

KEYWORD: Guideline E

DIGEST: Judge’s finding that Applicant deliberately provided false information during the security clearance process is sustainable. Hearing Office decisions are not binding on the Board or on other Hearing Office Judges. Adverse decision affirmed.

CASE NO: 09-03448.a1

DATE: 05/19/2011

DATE: May 19, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-03448
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 23, 2010, 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). The SOR was subsequently amended on October 13, 2010 to add an allegation under Guideline B (Foreign Influence). Applicants requested a hearing. On February 25, 2011, after the hearing, Administrative Judge Jennifer I. Goldstein denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse clearance

decision is arbitrary, capricious or contrary to law.

Applicant argues that the Judge's adverse decision should be reversed because: 1) the Judge erred in concluding that Applicant deliberately and intentionally provided false information on multiple occasions during the security clearance process, and 2) the record evidence is sufficient to support a favorable determination under the whole-person concept. Applicant's arguments do not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

In his brief, Applicant cites to other Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances. Although such decisions may be cited as persuasive authority, they are not binding legal precedent in another situation. Applicant's reliance on other Hearing Office decisions does not demonstrate that the Judge erred in this case. *See, e.g.*, ISCR Case No. 07-15590 at 2 (App. Bd. Nov. 18, 2008). "The adjudicative process is the careful weighing of a number of variables known as the whole-person concept." Directive, Enclosure 2 ¶ 2 (a). "Each case must be judged on its own merits . . ." *Id* at ¶ 2 (b).

In reaching her decision as to Applicant's falsifications, the Judge specifically considered Applicant's explanations. Decision at 7-9. However, she was not bound, as a matter of law, to accept or reject those explanations. Rather, the Judge considered those explanations in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. On this record, the Judge's finding that Applicant's falsifications were deliberate is sustainable. *See* Directive ¶ E3.1.32.1.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to mitigate those concerns. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security 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, or *vice versa*. A party'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. *See, e.g.*, ISCR Case No. 10-00278 at 2 (App. Bd. Mar. 18, 2011).

A review of the Judge's decision indicates that she weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. Decision at 7-9 and 10-11. She found in favor of Applicant under Guideline B, but reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns under Guideline E.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the 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, 158 (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

unfavorable security clearance decision is sustainable.

Order

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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