KEYWORD: Guideline K

DIGEST: With regard to SOR ¶¶ 1.c-1.f, he argues that he had a need-to-know the information in question. The issue of Applicant's need-to-know is not pertinent to the security concerns raised in this case. SOR ¶¶ 1.c-1.f do not raise concerns about the legality of Applicant's access to the information in question; instead, they raise concerns about how he handled that information. Adverse decision affirmed.

CASENO: 17-03588.a1

DATE: 03/07/2019

DATE: March 7, 2019

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
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 19, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 11, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 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 70 years old, has worked for his defense-contractor employer since 1987. He has a doctorate degree and was initially granted a security clearance in 1979. Over the years, he has received security refresher, classified information user, and related briefings.

The SOR alleged that Applicant risked a data spill when he directed a secretary to type a memorandum containing protected information on an unclassified computer in 1995 and did not inform security officials of the potential data spill (SOR ¶ 1.a). It also alleged that he improperly emailed protected information on an unclassified network causing data spills in 1998 (SOR ¶ 1.b), 2006 (SOR ¶ 1.c), 2013 (SOR ¶ 1.d), 2014 (SOR ¶ 1.e), and 2016 (SOR ¶ 1.f). The Judge found in favor of Applicant on SOR ¶ 1.b and against him on the remaining allegations.

Applicant's security incidents were not deliberate but persisted despite counseling. In 1995, he created multiple copies of a document that should have been marked Secret. Upon learning that error, he asked his secretary to retrieve them, but did not notify security officials. Not all copies of the document were retrieved, some were apparently discarded in the trash. His noncompliance with reporting requirements may have led to compromise. Additionally, his commission of four other security violations since 2006 continues to cast doubt on his ability to handle classified information appropriately.

Discussion

In his appeal brief, Applicant notes he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) in 2013 and argues that he was forced to submit another before his five-year periodic submission was due. Further, he contends that "[i]t is illegal to perform e-QIP investigations in less than 3 years without merits . . . ." Appeal Brief at 1. However, nothing in the Directive gives DOHA Judges or the Appeal Board jurisdiction or authority to pass judgment on the necessity or sufficiency of security clearance investigations. *See, e.g.*, ISCR Case No. 01-19823 at 3-4 (App. Bd. Dec. 3, 2003). Additionally, there is no right to a security clearance. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Nor does a prior favorable security clearance decision give rise to a vested right or interest in continued retention of a security clearance. To the extent that Applicant's argument could be construed as raising the question whether DoD is equitably estopped

from denying or revoking his security clearance, it is unpersuasive. The Federal Government is not restricted in reviewing an applicant's security clearance eligibility; especially, as in this case, when an applicant has one or more security violations since submitting his or her previous e-QIP. Applicant's prior favorable clearance determinations do not entitle him to continued retention of a security clearance. *See, e.g.,* ISCR Case No. 01-19823 at 5.

Applicant makes other arguments that we do not find persuasive. First, he argues that, because the Judge found for him on SOR ¶ 1.b, this confirms he always handled classified material in an authorized location with no unauthorized persons present and, as a result, he never committed the alleged security violation in SOR ¶ 1.a. This argument is based on a false premise that the Judge's favorable finding under SOR ¶ 1.b is evidence as to how he handles classified material. In her findings, the Judge noted that the allegation in SOR ¶ 1.b was apparently based on Applicant's 2013 background interview in which his statements regarding an incident 15 years ago may have actually been referring to the 1995 incident alleged in SOR ¶ 1.a. The Judge's conclusion that the evidence fell short of establishing the allegation in SOR ¶ 1.b does not support Applicant's argument that such a determination somehow establishes that the allegation in SOR ¶ 1.a lacks merits. Second, with regard to SOR ¶¶ 1.c-1.f, he argues that he had a need-to-know the information in question. The issue of Applicant's need-to-know is not pertinent to the security concerns raised in this case. SOR ¶¶ 1.c-1.f do not raise concerns about the legality of Applicant's access to the information in question; instead, they raise concerns about how he handled that information.

Applicant also questions whether his company may have erred in its security procedures. Specifically, he contends that, while he knew the classification guide used in his department, he did not know the classification guide used in another department and other individuals failed in their responsibilities to collect certain information from him. At the hearing, the Government offered into evidence investigation reports for each of the security violations that the Judge found against Applicant. Government Exhibits 3-11. Each report concluded that Applicant committed the security violation being investigated. We give deference to the findings and conclusion of security personnel in such investigations. *See, e.g.,* ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018) (citing ISCR Case No. 10-07070 at 8 (App. Bd. Apr. 19, 2012) for the proposition, "[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."). We conclude Applicant's argument that the company erred in its security procedures is an insufficient basis to challenge successfully the Judge's unfavorable findings or conclusions under Guideline K.

The balance of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. In those arguments, he cites to such matters as his honesty and integrity in disclosing his security incidents, the frequency of his security violations, and the length of time that has passed since his last incident. These arguments, however, are 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016). Once it is established that an applicant has committed security violations, he or she has a "very heavy burden" to mitigate the resulting security

concerns, insofar as security violations "strike at the heart of the Industrial Security Program." *See, e.g.*, ISCR Case No. 11-09219 at 3 (App. Bd. Mar. 31, 2014).

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*, at 528. *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