

KEYWORD: Guideline E

DIGEST: The Judge's material findings are sustainable.. The Directive assumes a rational connection between the Guidelines and an applicant's security eligibility. Adverse decision affirmed.

CASENO: 06-26304.a1

DATE: 07/11/2008

DATE: July 11, 2008

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In Re:)	
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-----)	ISCR Case No. 06-26304
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Donna MP Wilson, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 9, 2007, 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 March 31, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s findings are based on substantial evidence; and whether the Judge’s adverse security clearance decision under Guideline E is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings: Applicant is a 34-year old senior security clearance adjudicator employed by a defense contractor since October 2005. She seeks to retain the security clearance she has held since September 1997.

Applicant first went to work for Company 1 in October 2002, when she was employed as a contract adjudicator on-site at a federal government agency. Company 1 lost the contract to Company 2 in May 2005; but because Company 1 did not have a contract on which to employ her, she continued to work at the same site for Company 2. In so doing, she signed a standard non-disclosure agreement, stating that she would not disclose any information about Company 2 or its employees outside the company without the company’s permission. She asserted that she never read the document and signed it hurriedly to keep her job. However, she knew from earlier employments that she was prohibited from disclosing information about the company or its employees without permission. In September 2005, Applicant received an offer of employment from Company 1, which she indicated she would accept. Company 1 also indicated it was looking for other employees, and was willing to consider any of her coworkers who were interested. Applicant passed the information to her coworkers, collected resumes they offered to her, and attempted to transmit them by facsimile to Company 1—using the government agency facsimile machine and agency cover sheet. By error, she did not transmit the resumes and other supporting documents to Company 1, but to her then employer, Company 2. Company 2 fired her the same day for violating her written non-disclosure agreement.

In October 2005, Applicant resumed employment with Company 1. Her current supervisor considers her an excellent employee, but acknowledged that a non-disclosure agreement such as Applicant signed with her previous employer is fairly standard in the industry, and Applicant’s company also uses a similar agreement. He stated that providing employee information, such as resumes, to a third party without authorization is potential grounds for termination. At the hearing, as in her answer to the SOR, Applicant insists that she did nothing wrong. However, she acknowledged that it was not in her then-employer’s financial interest for her to transmit her coworkers’ resumes to a competitor, and it was not part of her job description.

(1) Applicant argues that the Judge’s adverse clearance decision should be reversed because the Judge erred in finding that Applicant “insisted that she did nothing wrong” and that “she does not really understand why what she did was wrong or why her employer was so upset that it fired her on the spot.” The Board does not find Applicant’s argument persuasive.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

After reviewing the record, the Board concludes that the Judge's findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

(2) Applicant also argues that the Judge erred, as a matter of law, because (a) he did not articulate a nexus between Applicant's conduct and the security concerns set forth under Guideline E, and (b) he did not favorably apply any mitigating conditions or whole-person factors. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 02-22325 at 3-4 (App. Bd. Jul. 30, 2004). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The absence of security violations does not bar or preclude an adverse security clearance decision. *See* ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance 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*. An applicant'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.

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct. Decision at 3-4. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Id.* at 4. The Board does not review a case *de novo*. The favorable record 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 2 (App. Bd. Sep. 4, 2007). 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). Accordingly, the Judge’s adverse decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board