

KEYWORD: Guideline E; Guideline D; Guideline M

DIGEST: In examining an applicant’s intent concerning allegations of false statements, the conduct must be evaluated in light of the entire record. The Appeal Board evaluates a Judge’s rulings on evidence to see if they are arbitrary, capricious, or contrary to law. Applicant was not denied due process. Adverse decision affirmed.

CASE NO: 12-02296.a1

DATE: 03/12/2014

DATE: March 12, 2014

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In Re:	)	
-----	)	ISCR Case No. 12-02296
	)	
Applicant for Security Clearance	)	
	)	

**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 June 19, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline M (Use of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 3, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., 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 of fact contained errors; whether the Judge erred in admitting a pieces of Government evidence; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines D and M are not at issue in this appeal. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant is a consultant for a Defense contractor. He was first granted a clearance in 2001. In 2011, he lost a clearance because a previous employer fired him. The reason for the job termination was Applicant's having spent excessive amounts of time on the internet for non-business purposes, including examining pornographic web sites. He charged his time spent on this non-business activity to Government contracts. He had been counseled on numerous occasions concerning the viewing of inappropriate material using company computer systems.

In September 2011, Applicant completed a security clearance application (SCA) in conjunction with his current employment. In this document, Applicant failed to disclose that he had been fired from his previous job. He affirmatively misrepresented the circumstances by stating that he had left the company due to "loss of contract/work." Decision at 2, quoting Government Exhibit (GE) 1, SCA, at 10-11. Later, he gave conflicting explanations during a clearance interview, stating that he did not list his termination due to an oversight and, conversely, that he had failed to do so because of lack of work at the previous employer.

Applicant enjoys a good reputation for his honesty and trustworthiness. However, only one of his character references appears to have been aware of the reasons Applicant was fired.

### **The Judge's Analysis**

The Judge concluded that the circumstances underlying Applicant's job loss and his deliberate falsification of his SCA raised concerns under Guideline E. He stated that Applicant's on-the-job infractions constituted a breach of the fiduciary duty he owed his employer. The Judge also stated that Applicant's failure to provide the Government with information that was material to a proper adjudication of his clearance suggests that he may be willing to put his own interests ahead of the legitimate interests of the Government. His falsification raises a reasonable concern that he might fail to report other security-significant information in the future.

### **Discussion**

Applicant denies that he deliberately omitted the information from his SCA. He states that his omission was inadvertent. We examine a Judge's findings of fact to see if they are supported by "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." In analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014).

In his reply to the SOR, Applicant admitted that he had “falsified material facts” in his SCA. He stated that he had been told by officials working for his employer that he had visited computer sites of a “questionable nature,” which was grounds for dismissal. GE 3, a letter to Applicant from his employer entitled Termination of Employment, stated that he had “spent an excessive amount of hours . . . on non-company business on the internet, including accessing pornographic websites, and charged [his] time to [G]overnment contracts.” In addition, Applicant Exhibit (AE) B, a portion of the ROI in this case, includes a summary of Applicant’s clearance interview. The summary depicts Applicant as stating the following:

There was a six month period prior to [Applicant] being let go that he was browsing the internet for personal use a lot because there was no work for him to do. The last month or two he started visiting the adult pornographic pictures on Facebook. [Applicant’s] director . . . a section head . . . and [a] human resource representative . . . called [Applicant] into an office and [he] was informed by the HR rep that he was being let go due to excessive personal use of the computer including visiting adult pornographic sites. [Applicant] does not recall any other reasons as to why he was terminated. AE B at p. 5.

The evidence demonstrates that Applicant was aware that he had been terminated because he used a company computer for personal reasons unrelated to business, including visiting pornographic web sites. Under the circumstances, a reasonable person could conclude that he omitted this incident from his SCA not due to simple oversight or honest mistake but because he did not want it to become more generally known. The evidence viewed as a whole supports the finding that Applicant’s omission was knowing and deliberate. The Judge’s material findings of security concern are sustainable.

Applicant challenges the Judge’s decision to admit GE 2, a JPAS entry, contending that it is not factually correct. We evaluate a Judge’s rulings on evidence to see if they were arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 10-08390 at 3 (App. Bd. Mar. 30, 2012). Assuming without deciding that the Judge erred in relying on the exhibit as the basis for a finding in the face of substantial contrary record evidence, such error was ultimately harmless.

Applicant states that he was not aware that his character references should have demonstrated knowledge of why he was fired. He notes that he was not represented by counsel. In making this argument he asserts matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. To the extent that Applicant is raising an issue of due process, prior to the hearing he received a letter from the Chief Administrative Judge advising him of his right to hire an attorney or to utilize the services of a personal representative, as well as his right to present evidence, question witnesses, etc. At the beginning of the hearing, the Judge apprised Applicant of his right to representation and described in detail the procedures governing the hearing. Tr. at 6-8; 12-18. Applicant presented documentary evidence, which the Judge admitted. Tr. at 25. There is nothing in the record that would prompt a reasonable person to question Applicant’s ability to understand the proceedings or to represent himself. *See, e.g.*, ISCR Case No. 12-00120 at 3-4 (App. Bd. Feb. 10, 2014). There is no reason to conclude that Applicant was denied the due process afforded by the Directive.

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: 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: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board