

KEYWORD: Guideline K; Guideline E

DIGEST: Security concern arose from two separate instances of security violations. Applicant also admitted to two additional violations not referenced in the SOR. Judge’s decision that Applicant had failed to mitigate the concerns raised in the SOR is sustainable. Adverse decision affirmed.

CASENO: 07-05761.a1

DATE: 11/14/2008

DATE: November 14, 2008

In Re: _____ Applicant for Security Clearance)))))))	ISCR Case No. 07-05761
--	---------------------------------	------------------------

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT

B. Daniel Lynch, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 13, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline K (Security Violations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 7, 2008, after the hearing, Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's adverse decision was arbitrary and capricious; whether the Judge's whole-person analysis was erroneous; and whether the case raised Guideline E security concerns. Finding no error, we affirm.

The Judge made the following findings of fact: Applicant holds two Bachelor of Science degrees and a Master's degree in electrical engineering. He works as an electrical engineer for a defense contractor. In March 2006 Applicant failed to secure a classified container in an approved manner. He received a warning letter. This incident was a violation of the National Security Manual and the National Industrial Program Operating Manual (NISPOM).

In November 2006 Applicant failed properly to secure classified material and media in an approved container. This too was a violation of the National Security Manual and the NISPOM. He received another warning letter. Applicant had two prior security violations, not referenced in the SOR. In 1990 he was cited and counseled for leaving his safe open. In 2005 Applicant and two or three other individuals received warning letters for storing special access material in a safe not authorized for those documents. Applicant was the primary custodian of the safe.

Applicant argues that the Judge did not consider certain mitigating evidence, for example documents and witness testimony regarding Applicant's job performance, trustworthiness, and security awareness. The Board has considered all the arguments contained in Applicant's brief, evaluating them in light of the record as a whole. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). Although Applicant appears to disagree with the weight which the Judge assigned to certain pieces of evidence, he has not demonstrated that the Judge's analysis is arbitrary, capricious, or contrary to law. *See* ISCR Case no. 07-07144 at 3 (App. Bd. Oct. 7, 2008). In support of his appeal, Applicant points to other decisions, by the Appeal Board and by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case "must be decided upon its own merits." Directive ¶ E2.2.3. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). Applicant also argues that the Judge's treatment of the pertinent whole-person factors is erroneous in that it is insufficiently analytical, consisting instead of a brief, conclusory paragraph. The Board has considered this aspect of the decision in light of the record as a whole. Given the record in this case, any error in this regard is at most harmless. *See* ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006).

The Board concludes that the Judge has articulated a satisfactory explanation for his conclusion that Applicant has failed to meet his burden of persuasion regarding the Guideline K security concern. *See* Directive ¶ E3.1.15 (After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns). Viewed in light of the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security'"), the Judge's decision under Guideline K is neither arbitrary, capricious, nor contrary to law. In light of this holding, the Board need not consider the issue Applicant raised concerning Guideline E.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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