KEYWORD: Guideline K; Guideline E

DIGEST: The Judge's finding that Applicant's security violations were not the result of honest mistakes is sustainable. The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's security worthiness. Applicant failed to rebut the presumption that the Judge considered all of the evidence in the record. We give deference to a Judge's credibility determination. Hearing Office cases are binding neither on other Hearing Office Judges nor on the Appeal Board. Adverse decision affirmed.

CASE NO: 11-10255.a1

DATE: 07/28/2014

DATE: July 28, 2014

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Corey Williams, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 4, 2013, DoD 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 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge erred in her findings of fact; whether Applicant's circumstances raised security concerns; and whether the Judge's decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issues on cross-appeal: whether the Judge erred in failing to address Applicant's security infractions under Guideline E as alleged and whether she erred in failing to address Applicant's failure to report his security breaches under Guideline K as cross-alleged. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is an employee of a Federal contractor who, in the past, has held sensitive compartmented information (SCI). In 2008, another Government agency (AGA) conducted a periodic re-investigation of Applicant, revoking his access to SCI.

The reason for the revocation was a series of security violations by Applicant extending back several years. AGA discovered that, during a prior investigation, Applicant had admitted to having disclosed classified information to his ex-wife, to an office worker, and to his pastor. None of these persons were cleared for access to the information. Applicant also took home documents from which he had removed classified headers and used a classified floppy disk on his home computer, which was not classified. He committed this latter infraction three to five times in the late 1980s. Applicant contends that his use of classified materials at home was justified because of the urgency and importance of his work. He was attempting to balance the demands of his job with those of stresses that his job placed on his family.

During a series of interviews in 2008, Applicant admitted to security violations that he had committed during the prior four years. He admitted taking material from his former employer without permission. These included 42 "banker boxes," six CDs, and twelve videotapes, all containing proprietary information related to his employer's national defense projects. Although he assumed that the contents of the "banker boxes" were not classified, he did not review them before removing them from the premises.

Just before one of his 2008 interviews, Applicant discovered that at least one of the boxes contained classified information. He turned the material over to his current employer's facility security officer (FSO). The FSO advised Applicant that he should not retain in his possession his former employer's proprietary information. Applicant contends that the FSO told him to either return the material to the employer, bring it into work for proper storage, or destroy the material, although he provided no corroboration for this assertion. Applicant used his personal shredder to destroy the remaining classified information, along with other information that had not been publicly released. He acknowledged that his reason for taking the material was to preserve his professional legacy and to benefit from being the only person in possession of the materials. He also hoped that the information would help him in his future work.[1]

[1]In Government Exhibit 2, Answers to Interrogatories, Applicant stated that his "only reason for possessing the boxes of files was to support future work in support of the U.S. Government defense interests." *Compare*, however, with his hearing testimony: "[A]: It wouldn't be something that a commercial entity or I personally would benefit from, but

After this interview, the FBI searched Applicant's home, removing numerous items, including 34 trash bags. Applicant had intended to dispose of the shredded documents along with his household garbage. During subsequent interviews, he admitted to having disclosed classified information to another family member and to a friend. He also stated that he had a binder of "random notes" pertaining to his work that he believed were not appropriate outside a classified setting, although he claimed that the notes were not classified and that it would have been "nearly impossible" for someone else to place them in context. Decision at 4.

Based on the results of the periodic re-investigation, AGA issued Applicant an SOR, revoking his access to SCI. Applicant contended during his appeal that the incidents in 2004 and the years following were the result of factual errors. AGA's appeal board upheld the agency's decision to revoke Applicant's access to SCI.

The Judge's Analysis

The Judge cited to Applicant's admissions during his AGA interviews. She stated that his efforts at mitigation did not undermine the overall tenor of these admissions, that he had "habitually mishandled classified or other protected information for may years." *Id*. At 5. She stated that Applicant provided no evidence of remedial training and that the number of violations to which Applicant had admitted impaired the credibility of his promise to be more cautious in the future. She also noted evidence that Applicant did not self-report these incidents until his interviews, which raises concerns under Guideline E.[2] She concluded that Applicant had failed to mitigate the security concerns raised by his conduct. In the whole-person analysis, she stated that Applicant had "repeatedly demonstrated a lack of respect and understanding of the rules that apply to the handling and safeguarding of classified information . . ." *Id*. At 6. She stated that he had placed his own interests over his obligation to protect classified information and that there is nothing in the record to suggest that he will change.

Discussion

Applicant has challenged some of the Judge's findings of fact. He notes that one of the allegations in the SOR was amended at the hearing to conform to the evidence. He claims that, as originally written, it was factually erroneous. However, we find no error here, in view of the fact that the Judge made findings and conclusions consistent with the amended language of the allegation

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the use of the information would help in the next concept that would be proposed to the Government. [Q]: But this was all information you kept at your house? [A]: Yes. [Q]: So let's say it all got destroyed. You'd be the only person that had this information possibly because you made sure you saved copies? [A]: I was hoping to benefit from it in a way." Tr. At 101-102.

[2] The Judge found that Applicant's security breaches, cross-alleged under Guideline E, did not raise additional concerns under that Guideline. She also found that his failure to self-report did not raise concerns under Guideline K.

rather than with its original iteration. Applicant has also argued that the Judge's findings mischaracterized the state of mind through which he committed his infractions, emphasizing his contention, expressed during his appeal of the AGA revocation, that he had been honestly mistaken about the classified nature of some of the documents in question. We have examined the Judge's findings in light of the record, paying attention to the documents pertaining to the AGA revocation. A reasonable person could conclude that Applicant's repeated infractions were not the result of honest mistakes but, rather, that they evidenced at the very least negligence in the handling of protected information and, in some instances, deliberate violations.[3] The Judge's material findings of security concern are based upon substantial evidence or constitute reasonable inferences and conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 10-00046 at 3 (App. Bd. Oct.1, 2013).

Applicant contends that his infractions in 2004 and the years following do not raise security concerns. He claims that he took the documents home due to "exigent circumstances" posed by the nature of his job. The Government bears the burden of producing substantial evidence of those allegations that an applicant has controverted. The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2013). In this case, Applicant admitted several of the allegations in the SOR, and, as stated above, the Government produced substantial evidence of the allegations as well. Applicant presented no evidence of any "exigent circumstance" that would justify or excuse his failure to protect classified information. That he was working long hours in the service of his country and found it expedient to work at home does not explain or excuse repeated security infractions, whether negligent or deliberate. Moreover, the Judge's findings about Applicant's desire to "preserve his professional legacy" undermine his argument that he was acting only in the best interests of the U.S. The Judge did not err in concluding that Applicant's circumstances raised concerns under both Guidelines.

Applicant cites to his favorable character references, to his hard work, to the cold-war context of his job, etc. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-13984 at 3 (App. Bd. Feb. 20, 2014). Applicant's argument is not sufficient to rebut that presumption.

Applicant states that he truthfully admitted his security-significant conduct and that Department Counsel described him as a truthful person. He contends that the Judge erred in discounting the credibility of his mitigation evidence. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. In this case, the Judge made no finding that Applicant had failed to admit the full measure of his infractions. Rather, she concluded that the

[3]*See* Letter from AGA Senior Adjudications Officer, included in GE 2: "During a polygraph examination on . . . you admitted to having 42 boxes of documents from your previous employment . . . You stated 30 of the boxes were taken by you at the time of your departure from [prior employment] in 2004. You obtained the remaining 12 boxes in 2007. You stated that you conducted a review of the documents prior to this examination and ascertained some of the documents contained sensitive information and were marked at a specific classification level with no dissemination to foreign nationals. You stated you knew the documents were classified at the time you removed them."

extent of Applicant's misconduct rendered his promises of future compliance with security requirements to be unworthy of belief. Given the record that was before her, this conclusion is sustainable. We find no reason to disturb the Judge's treatment of the credibility of Applicant's mitigation evidence.

In support of his effort to obtain a clearance, Applicant has cited to other cases by Hearing Office Judges in which applicants had received clearances despite security infractions. We give these cases due consideration as persuasive authority. However, Hearing Office cases are not binding on 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's circumstances, as presented in the evidence properly before the Judge, support her adverse decision, and the cases that Applicant has cited are not sufficient to show that the Judge's decision was arbitrary, capricious, or contrary to law.

Applicant takes issue with the Judge's whole-person analysis, which requires a Judge to evaluate an applicant's case in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 13-00311 at 4 (App. Bd. Jan. 24, 2014). The Judge evaluated Applicant's conduct as a whole, rather than in a piecemeal fashion, as some of Applicant's arguments would urge. Applicant provides no reason to conclude that the Judge contravened the requirement of the Directive regarding a whole-person analysis.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision regarding both the mitigating conditions and the whole-person factors. The decision is sustainable on this record. Once it is established that an applicant has committed security violations, he or she bears a"very heavy burden" of persuasion that he or she should be granted 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 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."

In light of this holding, any error identified by Department Counsel on cross-appeal is harmless. We note, however, that an applicant's conduct can be alleged under more than one Guideline and given independent weight under each. *See, e.g.*, ISCR Case No. 03-08257 at 3 (App. Bd. May 16, 2008).

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