KEYWORD: Guideline K; Guideline E

DIGEST: Applicant has had ten documented security violations in the period 1991 through 2006. Applicant has not met his heavy burden of persuasion to rebut the presumption of good faith by Federal Employees. Adverse decision affirmed.

CASENO: 06-22547.a1

DATE: 07/29/2008

DATE: July 29, 2008

In Re:	)	
	)	
---------	)	ISCR Case No. 06-22547
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT
Tara Lee, Esq., Patrick Gunn, Esq.
Michael Traynor, Esq. (Of Counsel,

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 8, 2007, DOHA 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 March 26, 2008, after the hearing, Administrative Judge Wilford H. Ross 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 Applicant was denied due process; whether the Judge's findings are based on substantial evidence; and whether the Judge's adverse security clearance decision under Guideline K is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings: Applicant is 49, single and has a Bachelor of Science degree. He has worked for his employer (Company) for 20 years. Applicant has moved up the ranks, holding positions of increasing authority and responsibility. He currently supervises 90 people who have security clearances. Applicant has favorable employment and character references.

Applicant has had ten documented security violations between 1991 and 2006, and admitted all of the allegations in the SOR.[1] During the entire time the Applicant has been at the Company, there has been a rule which allows employees on a secure floor to have classified information out of the classified container until 5:30 p.m. during the work week. At that time, all classified material must be returned to the container and secured for the night. Applicant worked on the secure floor at all times relevant to the case.

Applicant's first security violation occurred on March 22, 1991. This violation was for leaving his classified container unsecured and unattended. His second security violation occurred on March 28, 1991. This violation was also for leaving his classified container unsecured and unattended. This time it was unattended for over a day The Security Administrator wrote at the time, "[Applicant] was obviously concerned that this was his second open container violation within a one week period, and indicated that he would ensure that his container is properly secured in the future." This report was sent to a person in the Company's senior leadership (Mr. A) and also to the Defense Investigative Service (DIS).

Applicant's third security violation occurred on October 10, 1991. This violation was for leaving his classified container unsecured and unattended for approximately 25 minutes. This report was also sent to Mr. A and DIS. Applicant's fourth security violation occurred on January 6, 1992. This violation was for leaving his classified container unsecured and unattended for approximately

[1]The SOR originally alleged nine security violations. It was amended on October 2, 2007 to add the tenth violation as SOR paragraph 1(j).

six hours. This report was again sent to Mr. A and DIS. As a result of this report, additional security procedures were applied to Applicant's container.

Applicant's fifth security violation occurred on January 13, 1993. This violation was for leaving his classified container open, a Secret disk on his desk, and a Secret disk pack in his computer, all unsecured and unattended for two hours and 50 minutes. There were 81 unsecured classified items in his office at the time of this violation. Mr. A was sent an email by the security department concerning this security violation. This e-mail indicates that the Applicant "was reminded of the seriousness of the situation with respect to repeated security violations." Applicant was also reminded by the security department of the requirements established after his last security violation. Additionally, he was told that, despite the fact this was his fifth security violation in 22 months, DIS would not be sent a report, but that "any further breaches of security would have to be reported to the government with the resultant possibility of a formal investigation to determine his eligibility for continued access to classified information."

Applicant's sixth security violation occurred on December 27, 1999. This violation was for leaving his classified container unsecured and unattended. Applicant stated that he did not have an end of day security procedure in place and that is why the violation occurred. Applicant's seventh security violation occurred on July 21, 2003. This violation was for leaving his classified container unsecured and unattended for approximately 40 minutes.

Applicant's eighth security violation occurred on December 3, 2003. This violation was for leaving 16 pages of a classified rough draft unsecured and unattended for 45 minutes. A report of the incident was sent to the Defense Security Service. Applicant's ninth security violation occurred on October 12, 2005. This violation was for leaving his classified container unsecured and unattended for approximately five hours. Applicant once again stated to the Company security department that "he fully understands the importance of protecting classified information as well as the rules and regulations put in place to protect that same information." His direct supervisor at that time (Ms. B) was also notified of this violation.

Applicant's tenth security violation occurred on May 16, 2006. This violation was for leaving his classified container unsecured and unattended. Ms. B was notified of this violation. Applicant was again notified of his security responsibilities and, again, the Applicant indicated "that he fully understands the importance of protecting classified information as well as the rules and regulations put in place to protect that information."

(1) Applicant contends that the Judge did not adhere to the procedural requirements of Executive Order 10865 and the Directive because he did not conduct all proceedings in a "fair, timely, and orderly manner," and he did not issue his decision "in a timely manner." In support of this contention he argues that the Judge "interrupted [Applicant's] testimony to deal with another

matter" on one occasion, "thereby interrupting his own ability to focus on [Applicant]," and he took four and a half months to issue his decision in the case.[2]

The Board does not find Applicant's arguments in this regard persuasive. The transcript shows only that the Judge went off the record for an unspecified period of time. No reason was given for the recess, and no objection was made by Applicant's counsel at the time.[3] There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that the Judge acted improperly, unfairly or unprofessionally. *See, e.g,* ISCR Case No. 06-17409 at 2 (App. Bd. Oct. 12, 2007); ISCR Case No. 03-00740 at 2 (App. Bd. Jun. 6, 2006).[4]

The Board has no supervisory authority over Hearing Office Judges and no basis to assume how large an individual Judge's caseload may be. In this case, there is no basis in the record to conclude that the Judge processed this case in way that would constitute error. *See, e.g.,* ISCR Case No. 03-10880 at 3-4 (App. Bd. Jun. 24, 2005)(where Applicant objected to the 141 day passage of time between his hearing and the issuance of the Judge's decision). Absent a showing that a delay in the processing of a case prejudiced an applicant's rights in a meaningful way, mere proof of a delay is not sufficient to warrant remand or reversal of the Judge's decision. *See, e.g.,* ISCR Case No. 00-0030 at 4 (App. Bd. Sep. 30, 2001); DISCR Case No. 93-1186 at 5 (App. Bd. Jan. 6, 1995).

(2) Applicant also argues that the Judge erred as to six of his findings about the length of time Applicant had left classified containers unsecured and unattended,[5] and three of his

[2]Applicant's Brief at 30.

[3] *See* Transcript at 203.

[4]The record in this case is not troublesome. In some cases, a Judge's manner of going off the record has produced transcripts that are difficult to follow or leave pertinent decisions undocumented. It behooves the parties and the Judge to ensure that a record is complete and intelligible.

[5]Applicant argues that he left classified material unattended and unsecured: (1) on March 28, 1991, for less than a day, not for over a day; (2) on January 6, 1992, for 40 minutes, not for approximately six hours; (3) on January 13, 1993, for 50 minutes, not for two hours and 50 minutes; (4) on July 21, 2003, for 11 minutes, not 40 minutes, (5) on December 3, 2003, for 33, not 45 minutes; and (6) on October 12, 2005, for 45 minutes, not approximately five hours. Applicant does not dispute the fact that he left classified material unattended and unsecured on any of the aforesaid dates.

characterizations based on the evidence as a whole.[6] Applicant's argument in this regard does not demonstrate harmful error.

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).

After reviewing the record, the Board concludes that the Judge's material findings of security concern are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record, and are, therefore, sustainable. Applicant has not identified any harmful error likely to change the outcome of the case.

(3) Finally, Applicant argues that the Judge's adverse decision is arbitrary, capricious and contrary to law because the Judge failed to examine relevant evidence and factors, failed to consider an important aspect of the case, and reached an overall decision that ran contrary to the record evidence. The Board does not find this argument persuasive.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable 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.

The Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.,* ISCR Case No. 04-08623 at 4 (App. Bd. Jul. 29, 2005). He is not required to cite or discuss every piece of record evidence. *See, e.g,* ISCR Case No. 04-01961 at 2 (App. Bd. Jul. 12, 2007). The Judge's decision is not measured against a standard of perfection. *See, e.g.,* ISCR Case No. 03-01009 at 5 (App. Bd. Mar. 2005). A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. He found in favor of Applicant under Guideline E. However, he reasonably explained why

[6]Applicant objects to the Judge's statement that the "senior leadership" at Applicant's company "effectively were undercutting the work of their own security staff by downplaying or ignoring the repeated violations of Applicant." He also objects to the Judge's statements that Applicant "knew the rules but felt he could ignore them," and that his repeated violations were "not 'inadvertent,' but the result of a personal attitude." Decision at 10.

the evidence which the Applicant had presented in mitigation was insufficient to overcome all the government's security concerns. 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. The Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). "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). Accordingly, the Judge's adverse decision under Guideline K is sustainable.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board