

KEYWORD: Guideline E

DIGEST: Judge’s adverse credibility determination is reasonably supported by the record, as is his determination that Applicant engaged in falsification. Judge’s whole-person analysis is sustainable. Adverse decision affirmed.

CASENO: 08-06951.a1

DATE: 01/11/2011

DATE: January 11, 2011

In Re:)	
)	
-----)	ISCR Case No. 08-06951
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Tovah A. Minster, Esq., Department Counsel

FOR APPLICANT

C. Joel Van Over, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 23, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 24, 2010, after the hearing, Administrative Judge John Grattan

Metz, Jr., denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether certain factual findings made by the Judge are supported by the record evidence, whether the Judge properly considered evidence in mitigation, and whether the Judge properly analyzed the case under the whole-person concept. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant obtained his first clearance in October 1997, and it was renewed in May 2003 after a periodic reinvestigation. He handled classified information as necessary, without incident. Most of his work was for one government agency. From 1997 to 2005, Applicant took government computer equipment from his workplace without authorization. He was aware of the requirement to have a property pass to take government equipment out of the building. Applicant mostly took government equipment home to familiarize himself with it to better perform his work. He usually returned the equipment within a few weeks, but in some instances kept it longer when it became apparent that the equipment was not going to be used in his work. Applicant generally did not use the equipment for personal reasons, but did use a digital camera to take family pictures. Applicant also took home items the government agency had thrown in the trash, including compact discs, video discs, and an unopened copy of reinstallation software. The misuse of government property came to light when Applicant underwent polygraph examinations in 2005. The polygraphs were initiated as a result of Applicant's company nominating him to work on a contract with a different government agency, Agency 2. During the polygraphs, Applicant disclosed the misuse of government property as well as a history, from 1990 to 2005, of damaging the automobiles of persons who he considered to have driven dangerously. Applicant did the damage by "keying" the exterior of the vehicles. He has given varying estimates of the number of times he "keyed" automobiles. At the hearing he testified that he did this 6-10 times after earlier stating that he did it approximately 6-15 times. In November 2005, Agency 2 disapproved Applicant for additional access and revoked his existing access. Agency 2 raised issues under criminal conduct and personal conduct stemming from the misuse of government property and the "keying" incidents. The agency also based its decision on its assessment that Applicant had not been candid during security processing because he reported his misconduct in a piecemeal fashion. In January 2006, Applicant requested a review of the decision, but the decision was affirmed in December 2006. He was taken off the Agency 2 contract and assigned to other contracts. Applicant did not provide his facility security officer with copies of the correspondence between him and the government agency concerning the denial and revocation of his access. In March 2007, Applicant completed another clearance application for his periodic investigation. Applicant answered "no" to Question 26(b) requiring him to disclose if he had ever had a clearance or access authorization denied, suspended, or revoked. Applicant denies intending to falsify his clearance application, variously claiming that the omission was an oversight or that he was only focused on the "clearance" aspect of the question. The Judge found neither claim credible. The March 2007 clearance application was at least the third application Applicant had completed in 11 years, so he was familiar with the forms and the process. The language of the question is straightforward, and Applicant answered it three months after receiving the last letter from Agency 2 affirming the denial and revocation of his access. Applicant never gave his facility security officer copies of the letters from the agency, suggesting he did not

want the company to know about Agency 2's action. The company became aware of the termination of Applicant's clearance in November 2008, at which time it took the appropriate steps to notify clients that Applicant no longer had a clearance, and therefore no access. At least one incorrect visit request was processed for Applicant prior to November 2008. Applicant's work reference considers him honest and trustworthy and recommends him for his clearance.

The Judge concluded that: The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. Applicant falsified his March 2007 clearance application. Agency 2's adverse access determination was based, in part, on Applicant providing disqualifying information in a piecemeal fashion. In addition, Applicant took government property from his workplace to his home for personal use, without authorization, and without returning it in a timely manner. He also engaged in vigilante vandalism for about 15 years. There are two separate, but intertwined, threads of disqualifying conduct. First, Applicant has shown his willingness to hide adverse information from the government. Second is Applicant's willingness to decide for himself what government requirements and societal norms he will follow. Both forms of misconduct ceased in 2005 when they surfaced during his polygraph examinations. Applicant has handled classified information without incident since 1997. His work reference considers him trustworthy and reliable. However, this favorable information is inadequate to overcome the adverse implications of his misconduct under Guideline E or to warrant a favorable result under a whole-person analysis.

Applicant argues that substantial record evidence undercuts the Judge's finding that Applicant intentionally falsified his 2007 security clearance application. He states his position that he believed that he was only denied additional access to work on specific contracts of Agency 2, and his security clearance was not denied or revoked. He states that he believed the question was only asking about denials and revocations of a security clearance, and therefore did not address issues of access. Applicant asserts that his response was the product of oversight and that he misunderstood the question. Applicant objects to the Judge's consideration of the fact that he had filled out security clearance applications before as an impermissible "shifting of the burden" to him. Applicant's arguments do not establish error on the part of the Judge.

Applicant's testimony about the circumstances surrounding his answering Question 26(b) on his security clearance application, and his testimony about his state of mind at the time and what he reasonably believed were all matters that the Judge was required to consider. However, the Judge was also required to evaluate critically this evidence in light of all the other evidence in the record. Considering the totality of the record evidence in this case, including evidence that sheds light on Applicant's overall credibility, the Judge was not obliged to accept Applicant's version of events, nor was he required as a matter of law to find ultimately that Applicant's erroneous answer to the question was unintentional. Applicant has given varying explanations for why he answered the question the way he did, and they are not all consistent with one another. For example, Applicant's assertion that the requirement to complete the application hurriedly prevented him from reading the question carefully and therefore his mistake was a product of oversight does not completely square with his claim that he misunderstood the question and thought it referred only to clearances as opposed to access, a response that suggests some forethought in the response process. The totality

of the explanations and the extent to which they were inconsistent was a factor that the Judge reasonably considered in assessing Applicant's credibility and ultimately his state of mind. Another factor considered by the Judge was the plain wording of Question 26(b), which requires disclosure of a denial, suspension, or revocation of an access authorization as well as a clearance. Thus, Applicant's belief that he was only denied access, as opposed to losing his clearance, would not provide a satisfactory explanation for why he answered the question the way he did. The Judge also properly considered Applicant's written appeal to Agency 2 following the denial of access and the proximity of the appeal process to Applicant's execution of his security clearance application.

Applicant contends that the Judge's consideration of the fact that he had filled out security clearance applications before improperly shifted the burden of persuasion on the issue of falsification to Applicant. Applicant fails to explain adequately how the Judge's consideration of this factor, which was just one of numerous factors that the Judge properly considered in resolving the falsification issue, served to improperly shift the burden. The Judge's consideration of Applicant's prior experience in dealing with security clearance applications when assessing his state of mind was not error.

The Judge did not find credible Applicant's explanations as to why his incorrect answer was the result of inadvertence, as opposed to deliberate action. A Judge's credibility determination is entitled to deference on appeal. Directive, ¶ E3.1.32.1. Here, the Judge relied in part on the assessment of Applicant's credibility made by Agency 2 in making his own negative credibility assessment. He also relied on other factors, such as Applicant's varying explanations for his answer to Question 26(b), his level of experience with applications, and the wording of the question. The Judge's adverse credibility determination is reasonably supported by the record, as is his determination that Applicant falsified his answer to Question 26(b).

Applicant asserts that the Judge failed to consider exculpatory and mitigation-related evidence and failed to conduct a reasoned analysis of same. Applicant contends that this deleteriously affected his whole-person analysis and his decision as a whole. Applicant also states that the Judge committed error by not providing a detailed analysis of the whole-person factors. Applicant's arguments fail to establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). Applicant fails to establish that the Judge ignored significant record evidence or did not give sufficient consideration to matters in mitigation. Also, a Judge is not required to discuss each and every piece of record evidence in making a decision. Of course, the Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007); ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004). After a review of the entire record and the Judge's decision, the Board concludes that the Judge provided sufficient detail in his analysis of the case, and did not neglect significant portions of the record in his 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. Th Judge properly considered the whole pattern of Applicant's conduct, which included misuse of government property, falsification, and vandalism in reaching his ultimate conclusion in the case. He adequately discussed why the disqualifying conduct established under Guideline E was not mitigated.

The Board does not review a case *de novo*. The favorable 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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that 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). Therefore, the Judge's ultimate unfavorable security clearance decision 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
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board