KEYWORD: Guideline K; Guideline E

DIGEST: Applicant is advocating for a “piecemeal analysis” of the evidence, which the Appeal Board has long discounted as an appropriate manner in which to analyze the evidence. When weighing the evidence, the Judge must consider the evidence as a whole and not view it in an isolated and piecemeal fashion. Adverse decision affirmed.

CASE NO: 19-02136.a1

DATE: 03/08/2021

DATE: March 8, 2021

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

<u>APPEARANCES</u>

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 January 31, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 6, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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 the findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Guideline K Allegation

The Judge found against Applicant on the sole Guideline K allegation. It asserted that Applicant took a classified document home without authorization in 2013. In the decision, the Judge found, "The security violation report indicated the document was marked 'Secret/NOFORN.'" Decision at 2. In his appeal brief, Applicant contends the Judge erred in finding that the document was marked "Secret/NOFORN." Appeal Brief at 1. We examine a challenged finding of fact to determine if it is supported by substantial evidence, *i.e.*, "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." *See, e.g.,* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018)(quoting Directive ¶ E3.1.32.1).

This challenge is rather narrow in its scope. In responding to the SOR, Applicant admitted the Guideline K allegation with an explanation. He is not now contending that he did not commit a security violation but instead only contesting the nature of the markings on the document in question.

Applicant's statements regarding the document's classification markings have not been consistent or always clear. For example, his appeal brief states the document in question "was only labeled **Unclassified**" but later notes a portion of the document "was labeled at the bottom of the landscape page as Classified." Appeal Brief at 1, emphasis in brief. In responding to interrogatories, Applicant acknowledged the document had classification markings by stating, "Yes, only Secret[.]" Government Exhibit (GE) 2 at 4. At the hearing, a lengthy, confusing exchange occurred between the Judge and Applicant regarding the document's classification markings. As best we understand Applicant's testimony, he was asserting the electronic version of the document consisted of a PowerPoint presentation with an embedded PDF file. When he printed the PowerPoint presentation, the PDF file also printed. The PowerPoint pages were labeled unclassified, but the bottom of the PDF pages were labeled "classified," not "Secret/NOFORN." Tr. at 12-15, 23-33, and 77-79. In describing Applicant's testimony, the Judge stated, "[Applicant] somewhat reluctantly admitted that he knew the document was classified." Decision at 2.

In a nutshell, the Judge's challenged finding is based on substantial evidence—that is, the former employer's security violation report, which states:

> On 17-Sept-2013 (approximate date) [Applicant] obtained a hard copy **document that was labeled Secret/NOFORN** at [Site A]. Subjects account of 17-Sept-2013, "Since I had no office space at [Site A] and was still getting settled in a new office at [Site B] with no [Government agency] computer assigned to me yet, I took the document in my locked briefcase home overnight. I knew this was not proper protocol, but I felt the risk was mitigated since it was locked in my briefcase." [GE 3 at 1, emphasis added.]

The Judge's challenged finding merely reported what the security violation report states. A Joint Personnel Adjudication System entry also indicated the document was "a hardcopy Secret/NOFORN document." GE 4. Regarding this challenge, it merits noting that we have previously stated the findings and conclusions in a company's security investigation should be given deference. *See, e.g.*, ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)("[B]ecause of the unique position of employers as actual administrators of classified programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contradicted without a cogent explanation."). As a related matter, we find no error in the Judge's ultimate conclusion that Applicant committed a security violation.

In his brief, Applicant notes this security violation occurred over seven years ago and argues there should be a seven-year statute of limitation for considering such misconduct. This argument is not persuasive. The Board has consistently declined to establish "bright-line" guidance regarding the concept of recency. *See, e.g.,* ISCR Case No. 99-0018 at 4-5 (App. Bd. Apr. 11, 2000). In determining whether or not conduct of security significance is recent, a Judge must carefully consider the totality of the record evidence. In this case, the Judge conducted such an analysis. Noting first that a security violation is one of the strongest possible reasons for denying or revoking security clearance eligibility and that an applicant has a very heavy burden to mitigate the concerns arising from a proven security violation, the Judge concluded that Applicant failed to meet that burden because of his many incidents of poor judgment (discussed below), including an incident in which his employment was terminated in 2018 for violating rules by walking around a Federal building without an escort, and for failing to accept full responsibility for his security violation.[1] Applicant has not established the Judge erred in his analysis.

<u>Guideline E Allegations</u>

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[1] The Judge cited ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006) for the propositions that security violations strike at the heart of the industrial security program, that an applicant has very heavy burden to mitigate an established security violation, and that a Judge must apply strict scrutiny to an applicant's claims of reform and rehabilitation in security violation cases.

Under this guideline, the SOR alleged that Applicant was terminated from nine jobs between 2004 and 2018 for various reasons, including the mishandling of classified material incident in 2013; that he received a Incident Warning Letter from an employer in 2015; that he had 12 motor vehicle violations in a specific county between 2006 and 2019, during which his driver's license was suspended for about 90 days; and that he had two speeding violations in another state in 2009. The Judge found against Applicant on 10 of the 12 Guideline E allegations. The two favorable findings involved alleged employment terminations. Those favorable findings were not raised as an issue on appeal.

In his brief, Applicant provides explanations for each of his employment terminations and argues:

> As far as the problematic employment history is concerned, each case needs to be looked at independent of the other situations. There is no pattern of behavior per se in this area. Every termination has to be examined on a case by case basis. I know how to follow directions, especially in the area of security procedures. Remember I have taken and passed four polygraphs . . . from 2006 to 2018. [Appeal Brief at 2.]

In essence, Applicant is advocating for a "piecemeal analysis" of the evidence, which the Appeal Board has long discounted as an appropriate manner in which to analyze the evidence. When weighing the evidence, the Judge must consider the evidence as a whole and not view it in an isolated and piecemeal fashion. *See, e.g.*, ISCR Case No. 16-02069 at 2 (App. Bd. Jan. 11, 2018). *See also*, *Raffone v. Adams*, 468 F. 2d 860, 866 (2nd Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). As noted above, the Judge in this case properly considered the evidence in its entirety in analyzing the security significance of Applicant's misconduct.

<u>Weighing Evidence</u>

Applicant contends the Judge overemphasized the negative aspects of the case and gave little or no mention to the positive aspects. In doing so, he emphasizes that he has passed four security-related polygraphs in his career. The ability to pass a polygraph, however, is not a determinative factor in assessing an applicant's security clearance eligibility. *See, e.g.*, ISCR Case No. 18-00751 at 3 (App. Bd. Nov. 7, 2019). Other factors such as judgment and reliability must also be taken into consideration in assessing an individual's security clearance worthiness. Applicant also highlights the actions that he has taken to reform and rehabilitate himself and argues the security incident will never happen again. Applicant's assertions are not sufficient to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020). Furthermore, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for

a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 19-01431 at 4 (App. Bd. Mar. 31, 2020).

New Evidence

Applicant's appeal brief contains matters from outside the record, including documentation showing he completed driver and security training. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Conclusion

Applicant has failed to establish the Judge committed any harmful error. 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, 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 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