

KEYWORD: Guideline E; Guideline F; Guideline H

DIGEST: We have never drawn a bright-line rule as to the recency of misconduct. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. The Judge found, and the record demonstrates, that Applicant's misconduct goes back many years, resulting in discharge from the military and multiple job terminations. Accordingly, we cannot say that the Judge erred by concluding that Applicant's few months of good behavior are insufficient to show permanent behavioral changes. Adverse decision affirmed.

CASENO: 17-04070.a1

DATE: 03/18/2019

DATE: March 18, 2019

In Re: _____)
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Applicant for Security Clearance)

ISCR Case No. 17-04070

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 April 30, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 20, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Eric H. Borgstrom 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 decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines F and H are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant attended college but did not receive a degree, due to unsatisfactory academic performance. In 2010, he enlisted in the U.S. military and received a security clearance. During his enlistment he received a letter of counseling, several letters of reprimand, and engaged in misconduct such as disrespect toward superiors. The military discharged Applicant for misconduct with a general discharge under honorable conditions. After his discharge from the military and while working for Defense contractors Applicant received a letter of counseling for insubordinate conduct. In March 2015 he was dismissed from contractor employment after making a sexually suggestive comment to a female enlisted member.

Applicant used ecstasy once in 2014 and marijuana once in 2015. During this time he possessed a DoD security clearance. He has not had contact with drug-using associates since 2015. He attributed his drug use to poor judgment and to stress resulting from unemployment, a relative's suicide, and his own cancer diagnosis. After he was fired in 2015, Applicant has held several entry-level jobs at a candy distributor, a fast-food restaurant, and a construction company. He was either dismissed from these jobs or asked to resign due to workplace misconduct. In August 2018, during his current job, he received a letter of counseling for losing his temper and using inappropriate language. He still works at this job and has initiated mental health counseling to address his anger issues and other problems.¹

The Judge's Analysis

As noted above, the Judge entered favorable findings under Guidelines F and H. However, he arrived at the opposite conclusion concerning Guideline E. He found that Applicant's military infractions, drug misuse, and lack of professionalism during civilian employment raised concerns that were not mitigated by such things as Applicant's mental health counseling and his candid

¹The incidents and adverse actions that occurred after Applicant's March 2015 job loss were not alleged in the SOR. The Judge stated that he was considering these things on the issues of credibility, mitigation, extenuation, and the whole-person analysis. Decision at 9, n.16.

acknowledgment of his failures. The Judge cited to Applicant's non-alleged misconduct in evaluating his evidence in mitigation. In the whole-person analysis the Judge stated that Applicant's security-significant conduct was too recent to permit a conclusion that it was firmly behind him.

Discussion

Applicant cites to his evidence of rehabilitation, such as the counseling he has undergone, his expressions of remorse for his misconduct, the stressors that underlay his behavior, etc. He argues that the Judge devoted too much attention to the negative aspects of his record and not enough to his favorable evidence. The Judge made findings about the things that Applicant has cited and addressed them in his analysis. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). An ability to argue for an alternative interpretation of the record is not enough to show that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

Applicant argues that the months that have elapsed since his last incident show that he has rehabilitated himself. He believes that the Judge erred in concluding that not enough time had passed to show that his problems were behind him. However, we have never drawn a bright-line rule as to the recency of misconduct. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015). In this case, the Judge found, and the record demonstrates, that Applicant's misconduct goes back many years, resulting in discharge from the military and multiple job terminations. Accordingly, we cannot say that the Judge erred by concluding that Applicant's few months of good behavior are insufficient to show permanent behavioral changes.

Applicant's brief cites to matters from outside the record, principally to information about the length of time that it takes to process a clearance application. He argues that this lengthy processing time could result in the decline through misuse of particular skills that he possesses and that he would like to be able to use in future employment. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. In any event, we do not have jurisdiction to comment on the manner in which officials process clearance applications. *See, e.g.*, ISCR Case No. 14-04186 at 3-4 (App. Bd. Oct. 28, 2015). Moreover, we are not permitted to consider the impact that an unfavorable decision might have upon an applicant. *See, e.g.*, ISCR Case No. 15-07941 at 3 (App. Bd. Nov. 29, 2018).

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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board