

KEYWORD: Guideline E

DIGEST: We examine a Judge’s findings to see if they are supported by substantial record evidence. Failure to provide truthful answers during the clearance investigation process is of special interest in evaluating an applicant’s worthiness for a clearance. We cannot consider evidence from outside the record. Adverse decision affirmed.

CASE NO: 12-03970.a1

DATE: 09/30/2014

DATE: September 30, 2014

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In Re:)	
-----)	ISCR Case No. 12-03970
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 27, 2014, DoD 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 July 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mary E. Henry 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 some of her findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant works for a Defense contractor. She was terminated from a previous employment for having violated her company's policy. Specifically, she asked a fellow employee, who worked in information technology (IT), to obtain a non-business document from the computer of another employee, whom Applicant was dating. The IT employee reported this request to the facility security officer (FSO), who, in turn, notified the employer's human resources office.

The employer suspended Applicant pending an investigation. Upon completion of the investigation, the company fired Applicant. In completing a subsequent security clearance application (SCA) in 2007, Applicant answered "no" to a question about whether, within the previous seven years, she had been fired or otherwise had left a job due to allegations of misconduct. She completed another SCA in 2011, again denying that she had been fired, etc, within the previous seven years. In this SCA, she also denied having been disciplined for misconduct in the workplace, "such as a violation of company security policy." Decision at 7. These answers were false, in view of her job termination in 2006.

Applicant was interviewed in 2012 as part of her clearance investigation. She told the interviewer that she had been laid off from her prior employer. She stated that she had received verbal warnings about tardiness. One month later, the investigator re-interviewed Applicant. She again denied any disciplinary action other than the verbal warnings. When specifically asked if she had been fired or had left a job under unfavorable circumstances, she stated that she had not, insisting that she had been laid off. When confronted with the investigation report, which included a letter of apology Applicant had written concerning her misconduct, she denied any memory of the matter. In her response to the SOR and at the hearing she continued to deny an intent to falsify her answers, claiming that she could not recall the incident.

The Judge made extensive findings about Applicant's character evidence. She enjoys a good reputation for her honesty and trustworthiness. However, not all of her references evidenced knowledge of her security significant conduct.

The Judge's Analysis

The Judge found that Applicant's on-the-job misconduct, along with her omissions and false statements, raised concerns under Guideline E. She stated that Applicant was well aware of the unfavorable circumstances surrounding her job loss and that the SCA questions were clear. The Judge found that Applicant had deliberately omitted the information from her SCAs. She also found that Applicant's false answers during her clearance interviews were deliberate, noting that, even when presented with documents outlining the entire matter, Applicant claimed to have no memory

of it. The Judge found that Applicant had mitigated concerns arising from her misconduct in 2006. However, she concluded that Applicant had not mitigated concerns arising from her numerous false statements. The Judge noted evidence of Applicant's good work record and the laudatory comments by her witnesses and character references. However, she stated that a clearance investigation requires complete honesty at each step and that Applicant had failed to live up to that requirement.

Discussion

Applicant challenges the Judge's finding that she had deliberately provided false information during the processing of her case. We examine a Judge's findings to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the conflicting evidence in the same record." Directive ¶ E3.1.32.1. In evaluating an applicant's *mens rea*, we consider the omissions or false statements in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-03415 at 3 (App. Bd. Jul. 25, 2014).

In this case, we note the Judge's extensive findings in support of her conclusion that Applicant was aware that she had been fired due to misconduct and had not simply been laid off. We note the clarity of the SCA questions, and we note in particular Applicant's continued denial of wrongdoing during her interview despite persistent questioning by the investigator. Given the evidence as a whole, no reasonable person in Applicant's circumstances could honestly have believed that her denials were truthful. The Judge's findings about the deliberate nature of Applicant's many false statements are supported by substantial evidence.

Applicant also contends that the Judge erred in finding that she had committed the misconduct that led to her firing. However, Government Exhibit 5, Counseling Notice with attachments (including the letter of apology by Applicant), supports the challenged finding. The Judge's material findings of security concern are supported by substantial record evidence.

Applicant argues that her circumstances do not raise concern under Guideline E. This argument is predicated on her assertion that she was simply laid off from her job and that she had not falsified her SCAs or provided false answers during her interview. Given our conclusion that the Judge's findings are supported by substantial evidence, however, we find no merit in this argument. Failure to provide truthful and candid answers during the clearance process is "of special interest" in evaluating an applicant's worthiness for a clearance. Refusal to provide truthful answers to lawful questions in connection with a security determination "will normally result in an unfavorable clearance action[.]" Directive, Enclosure 2 ¶ 15.

Applicant cites to her favorable evidence, such as a her good work performance and her testimony that she believed she had been laid off rather than fired. She also argues that there is no evidence of other "personal conduct issues." Applicant's argument is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. Neither is it sufficient to show that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 10-06824 at 2 (App. Bd. Apr. 9, 2014).

In support of her appeal, Applicant has cited to other Hearing Offices cases in which, she argues, applicants similarly situated to her received clearances. We give these cases due consideration as persuasive authority. However, Hearing Office cases are binding neither on other Hearing Office Judges nor on the Appeal Board. *See, e.g.*, ISCR Case No. 11-10255 at 5 (App. Bd. Jul. 28, 2014). These cases do not undermine the Judge’s adverse decision.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. 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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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