

KEYWORD: Guideline I; Guideline E; Guideline K

DIGEST: The Judge noted that Applicant has a history of unreliable and inappropriate workplace behavior. He has committed security violations. A psychologist determined he has mental health conditions that are not fully under control. Applicant has failed to establish his questionable conduct is unlikely to recur. His psychological conditions that cast doubt on his reliability, trustworthiness, and good judgment are resolved.

Applicant cites no authority supporting his contention that the Judge could order another agency to produce such a report. We find no error in the Judge’s ruling. Directive ¶ E3.1.11 provides that an applicant’s discovery “is limited to non-privileged documents and material subject to control by the DOHA.” A DOHA Judge lacks jurisdiction over another Government agency. Adverse decision affirmed.

CASE NO: 18-02384.a1

DATE: 09/14/2020

DATE: September 14, 2020

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In Re:	)	
-----	)	ISCR Case No. 18-02384
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Mendez, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Elmo Arthur Blubaugh, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 3, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions), Guideline E (Personal Conduct), and Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 10, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson 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 her evidentiary and procedural rulings, whether the Judge erred in her findings of fact, 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**

Applicant, who is in his early 40s, was hired by a defense contractor, but this employment is contingent on him obtaining a security clearance. He has earned a master’s degree. He has never been married and has no children.

In 2011, Applicant was terminated from a Federal Government position for engaging in questionable conduct and demonstrating an inability to follow policies and procedures. His questionable conduct included tardiness, demonstrating a lack of respect for coworkers, attempting an unauthorized entry into a Sensitive Compartmented Information Facility (SCIF), attempting to query a unknown foreign national online for assistance with his work, bringing a prohibited USB device into a SCIF, and failing to properly report his security violation. His security violations resulted in the suspension of his access to classified information prior to his termination. He denied the alleged conduct with explanations, such as, he unintentionally brought the USB device into the SCIF. An examination of the device revealed it contained no classified information.

In 2014, Applicant was terminated from a job for failing to follow project guidelines and meet requirements and deadlines. He claims his employer instituted unreasonable timelines for projects and failed to provide proper equipment. He also claimed he was terminated shortly after raising workplace safety concerns. Following his termination, he sent questionable emails to his former employer, including a threat to reveal unfavorable information to the employer’s client. An attorney representing the former employer sent Applicant a letter telling him to “immediately cease and desist from any further communications” and reminded him that he signed a confidentiality agreement. Decision at 5.

In 2018, a licenced psychologist diagnosed Applicant with exhibiting signs of Paranoid Personality Disorder, Autism Spectrum Disorder, and Unspecified Anxiety Disorder. The psychologist “concluded that Applicant suffers from interfering mental health conditions that could have a negative impact on his judgment, reliability, and trustworthiness when handling classified

information or performing sensitive tasks in the future.” Decision at 3. Applicant contends the psychologist’s diagnosis was defective due to a lack of information and biased. During the clinical interview, Applicant reported he was wrongfully terminated from his Government position in 2011 because he witnessed and reported improper activities in the workplace, including the mishandling of classified information, a coworker’s connection to a drug cartel, deliberate espionage, and the framing of an innocent employee with allegations of child pornography. Additionally, he claimed he was later subjected to surveillance by defense contractor employees and became the victim of arson in retaliation for disclosing information to the FBI and a military law enforcement agency. The psychologist indicated that Applicant had a “global mistrust and suspicion of other’s motives” and recommended he participate in psychiatric treatment. As of the date of the hearing, he has not participated in such treatment. *Id.*

Applicant’s father testified regarding the surveillance of his home and the purported arson. Applicant also presented character reference letters that described him as a trusted, gifted, and dedicated individual.

### **The Judge’s Analysis**

Applicant has a history of unreliable and inappropriate workplace behavior. He has committed security violations. A psychologist determined he has mental health conditions that are not fully under control. Applicant has failed to establish his questionable conduct is unlikely to recur. His psychological conditions that cast doubt on his reliability, trustworthiness, and good judgment are resolved.

### **Discussion**

#### Evidentiary and Procedural Rulings

In his post-hearing submission, Applicant requested the Judge obtain an unredacted version of a FBI report so that she could understand the conduct he witnessed as a Government employee and the harassment he later encountered. In the decision, the Judge noted that she did not have the authority to order another Federal agency to provide an unredacted copy of its investigative report. In his appeal brief, Applicant argues that the Judge’s ruling was erroneous, stating she did not need to make the report public. Applicant cites no authority supporting his contention that the Judge could order another agency to produce such a report. We find no error in the Judge’s ruling. Directive ¶ E3.1.11 provides that an applicant’s discovery “is limited to non-privileged documents and material subject to control by the DOHA.” A DOHA Judge lacks jurisdiction over another Government agency. *See, e.g.,* ISCR Case No. 17-02208 at 2 (App. Bd. Feb. 15, 2019). More specifically, a DOHA Judge has no authority to order another Government agency to produce a unredacted copy of its investigative report.

Applicant notes that the hearing was held less than three weeks after the issuance of the Notice of Hearing and argues that he was not given adequate time to arrange for critical witnesses to be present at the hearing and for the advice of legal counsel. We note the record does not reflect

that Applicant requested a continuance before or at the hearing for additional time to prepare his case, to arrange for the availability of witnesses, or to seek the advice of legal counsel. “If a party has a meaningful opportunity to raise an objection or procedural issue with an Administrative Judge, but fails to do so, then the party is not in a strong position to claim error on appeal.” *See, e.g.*, ISCR 03-00543 at 4-5 (App. Bd. May 21, 2004). In this case, the SOR was issued on October 3, 2019, Department Counsel mailed the government exhibits (GE) to Applicant on January 30, 2020 (GE 7), and, in accordance with Directive ¶ E3.1.8, Applicant was provided the Notice of Hearing more than 15 days before the date of the hearing, *i.e.*, February 26, 2020. Applicant has failed to establish any procedural or due process error occurred in the scheduling of the hearing.

Applicant argues the hearing was held at an “extreme distance” from his home, which made it “impossible” to arrange for witnesses to testify. Appeal Brief at 2. This is another issue that Applicant failed to raise before or at the hearing. We note the hearing was held within 150 miles of Applicant’s residence. The Chief Administrative Judge’s prehearing guidance notifies applicants that they “can expect the hearing to be held at a facility within 150 miles of their residence or place of employment.” *See* Chief Administrative Judge’s Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings, dated January 15, 2019. We find no error occurred in DOHA’s or the Judge’s selection of the location where the hearing was held.

In his post-hearing submission, Applicant requested the Judge contact specific individuals to obtain testimony from them. In her decision, the Judge noted that she was not responsible to contact individuals to obtain information from them and that Applicant could have provided affidavits and character reference letters from them but failed to do so. The Judge also noted that the burden was on an applicant to present evidence in mitigation. Contrary to Applicant’s assertions in his appeal brief, we find no error in the Judge’s ruling. *See* Directive ¶ E3.1.15, which states, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision.”

### Substantial Evidence

Applicant challenges a number of the Judge’s findings of fact. We examine disputed findings of fact to determine if they are 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).

Applicant claims the Judge erred in finding that he “refused medical treatment.” Appeal Brief at 3. This assertion is incorrect. The Judge did not find that Applicant refused medical treatment. Rather, she found the psychologist recommended Applicant participate in psychiatric treatment and, as of the date of the hearing, he has not participated in such treatment. We note the Judge’s finding is not accurate. In his written evaluation, the psychologist noted Applicant’s primary care physician recommended Applicant undergo a psychiatric evaluation, which he did not do, and

concluded “[h]e is unlikely to seek treatment and, even if he did, his conditions will likely be life-long.” GE 4 at 8. While the Judge erred in her finding that the psychologist recommended psychiatric treatment, it is a harmless error because it did not likely have any affect on the outcome of the case. *See, e.g.*, ISCR Case No 19-01220 at 3 (App. Bd. Jun. 1, 2020).

In his appeal brief, Applicant contends that the Judge found Applicant was sexually inactive and a virgin. He also argues his sexual orientation cannot be used as a basis to deny him a security clearance. The Judge’s finding at issue was limited to reciting the psychologist’s finding that Applicant “was sexually inactive, which [Applicant] asserted was information that was inappropriately considered by the doctor.” Decision at 4. The Judge’s decision makes no reference to virginity or sexual orientation. This assignment of error is unpersuasive.

Applicant challenges some of the Judge’s findings that he engaged in the questionable conduct which led to his termination from his Government position in 2011. For example, he asserts that he never demonstrated a lack of respect to his coworkers, that the unauthorized attempt to enter a SCIF occurred when he was a new employee who was not adequately informed of the restrictions, and that he never attempted to ask a foreign individual for assistance with his work. He argues all the alleged conduct leading to his 2011 termination was incorrect and baseless. From our review of the record evidence, the Judge’s challenged findings were based on substantial evidence, particularly, GE 6, the termination memorandum that Applicant received from the Government agency.

Although Applicant has styled other arguments as challenges to the Judge’s findings of fact, those arguments, in effect, are seeking an alternative interpretation of the evidence. For example, he contends the Judge reached conclusions based on false and incorrect evidence and argues there is no evidence that he engaged in misconduct. Appeal Brief at 6. From our overall review of the record, we concluded the Judge’s material findings and conclusions of a security concern are based on substantial evidence or constitute reasonable characterizations or inferences that could be drawn from the record.

### Weighing the Evidence

In his appeal brief, Applicant highlights that the FBI denied his request to take a polygraph. He also notes the FBI informed him that they would not honor his request for them to perform a polygraph on him to verify his disclosures to them. In his brief, he argues the Judge’s evaluation of his statements about various events are in error as a result of the FBI’s denial to perform a polygraph on him. We find this contention baseless. In her decision, the Judge merely made a finding that the FBI denied his polygraph request. She did not draw any conclusions based on that denial.

Most of Applicant’s arguments in his appeal brief amount to a disagreement with the Judge’s weighing of the evidence. For example, he challenges reliability of the psychologist report, claiming a clinical interview of hour and a half in length was insufficient to make a diagnosis. He also argues that his firing in 2014 was based on false grounds, that the employer made demands that far exceeded the initial expectations for the job, that the employer failed to provide adequate equipment for him to perform the job for weeks, and that the work environment at that job was toxic. However,

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. 19-01759 at 3 (App. Bd. Jun. 8, 2020). Applicant further notes that the loss of his security clearance has devastated his professional career, but, as we have previously stated, the adverse impact of an unfavorable decision on an applicant is not a relevant consideration in evaluating his or her security clearance eligibility. *Id.*

### Conditional Security Clearance

In his brief, Applicant requests that he be granted a temporary security clearance so that he could obtain employment, secure counsel, and obtain mental health treatment to alleviate any security concerns. However, we conclude that Applicant has not established that the granting of an exception under Appendix C of the Adjudicative Guidelines is merited.

### Conclusion

Applicant has failed to establish that 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, 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