DATE: 01/06/2012

DATE: January 6, 2012

In Re:)

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Applicant for Security Clearance)

) ISCR Case No. 11-03025
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Donald H. Sheffy, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 13, 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 October 21, 2011, after the hearing, Administrative Judge Marc E. Curry 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 concluding that Applicant’s case raised security concerns; whether the Judge failed to consider all of the record evidence; and whether the Judge failed in his application of the mitigating conditions. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant, a veteran of the U.S. Marine Corps, works as a computer technician for a Defense contractor. He is considered an outstanding employee.

Applicant has been married since 2001. He and his wife have a troubled relationship, repeatedly separating and reconciling. They have been together for only two months since 2006. In December 2005, Applicant was arrested and charged with second degree assault after a domestic dispute. Applicant’s wife declined to testify against him, and the court dismissed the charge. He voluntarily attended counseling from 2006 to 2008 in order to obtain help in dealing with his marital issues. He and his wife attended counseling together, but they stopped after three or four sessions.

In 2010, Applicant’s wife informed him she was throwing him out of the house. He left work to go home and collect his things. “What happened next is inconclusive” (Decision at 2), but Applicant’s wife was injured. Applicant did not corroborate his claim that he had tripped over the curb and had fallen into her, knocking her down. Applicant’s wife called the police, who arrested Applicant for second degree assault. Applicant’s wife went to an emergency room, where she was diagnosed with bleeding on the brain.

Applicant received probation before judgment. He was required to meet with a probation officer and attend anger management classes. He was ordered to pay his wife \$9,082 in restitution in \$500 increments. However, he fell into arrears, and was subsequently arrested for failing to make restitution payments. He attended the required anger management classes, though the program administrator concluded that Applicant showed little improvement during the course. The court terminated the probation order in July 2011.

Applicant’s wife is mentally unstable and has been hospitalized in a psychiatric hospital on at least two occasions.

The Judge concluded that Applicant’s arrests and the circumstances underlying them raised security concerns under Guideline J. He described Applicant as a “stellar employee” and cited to evidence that Applicant’s wife instigated one or both of the incidents of domestic violence alleged in the SOR. However, he concluded that, given the couple’s history of reconciliation, Applicant had

not demonstrated sufficient effort to avoid situations in which domestic violence could occur. He also noted that Applicant's last arrest occurred fairly recently and that the results of Applicant's anger management class were ambiguous. All in all, he concluded that Applicant had not mitigated the security concerns in his case.

Applicant contends that the Judge erred in concluding that the evidence raised security concerns under Guideline J. He noted that Applicant had not been convicted of any offense and that there was no evidence that Applicant had actually committed misconduct.

When an applicant denies an allegation in a SOR, the Government must present substantial evidence in support of the allegation. Substantial evidence means "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* ISCR Case No. 10-03426 at 2 (App. Bd. Jul. 15, 2011). In this case, Applicant admitted the allegations concerning the 2005 domestic violence arrest and the later one for failure to pay restitution. Therefore, the Government had no requirement to provide evidence of them.

However, he denied the allegation concerning the 2010 assault. The evidence supporting this allegation consists of Applicant's description of the incident, in which he admits having caused his wife to fall and suffer a brain hemorrhage. The Judge found that Applicant's claim as to the accidental nature of this incident was not corroborated. This finding is consistent with the record, viewed in its entirety. Although there is no judgment in this case, evidence of the legal consequences of this act, including a requirement for Applicant to pay restitution, be placed on probation, and to attend anger management classes (Applicant Exhibit H describes this an "Abuser Intervention Program"), support a conclusion that he engaged in wrongful conduct.

The record evidence viewed as a whole supports the Judge's conclusion that Applicant's circumstances constitute substantial evidence of security concerns under Guideline J. The fact that criminal charges have been dropped or dismissed does not preclude a finding that the charges raise security concerns. *See, e.g.*, ISCR Case No. 08-02299 at 4 (App. Bd. Nov. 12, 2010).

Applicant cites to his employment record and to his military service. We construe this as an argument that the Judge failed to consider this evidence or that he mis-weighed it. However, the Judge made findings concerning these matters and addressed his work record in the Analysis. Applicant has not rebutted the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-06436 at 2 (App. Bd. Feb. 15, 2011). Neither has he demonstrated that the Judge mis-weighed the evidence.

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: Michael Y. Ra’anan _____

Michael Y. Ra’anan
Administrative Judge
Chairperson, 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