

KEYWORD: Guideline E; Guideline K

DIGEST: The Judge's application of collateral estoppel of issues decided in MSPB proceedings did not impair Applicant's ability to present a case in mitigation and extenuation. Applicant's argument that DOHA was obliged to grant him a clearance due to the NISPOM's reciprocity provision is inconsistent with the language of the provision. Adverse decision affirmed.

CASENO: 11-09245.a1

DATE: 07/08/2014

DATE: July 8, 2014

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In Re: )	
)	
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)	
Applicant for Security Clearance )	
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**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 April 17, 2013, DoD 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 (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 19, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy 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 applying the doctrine of collateral estoppel to a prior Merit Systems Protection Board (MSPB) decision; whether the Judge should have concluded that Applicant was entitled to a clearance through the doctrine of reciprocity; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.<sup>1</sup>

### **The Judge’s Findings of Fact**

Applicant is an employee of a Defense contractor. He started working for his employer in 2010. Applicant has served on active duty with the U.S. military, in the reserves, and in the National Guard. He retired in the grade of E-8. He has held a clearance since the late 1980s.

In the early 2000s, Applicant began a job as a civilian employee of the Federal Government in a position that required a security clearance. While in this job, Applicant was investigated for selling excess Government property on the internet. Although cleared of that allegation, the investigation concluded that Applicant had improperly utilized a Government computer to track transactions. The investigation also concluded that Applicant’s Government computer contained pornographic material.

A few years later, some media (M) were found at Applicant’s job site that contained classified information but that did not have classified markings. An investigation concluded that Applicant had removed the classification markings and had improperly distributed the CDs.

In 2004, Applicant’s chain of command proposed that he be removed from his job. The reasons were (1) violation of regulations in which restricted information was compromised, (2) misuse of Government equipment, and (3) repeated failure to follow supervisory orders and instructions. This removal was effectuated the following year. He appealed to the MSPB. After a hearing, the Administrative Law Judge (ALJ) upheld the removal. Regarding the first allegation, the ALJ stated that Applicant’s denial of responsibility was not credible. He concluded that Applicant was the author of the M in question. Decision at 5. As to the second allegation, the ALJ found that Applicant Government computer was used to track internet sales and that it contained

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<sup>1</sup>While the case was pending, Applicant submitted a second brief. The Directive only authorizes one brief from each party. To the extent that the second brief is premised on the assertion that Department Counsel’s brief raised a new issue, we disagree. However, where we have reached such a conclusion in a past case, the proper solution was for us to decline to consider the argument. *See, e.g.*, ISCR Case No. 12-00120 at n. 1 (App. Bd. Feb. 10, 2014).

pornographic material. The ALJ concluded that Applicant violated agency regulations by tracking sales and that his contention that others may surreptitiously have placed pornography on his computer was unsupported by the evidence. The ALJ also concluded that the third allegation was supported by the preponderance of the evidence.

In addition to the removal action, the adjudication facility (AF) issued Applicant an SOR that contained similar allegations. After considering Applicant's response to the SOR, the AF restored Applicant's clearance, with a warning that subsequent unfavorable information may lead to another clearance suspension.<sup>2</sup>

Subsequently, Applicant was accepted for employment by another Government agency (AGA). This agency granted him a clearance in October 2007. However, AGA terminated Applicant's employment based on the incidents set forth in his prior removal action. The Notice of Termination cited both Applicant's responses to AGA interrogatories and to the ALJ Decision.

After his job loss in 2005, Applicant received two promotions in the National Guard. Applicant's former commander stated that Applicant always took care with classified information. He related an incident in which Applicant took steps to protect him when they came under fire in an overseas location. Applicant enjoys a good reputation for following orders and safeguarding classified information. He has engaged in significant community outreach endeavors through his church and has received several medals and awards during his service in the military.

### **The Judge's Analysis**

The Judge concluded that the Government had presented substantial evidence of an intentional security violation. Noting the discrepancy between Applicant's having been removed from his job yet having retained his clearance, the Judge stated that the AF acted before the ALJ Decision was issued. He stated that the ALJ had the advantage of considering in-person testimony, which, in the Judge's view, enhanced the weight to which the ALJ Decision was entitled. The Judge concluded that, despite his impressive character evidence, Applicant had not met the "very heavy burden" of persuasion necessary to mitigate the Guideline K concerns alleged in the SOR. He stated that Applicant's denial of culpability evidenced a failure to accept responsibility for his conduct. The Judge also cited to a nonjudicial punishment given to Applicant in the late 1990s for falsifying orders, which detracted from Applicant's credibility.

Under Guideline E, the Judge concluded that Applicant's having used a Government computer to track internet sales did not raise security concerns. However, he found that Applicant did fail to follow his supervisor's orders which, although less serious than the security violation, raised a security concern. As with the Guideline K allegation, the Judge concluded that Applicant's conduct raised concerns that had not been mitigated by the record evidence.

### **Discussion**

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<sup>2</sup>The AF restored Applicant's clearance before the ALJ issued his Decision on the removal action.

### Collateral Estoppel

Applicant contends that the Judge erred in extending collateral estoppel effect to the Decision of the MSPB ALJ. The ALJ Decision addressed all of the conduct that is at issue in the case before us. The criteria pertinent to a collateral estoppel determination are (1) that the party against whom it is asserted had an opportunity to litigate the earlier case; (2) that the issues in the current hearing are the same as those in the prior one; and (3) that application of collateral estoppel must not result in unfairness. *See, e.g.*, ISCR Case No. 09-02752 at 4, n. 1 (App. Bd. Apr. 6, 2010). We have previously held that MSPB hearings can satisfy the requirements of collateral estoppel. ISCR Case No. 03-24233 at 7 (App. Bd. Oct. 12, 2005). In the case before us, the Judge's conclusion that the MSPB Decision met the above criteria is consistent with the record that was before him. Applicant argues that he was precluded from submitting the full range of exculpatory evidence that he otherwise would have offered had the Judge not applied collateral estoppel. We note, however, that the Judge's ruling on the collateral estoppel issue stated that Applicant would not be precluded "from presenting evidence to explain his conduct, present it in a meaningful context, and ultimately to extenuate or mitigate such conduct." Ruling on Motion in *Limine* at 6. We also note that the Judge limited his application of collateral estoppel by giving "no weight" to the ALJ's conclusion that Applicant had violated a regulation by tracking internet sales. The voluminous documentary record and the hearing transcript support a reasonable conclusion that Applicant was given wide latitude to present his case, within the constraints of the Judge's ruling. Moreover, the Government's own evidence includes Applicant's response to the AF's SOR (Government Exhibit 7), which contains much that is exculpatory in nature, as does the extensive documentation accompanying Applicant's response to the DOHA SOR. We find no reason to believe that the application of collateral estoppel in this case caused unfairness to Applicant.

### Reciprocity

Applicant contends that the Judge erred in not granting him a clearance based upon reciprocity with his 2005 adjudication. The Judge found that Applicant underwent a periodic reinvestigation of an existing clearance in 2003, and the AF granting him a clearance in June 2005. After he was removed from his job, he took a position with AGA, which granted him a clearance in 2007 based on reciprocity with the 2005 grant. The reinvestigation that is the subject of the current DOHA adjudication closed in 2011. The security clearance application that initiated this reinvestigation was submitted in December 2010.

DoD 5220.22-M, *National Industrial Security Program (NISPOM)*, dated February 2006, ¶ 2-204, provides the following:

Any previously granted [clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

NISPOM ¶ 2-201 explains what qualifies as a current investigation: investigations by one Federal agency will not be duplicated by another Federal agency “when those investigations are current within 5 years[.]” We have stated that if any of the elements set forth in ¶ 2-204 are not satisfied, reciprocity does not apply. ISCR Case No. 03-04172 at 3-4 (App. Bd. Jun. 7, 2005). In the case before us, the investigation upon which the current DOHA adjudication is based closed in 2011. It was initiated more than five years after Applicant was granted his prior clearance. Therefore, that earlier investigation was not current within the meaning of the NISPOM, precluding an application of reciprocity.<sup>3</sup> The 2007 grant by AGA is of no significance, insofar as it was not based upon the current periodic reinvestigation. The Judge did not err in failing to extend reciprocity to Applicant’s earlier adjudications.

### Other Issues

We have considered Applicant’s arguments challenging the sufficiency of the Judge’s mitigation analysis. Once it is established that an applicant has committed security violations, he or she has a “very heavy burden” of persuasion that he or she should have a clearance. Security violations “strike at the heart of the industrial security program.” ISCR Case No. 10-04911 at 5 (App. Bd. Dec. 19, 2011). The record supports the Judge’s conclusion that Applicant had not mitigated the concerns arising from his security violations and from his failure to follow orders and instructions. Applicant’s appeal argument is, to a large extent, a disagreement with the Judge’s weighing of the evidence, which is not sufficient to demonstrate error. We note Applicant’s argument that he had been given a clearance in 2005 despite AF’s knowledge of the same security concerns at issue here. However, in a case like this, in which the applicant is not entitled to reciprocity, the Government is not precluded from making an adverse clearance determination despite prior favorable ones. *See, e.g.*, ISCR Case No. 06-23613 at 4 (App. Bd. Feb. 4, 2013). The interests of national security are paramount in decisions rendered under the Directive.

Applicant challenges the Judge’s conclusions about his credibility. The ALJ Decision, even without recourse to collateral estoppel, could persuade a reasonable person that Applicant committed the misconduct at issue in the case before us. A reasonable person could also conclude that Applicant’s denials of this misconduct lacked credibility, impugning his case for mitigation. We defer to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. We note the Judge’s reference to Applicant’s nonjudicial punishment. We find no error in his consideration of this evidence as part of his credibility determination, nor do we find error in the apparent weight which he extended to it. Conduct not alleged in an SOR can be considered for things besides actual security concerns, such as assessing an applicant’s credibility. *See, e.g.*, ISCR Case No. 11-12803 at 2 (App. Bd. Feb. 21, 2014).

Applicant’s brief cites to numerous other DOHA cases that he contends support his effort to obtain a clearance. We have given these cases due consideration as persuasive authority.

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<sup>3</sup>Additionally, under the facts of this case, a reasonable person could conclude that the ALJ Decision and the removal action by AGA constituted derogatory information that was not available for consideration in the 2005 adjudication by AF.

However, we do not find in them a reason to reverse the Judge's adverse decision. In any event, they are not binding on either other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 13-00464 at 3 (App. Bd. Feb. 20, 2014). Applicant cites to his prior favorable adjudication, his good work history, his military history, and other favorable matters. A Judge is presumed to have considered all of the evidence in the record. ISCR Case No. 11-13948 at 3 (App. Bd. Feb. 26, 2014). The Judge made extensive findings about much of the evidence to which Applicant refers. Applicant's arguments are not sufficient to show that the Judge did not consider all of the evidence.

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information 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: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board