KEYWORD: Guideline E

DIGEST: Applicant relies extensively on decisions of Hearing Office Judges to support his arguments. He cites those decisions to show that Judges decided particular issues or cases in favor of applicants. His reliance on those Hearing Office decisions is misplaced. Decisions by Hearing Office Judges are not legally binding precedent that the Appeal Board must follow. The Board is neither required to justify why it chooses not to follow Hearing Office decisions nor required to reconcile its decisions with such lower decisions. Adverse decision is affirmed.

CASE NO: 19-00327.a1

DATE: 05/20/2020

DATE: May 20, 2020

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Daniel P. Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 25, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 13, 2020, after the hearing, Administrative Judge Arthur E. Marshall, 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 erred in his findings and conclusions and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant, who is in his 40s, is married with a minor child. In about 2017, he resigned from a job when his employer was poised to terminate his employment for violating a non-compete agreement by failing to obtain prior approval before working simultaneously for another entity. When he obtained the second job, he did not either realize that he had signed such an agreement or understand what it entailed.

At an earlier job in 2016, Applicant allegedly falsified records by mischarging approximately 300 hours of work. Applicant denied that he intentionally defrauded this employer. At that time, his work status was somewhat muddled. He was an office worker who was occasionally permitted to telework due to a shortage of work space in the office. At one point, he assumed he was a regular teleworker because other employees were full-time teleworkers. In the office, a badge-in, badge-out system was employed to track attendance. At times, Applicant would "piggyback" on another employee when going through the scanner to enter the facility or be manually permitted to enter the facility by a third party. Applicant possibly also did not receive credit for his work when he was teleworking at home without authorization. In responding to the SOR, Applicant admitted this allegation.

While Applicant denied violating the non-compete agreement, "it is difficult to fathom a professional at mid-career in this industry would not know he had at least some responsibility to tell his primary employer he was accepting work of the same nature on the side. This is particularly true when the individual should clearly recognize there would ultimately be repercussions, personal or professional, from working a full time job elsewhere." Decision at 5. As for the alleged falsification of work records, a responsible professional would have also sought clarification as to how to document his work hours and where those hours should be spent. However, he later took steps to clarified these issues.

Discussion

Applicant relies extensively on decisions of Hearing Office Judges to support his arguments. He cites those decisions to show that Judges decided particular issues or cases in favor of applicants. His reliance on those Hearing Office decisions is misplaced. Decisions by Hearing Office Judges are not legally binding precedent that the Appeal Board must follow. The Board is neither required to justify why it chooses not to follow Hearing Office decisions nor required to reconcile its decisions with such lower decisions. *See, e.g.*, ISCR Case No. 03-06174 at 3 n.1 (App. Bd. Feb. 28, 2005). Nor are Hearing Office Judges required to follow–or otherwise justify or reconcile their decisions with–other Hearing Office decisions. Each case must be decided on its own merits. Directive, Encl. 2, App. A ¶ 2(b). In this case, the Hearing Office decisions cited in the appeal brief do not establish a reason for concluding the Judge erred in his analysis of the facts or in his drawing of conclusions.

Applicant's appeal brief also contains a document that is not included in the record. This document (identified as Tab A) appears to be a supplement to Applicant's testimony. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

Applicant challenges the sufficiency of the evidence supporting the Judge's adverse findings. He argues that the employer's inquiry into his suspected falsification of records was flawed because the employer was measuring flawed data and contends the Judge overemphasized Applicant's admission of that SOR allegation. As for the alleged violation of the non-compete agreement, he argues that he did not understand the repercussions of his actions and he was following the corporate norm. We do not find these arguments persuasive. From our review of the record, the Judge's material findings and conclusions of a security concern are based on substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3 (App. Bd. Jun. 25, 2019). In this regard, we have previously stated that an employers's description or characterization of events arising from an inquiry into an employee's overcharging of hours was entitled to some degree of deference. *See, e.g.*, ISCR Case No. 17-03446 at 4 (App. Bd. Mar. 5, 2019). We are also required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1.

Applicant notes that the Judge erred in stating he was terminated from two jobs. Although the evidence establishes that Applicant resigned in lieu of being terminated for the violation of the non-compete agreement, this error was harmless because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No 11-15184 at 3 (App. Bd. Jul. 25, 2013).

Applicant contends that the Judge failed to consider evidence and did not properly weigh the evidence. His arguments, however, are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor 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. 15-04856 at 2-3 (App. Bd. Mar. 9, 2017).

Applicant has failed to establish the Judge committed any harmful errors. The Judge examined the relevant evidence 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, 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