

KEYWORD: Guideline E; Guideline K

DIGEST: There is a rebuttable presumption that the Judge considered all the record evidence. The Judge is not required to cite or discuss every piece of evidence. On the record the Judge's findings of deliberate falsification are sustainable. Applicant is entitled to receive an SOR that places him on reasonable notice of the allegations. An SOR is not required to satisfy the strict requirements of a criminal indictment, nor does it have to allege every possible fact that may be relevant. A Favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. The appealing party must set forth claims of error with specificity. Adverse decision affirmed.

CASENO: 04-08806.a1

DATE: 05/08/2007

DATE: May 8, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 04-08806
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 30, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline K (Security Violations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 27, 2006, after the hearing, Administrative Judge Marc E. Curry denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his findings; whether the Judge erred in concluding Applicant’s falsifications of his security clearance application, two documents filed in state judicial proceedings, and a signed, sworn statement to a government investigator, were deliberate; whether the SOR placed Applicant on reasonable notice of the allegations against him; whether the Judge was barred by the doctrine of *res judicata* from considering evidence of “settled past cases” relating to the allegations set forth in the SOR; whether the Judge’s overall adverse security clearance decision is arbitrary, capricious, or contrary to law.

(1) Applicant argues that the Judge erred with respect to six of his findings, in that the “summary” presented by the Judge in his decision omitted certain facts, and did not reflect the full nature and circumstances of the incidents at issue. The Board does not find Applicant’s argument persuasive.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997); DISCR Case No. 93-1186 at 5 (App. Bd. Jan. 5, 1995). Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 05-03143 at 2 (App. Bd. Dec. 20, 2006); DISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992).

Several of the findings which Applicant challenges relate to SOR allegations on which the Judge found in favor of the Applicant. With respect to the remaining ones, even if each of the challenged findings were changed to reflect Applicant’s interpretation of the record evidence, the changes would not have undermined the Judge’s ultimate conclusions. Therefore, any such errors would be at best harmless. *See, e.g.*, ISCR Case No. 04-00949 at 2 (App. Bd. Mar. 27, 2007); ISCR Case No. 05-08459 at 2, n. 1 (App. Bd. Nov. 16, 2006).

The Board’s review of a Judge’s findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620, (1966). The Board does not review a case *de novo*. Applicant has not met his burden of demonstrating that the Judge’s material findings with respect to Applicant’s conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge’s material findings of security concern are supported by substantial evidence and are sustainable.

(2) Applicant also contends that he did not deliberately falsify his security clearance application, two documents filed in state judicial proceedings, and a signed, sworn statement to a government investigator, because “[o]ne need not report items of no consequence.”<sup>1</sup> The Board does not find this argument persuasive.

The Judge had the opportunity to consider Applicant’s explanation for why he failed to disclose the information in question.<sup>2</sup> The Judge was not bound, as a matter of law, to accept or reject Applicant’s explanation. The Judge considered Applicant’s explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omissions were deliberate and intentional. On this record, the Judge’s findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1; *See, e.g.*, ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006).

(3) Applicant argues that the SOR did not place him on reasonable notice of the allegations against him because: “The action of de-facto adding to the Statement of Reasons by admitting new evidence (as occurred in our case) we consider to be a breach of FRCP Rule 15 and other as appropriate.”<sup>3</sup> The Board does not find this argument persuasive.

Applicant is entitled to receive an SOR that places him on reasonable notice of the allegations being made against him. However, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003). Nor does an SOR have to indicate what arguments Department Counsel might make at the hearing, nor does the SOR have to identify specific evidence that Department Counsel will rely on at the hearing. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegations being made against him. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant’s ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case. Given the SOR allegations against Applicant and the manner in which the hearing was conducted, Applicant was on adequate notice of the factual circumstances that formed the basis of the government’s security concerns in his case. *See, e.g.*, ISCR Case No. 03-24428 at 3 (App. Bd. May 3, 2006). Moreover, the record indicates that the Judge declined to admit into evidence a number of government exhibits that he ruled were irrelevant or beyond the scope of the allegations contained in the SOR. There is no presumption of error below, and Applicant has not demonstrated that the Judge’s evidentiary rulings were erroneous.

(4) Applicant argues that the Judge’s adverse clearance decision should be reversed because the Judge was barred by the doctrine of *res judicata* from considering evidence of his past relating to some of the allegations set forth in the SOR. The Board does not find this argument persuasive.

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<sup>1</sup>Applicant’s Appeal Brief at 6.

<sup>2</sup>The adverse information which Applicant failed to disclose related to his prior employment, a state tax lien, a prior investigation by the police, and a prior denial of clearance access.

<sup>3</sup>Applicant’s Appeal Brief at 8.

*Res judicata* involves issue preclusion when the same claim or cause of action has been litigated previously. *See, e.g.*, ISCR Case No. 97-0191 at 3 (App. Bd. Apr. 28, 1998). It has no applicability in this case. Applicant was granted a security clearance after a DISCR hearing in 1986. Applicant reapplied for a security clearance in 2000 and was asked to complete a security clearance application. On that application, Applicant did not reveal past conduct and events relating to his finances, employment and prior security clearances. The scope of some of the questions on the security clearance application required Applicant to divulge events that predated 1986. On appeal, Applicant argues that because his security clearance eligibility was favorably adjudicated in 1986, any facts or circumstances arising before 1986 cannot provide a basis for an adverse security clearance decision in the instant case.

A favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. *See, e.g.*, DISCR Case No. 86-3543 at 3 (App. Bd. Apr. 27, 1989). Accordingly, the doctrine of *res judicata* does not bar an adverse security clearance decision when an applicant has engaged in misconduct subsequent to a favorable security clearance decision. DISCR Case No. 91-1436 at 4 (May 3, 1993); DISCR Case No. 91-0775 at 3 (Aug. 25, 1992). In this case, Applicant's history prior to 1986, in and of itself, does not form the basis for the SOR allegations. Rather, Applicant's failure to provide truthful answers in 2000 about events prior to 1986 when required to do so by the questions on his security clearance application forms the basis for some of the allegations in the SOR. The mere fact that Applicant obtained a favorable security clearance determination in 1986 did not relieve him of the duty, subsequently, to answer security clearance application questions truthfully, even when those questions required the revealing of information that predated 1986. This is consistent with the basic proposition that when reevaluating an applicant's security eligibility in keeping with the "whole person" concept, such a reevaluation should consider the applicant's overall history, not just the most recent instances of the applicant's conduct. Thus, since Applicant's underlying conduct and circumstances that predated 1986 could have been considered in the instant case, his failure to list the same underlying conduct and circumstances on a 2000 security clearance application provide a proper basis for the falsification allegations in this case.

(5) Finally, Applicant argues, in essence, that the Judge's adverse security clearance decision is arbitrary, capricious, and contrary to law. Part of Applicant's argument is based on the assertion that the Judge's decision should be reversed because it contains multiple "errors of logic." Applicant's Appeal Brief does not elaborate on or enumerate with specificity what these "errors of logic" are. The appealing party must set forth its claims of error with specificity. *See, e.g.*, ISCR Case No. 99-0519 at 9 (App. Bd. Feb. 23, 2001). Applicant has failed to do so in this instance.

Regarding the broader issue of whether the Judge's decision is arbitrary, capricious, or contrary to law, the application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, 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*. An applicant'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.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. The Judge found in favor of Applicant under Guideline K and with respect to two of factual allegations under Guideline E. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. As noted above, the Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline E is sustainable.

### **Order**

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board