

KEYWORD: Guideline E; Guideline F

DIGEST: A review of the record shows Department Counsel’s conduct was consistent with the standards of his position. Adverse decision affirmed.

CASENO: 13-00828.a1

DATE: 02/26/2015

DATE: February 26, 2015

In Re:	)	
	)	
----	)	ISCR Case No. 13-00828
	)	
Applicant for Security Clearance	)	

**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 February 26, 2014, 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 F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).

Applicant requested a hearing. On December 9, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 he was denied due process; whether the Judge's findings contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

The Judge made the following findings pertinent to the issues raised on appeal. Applicant is an employee of a Defense contractor. Since 2012 he has worked part-time pending receipt of a security clearance. From 1986 to his retirement in 2012, Applicant was employed by another Government agency (AGA), at which he held a top secret clearance with access to sensitive compartmented information (SCI).

In 2001, while performing duties for AGA, Applicant used a Government-issued credit card for personal, unauthorized reasons. A subsequent investigation substantiated Applicant's misuse of the card. AGA suspended Applicant for three days without pay and placed him on probation for six months.

Ten years later, again while performing duties for AGA, Applicant misused his Government credit card. An investigation revealed that, from 2007 to 2011, he had used the card 223 times for unauthorized reasons. Applicant eventually paid off a balance of \$9,294.87 in personal charges.

The AGA investigation contained an admission by Applicant that he had withheld his Government credit card statements from the appropriate authority, in order to prevent discovery of his misuse. In his response to the SOR, however, he stated that "there is conflicted information concerning that in current litigation." Decision at 4. He subsequently claimed that the post office box to which the statements were to be mailed had relocated several times.

AGA authorities recommended Applicant's dismissal. He disputed the allegations against him and filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that he had been a victim of unlawful discrimination.

Applicant's security clearance application (SCA) inquired if, within the previous seven years, he had been fired from a job. He answered the question in the negative. This answer was false, in that he concealed his 2012 dismissal from employment for misconduct. He claimed that an attorney had advised him to answer the question as he did.

Another question on the SCA addressed whether, within the previous seven years, Applicant had been counseled, disciplined, warned, etc., for violating terms of agreement for a travel card. He answered this question in the negative, which was false in light of his repeated misuse of his

Government credit card. Applicant denied intending to mislead anyone, but he acknowledged that he should have answered the question in the affirmative.

Other SCA questions pertained to Applicant's financial affairs. He was asked if, within the previous seven years, he had had bills turned over to a collection agency; been over 120 days delinquent on any debt, and if he were currently over 120 days delinquent on any debt. He answered the questions in the negative, which was false. Applicant, in fact, had multiple accounts that were either placed in collection or were over 120 days delinquent. Applicant subsequently admitted having collection accounts, but he denied an intent to mislead.

Applicant has received many certificates of appreciation, superior service, etc. He enjoys an excellent reputation for the quality of his work performance as well as his dedication, efficiency, honesty, trustworthiness, and integrity.

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

The Judge resolved the Guideline F allegations in Applicant's favor. However, he concluded that Applicant had not mitigated the concerns raised under Guideline E. These concerns involved his credit card misuse with resulting job termination as well as his false statements on his SCA. The Judge stated that Applicant's position regarding his false statements was not credible. He stated that Applicant's conduct "shows a lack of honesty and integrity." *Id.* at 11. The Judge concluded that Applicant's false answers were a deliberate effort to conceal the truth about his job loss. He concluded that Applicant had not mitigated the security concerns arising from his misconduct.

### **Discussion**

Applicant states that he lacked the expertise to present his case in a professional manner. He argues that he was outmatched by Department Counsel. However, Applicant received a copy of the Directive, which included information about his right to counsel. In addition, the Judge questioned him at the beginning of the hearing, ascertaining that Applicant understood his rights, including the right to counsel. The Judge also elicited information about Applicant's education and fluency in English, which were sufficient to have enabled him to represent himself. *Tr.* at 6-7. There is no reason to conclude that Applicant's *pro se* representation precluded him from presenting an adequate case in mitigation. He has pointed to no evidence that he would have presented but for his self-representation. The record discloses no reason to believe that Applicant was denied his rights under the Directive or that he had not adequately been advised of those rights. *See, e.g.,* ISCR Case No. 08-03110 at 2 (App. Bd. Jan. 27, 2009). He argues that Department Counsel "berated" him during the hearing, impugning his trustworthiness and candor. We have examined the record as a whole and conclude that Department Counsel did not depart from the standards of zealous advocacy expected of his position. *See, e.g.,* ISCR Case No. 12-04540 at 3 (App. Bd. Mar. 19, 2104). Applicant has not demonstrated that he was denied the due process afforded him by the Directive.

Applicant argues that the Judge’s findings contain errors. He notes that he did not retire from AGA, as the Judge stated at the beginning of his findings. He also denies that he intentionally falsified his SCA. 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 contrary evidence in the same record.” Directive ¶ E3.1.32.1. In evaluating an applicant’s *mens rea*, a Judge must consider the false statements or omissions in light of the record as a whole. *See, e.g.*, ISCR Case No. 13-00142 at 3 (App. Bd. Oct. 15, 2014). The record supports the Judge’s findings that Applicant’s false answers were deliberate. We note the clarity of the questions, Applicant’s acknowledgment that he should have answered at least some of the questions differently, and the Judge’s unfavorable credibility determination, to which we give deference. Directive ¶ E3.1.32.1.

Applicant argues that he answered the questions as he did because of constraints imposed by litigation resulting from his job termination. Neither this argument nor the record evidence are sufficient to justify favorable application of Guideline F Mitigating Condition 17(b).<sup>1</sup> *See* ISCR Case 12-04540, *supra*, at 6 (The applicant’s claim that he omitted material information from his SCA because he was undergoing an administrative appeal of a clearance denial insufficient to raise MC 17(b)). Among other things, the evidence does not support a conclusion that Applicant has cooperated fully and truthfully once he was made aware of his obligation to cooperate. The Judge’s negative credibility determination undermines Applicant’s argument on this issue.

We agree with Applicant that the Judge erred in stating that he had retired from AGA, insofar as he was fired. However, we find no reason to conclude that this error affected the overall decision. Applicant has cited to no harmful error in the Judge’s findings. The Judge’s material findings of security concern are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence.

Applicant denies that his circumstances raised concerns under Guideline E. The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant’s eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-00114 at 4 (App. Bd. Sep. 30, 2014). In the case before us, the Judge found that Applicant had misused his Government credit card, for which he was fired, and that he made several deliberately false statements on his SCA. The Directive provides that failure to provide truthful answers to lawful questions during the processing of a clearance determination “will normally result in an unfavorable clearance action[.]” Directive ¶ 15. Applicant’s false statements, along with his other misconduct, are sufficient to persuade a reasonable person that he has questionable judgment, lacks candor, and may be unwilling to follow rules and regulations. *Id.* Applicant’s argument is not sufficient to rebut the presumption of nexus.

---

<sup>1</sup>Directive, Enclosure 2 ¶ 17(b): “the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.”

In challenging the Judge’s mitigation analysis, Applicant cites to his testimony to the effect that the proceedings leading up to his job termination were unfair. He also cites to evidence that he has filed a discrimination complaint against AGA with the EEOC. He argues that this evidence demonstrates that his conduct was not serious enough to justify denying him a clearance. The Judge made findings about this evidence. In the Analysis, however, he properly noted that the central issue was Applicant’s conduct rather than the degree of adverse action that he had experienced and that a DOHA hearing is not a proper forum for addressing Applicant’s complaints against AGA. Applicant’s arguments about the purported unfairness of the AGA proceedings do not call into question the Judge’s findings about his misconduct or his discussion of their significance. Applicant also cites to his favorable evidence, such as his good work record. His arguments are not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-04540, *supra*, at 6.

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