

KEYWORD: Guideline E; Guideline F

DIGEST: While res judicata has some applicability in DOHA cases, the Government is never estopped from considering matters from a prior adjudication, especially when, as in the case before us, there is subsequent misconduct. In this case, Applicant went AWOL from his job in 2013 and made numerous false statements to his employers about his circumstances. That he did so despite having received a punitive discharge for a six-year incident of AWOL several years earlier was a matter that the Judge was entitled to consider in evaluating Applicant's case for mitigation and rehabilitation. The Judge did not err by admitting and considering evidence of Applicant's earlier misconduct. Adverse decision affirmed.

CASENO: 17-02520.a1

DATE: 06/27/2019

DATE: June 27, 2019

In Re: _____)
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-----) ISCR Case No. 17-02520
Applicant for Security Clearance)
_____)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher D. Thomas, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 13, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 29, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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 by admitting evidence of conduct that had been addressed during a prior clearance adjudication; whether the Judge erred in finding that Applicant had deliberately made false statements or omissions; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

The Judges’s Findings of Fact

Applicant joined the U.S. military after graduating from high school. Stationed at a location near his parents, he lived with them. Applicant’s mother suffered from health problems, and he requested leave in order to care for her. His request was denied, but he stayed behind with his mother rather than report for deployment to another country, remaining in AWOL status for about six years. In 2006, he returned to duty and was court-martialed, receiving a bad conduct discharge.

Applicant began working for a Defense contractor in 2010. He received a security clearance the next year. In 2013, while married and while holding a clearance, Applicant became romantically involved with a woman from Taiwan. In June 2013, he traveled to Taiwan to visit her, and he submitted a travel request that his employer required for foreign travel. In this request, Applicant falsely stated that he was going to Taiwan with his wife, and he also failed to receive a required travel briefing. Applicant remained away from his job longer than his scheduled period of approved leave, advising his employer that he had missed his return flight. In fact, he intentionally missed the flight so that he could remain in Taiwan longer with the woman with whom he was conducting an affair. As a result, Applicant was AWOL from his employment for about five days.

When questioned by a Government official about his relationship with the Taiwanese woman, Applicant stated that he would not be seeing her again. After that, however, the woman came to visit Applicant in the U.S. for about six weeks. He failed to report this visit to the appropriate security authorities at his place of employment.

When completing his security clearance application (SCA) in 2016, Applicant did not disclose a judgment against him, delinquent student loans in significant amounts, and accounts that had been placed in collection status. His “no” answers to the questions at issue were false.

A co-worker found Applicant to be reliable and trustworthy. His job performance evaluations generally rate him as “consistently meets standards.” A friend commended Applicant’s honesty, loyalty, and integrity.

The Judge's Analysis

Though noting that Applicant's military AWOL occurred several years in the past, the Judge stated that his poor decision-making persisted in the intervening years. She also found Applicant's credibility to be questionable. The Judge noted, for example, that he was not truthful concerning his affair with the Taiwanese women and that he deliberately lied to his employer on more than one occasion. She also stated that he deliberately failed to disclose his debts, citing to the extent of his delinquent student loans as a reason to believe that Applicant was aware of them at the time he completed his SCA. "The fact that he did not list these loans in response to questions on his application, shows that he was either extremely careless, or he deliberately concealed the information from the Government, which in either case indicates questionable judgment, unreliability, and untrustworthiness[.]" Decision at 7.

In the whole-person analysis, the Judge noted Applicant's having held a clearance for several years. She stated, however, that he was neither young nor naive, reiterating her findings that he lied on his SCA about his debts and that he lied to his employer in order to conceal material information about his extramarital affair. "This is not an individual . . . whom the Government can be confident . . . will always follow rules and regulations and do the right thing, even when no one is looking." Decision at 9.

Discussion

Applicant contends that the Judge erred by admitting evidence of his AWOL while in the military and of the resulting court-martial. These things were considered during an earlier clearance investigation, and he believes that the doctrine of *res judicata* prevents them from being addressed during his current one. We do not find Applicant's arguments to be persuasive. While *res judicata* has some applicability in DOHA cases, the Government is never estopped from considering matters from a prior adjudication, especially when, as in the case before us, there is subsequent misconduct. *See, e.g.*, ISCR Case No. 04-08806 at 4 (App. Bd. May 8, 2007). In this case, Applicant went AWOL from his job in 2013 and made numerous false statements to his employers about his circumstances. That he did so despite having received a punitive discharge for a six-year incident of AWOL several years earlier was a matter that the Judge was entitled to consider in evaluating Applicant's case for mitigation and rehabilitation. The Judge did not err by admitting and considering evidence of Applicant's earlier misconduct.

Applicant argues that the Judge erred in finding that he had made deliberate false statements to his employer as well as on his SCA. He contends that, at worst, he was negligent in failing to notify his employer about his travel plans and that he relied on his wife to pay bills and, therefore, did not know about the extent of his debts. However, Government Exhibit 3, a U.S. Government Memorandum, dated October 1, 2014, contained a transcription of Applicant's interview with a Government agent from September 26, 2013, in which he admitted that he was not truthful during a security interview concerning his 2013 travel to Taiwan. In addition, Applicant acknowledged on cross examination that he told his employer "lies" and was deceitful about his travel to Taiwan and about his relationship with the Taiwanese woman. Tr. at 137-140.

Regarding Applicant's omissions from his SCA, the Judge's finding of deliberate falsification is supported by evidence that Applicant was aware of his financial problems at the time he completed his SCA, as well as by the multiple nature of his false statements, which in and of itself can give rise to a conclusion of deliberate misconduct. *See, e.g.*, ISCR Case No. 15-08163 at 5 (App. Bd. Oct. 25, 2017). We note the Judge's comment that if Applicant did not lie on his SCA he was at least extremely negligent, which might appear to qualify her conclusion about his *mens rea*. In the first place, the Directive provides that "any failure . . . to provide truthful and candid answers during national security investigative . . . processes" can raise questions about a person's eligibility for a clearance. Directive, Encl. 2, App. A ¶ 15 (emphasis added). It does not expressly limit the concern to deliberately false statements only. In the second place, viewing the decision as a whole, we conclude that the Judge treated the SCA omissions as deliberate failures to disclose material information, as, for example in her whole-person analysis. The Judge's various findings about Applicant's falsifications and omissions 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 same record." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 18-01564 at 3 (App. Bd. May 30, 2019).

Applicant cites to his favorable evidence and argues that the Judge erred in evaluating his case for mitigation. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 16-04112 at 2 (App. Bd. May 28, 2019). A disagreement with the Judge's weighing of the evidence or an ability to argue for a different interpretation of the record is not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02250 at 3 (App. Bd. May 23, 2019).

Applicant asks if he can be given the "benefit of the doubt." (Appeal brief at 3). We are instructed as follows: "any doubt shall be resolved in favor of the national security." Directive, Encl. 2 ¶ E.4.

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).

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