

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge’s material findings of security concern are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 11-00281.a1

DATE: 11/25/2011

DATE: November 25, 2011

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 25, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). On July 27, 2011, DOHA amended the SOR to add an allegation under Guideline E. Applicant requested a hearing. On October 11, 2011, after the hearing, Administrative Judge LeRoy F. Foreman 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 his findings of fact; whether the Judge failed to consider record evidence favorable to Applicant; whether the Judge mis-weighed the record evidence; and whether the Judge failed properly to apply the mitigating conditions. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Federal contractor. She served in the U.S. Air Force from 1999 to 2008. While on active duty, she obtained an associate's degree. She held a security clearance while in the Air Force and has held one during her civilian employment. While in the Air Force, she received several Achievement Medals. At various times she was selected as Airman of the Month, Airman of the Quarter, and Noncommissioned Officer of the Quarter.

Despite these accolades, Applicant's military career was marred by disciplinary problems. In 2003, she received a letter of reprimand for violating a regulation prohibiting the possession of a pellet gun and for insubordination to a security policeman. Additionally, she entered into a contentious relationship with another Air Force member, with whom she had a child. Applicant's partner was abusive toward her. On one occasion, in August 2007, Applicant had an argument with him, during which the partner assaulted Applicant, and she, in turn, bumped him with her car. Later that evening, the partner came to Applicant's residence. He kicked her in the abdomen, and she slashed at him with kitchen knives, stabbing him in the leg. As a consequence of this, Applicant was charged with felonious assault.

Later in 2007, Applicant's partner obtained a civilian protective order against her. Additionally, Applicant's military superior ordered her to have no contact with her partner. About a month later, the partner told Applicant the protective order had been lifted and asked her to move back in with him. She did so, but two weeks later the partner reported to the police that she had violated the protective order.

Another month passed, and Applicant attended a farewell party for one of her fellow military members. Her partner attended as well, and a senior noncommissioned officer and a captain informed Applicant that she should not be there, due to the no-contact order. She replied to the captain in "vulgar and profane language." Decision at 4. She subsequently was punished under Article 15, Uniform Code of Military Justice (UCMJ), for disobeying the no-contact order and for disrespect to an officer.<sup>1</sup>

In 2008, Applicant was convicted of misdemeanor assault and battery, arising from her having stabbed her partner. Her security clearance was suspended but later reinstated. Later that

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<sup>1</sup>Article 15 is codified at 10 U.S.C. 815.

year, she was tried and convicted in civilian court for violating the protective order. Subsequently, the Air Force discharged her with a General Discharged Under Honorable Conditions. The Air Force Discharge Review Board upgraded in service characterization to Honorable two years later.

Applicant was hired by a Federal contractor, but she lost her job in 2009 because of disparities between her time card and the hours she actually worked. She found another job, and her current supervisor praises her work ethic, professionalism, dependability, and punctuality.

In the Analysis portion of the Decision, the Judge acknowledged matters favorable to Applicant, such as evidence that (1) her partner “was a contributing cause to much of her misconduct” and (2) she has learned from her past experience. He also stated that he viewed her 2007 violation of the civilian protective order as the last instance of a criminal arrest by civilian authorities, rejecting as unsubstantiated a SOR allegation of a more recent forgery. However, he plausibly explained why he concluded that Applicant had failed to mitigate the Criminal Conduct and Personal Conduct security concerns. His analysis cited to other record evidence less favorable to her, for example her disobedience of the no-contact order and her loss of civilian employment due to a false time card. He also cited to evidence that Applicant’s former partner still influences her behavior. He concluded that this evidence undermined Applicant’s case for mitigation.

Applicant’s challenges to the Judge’s findings of fact rely to a certain extent on her testimony at the hearing. Applicant’s testimony is evidence that the Judge was required to consider. However, he was required to evaluate that evidence in the context of all the record evidence. *See, e.g.*, ISCR Case No. 08-11940 at 3-4 (App. Bd. Dec. 2, 2010) and ISCR Case No. 08-06951 at 3 (App. Bd. Jan. 22, 2011).

Applicant challenges certain of the Judge’s statements, found in the Analysis portion of the decision. She contends that he erred in stating that she was a person who by nature does not avoid confrontation. She points to the hearing transcript, which quotes her as saying “by nature I dispute if I think I’m right and you’re wrong.” Tr. at 77. While Applicant has correctly cited the transcript, the Judge’s statement is a reasonable characterization of her testimony. Applicant’s argument does not undermine the Judge’s conclusion that Applicant’s capacity for contentious behavior impaired her case for mitigation.

She also takes issue with the Judge’s statement that she has a “long history of insubordination and rules violations.” Decision at 8. She contends that her incident involving the security policeman and the later one with the Air Force officer do not establish a long history. However, examining the Judge’s findings of fact in light of the record as a whole, we find no error in the challenged statement. Applicant’s conduct in the military, viewed in light of her more recent job termination due to having submitted a false time card, support the Judge’s characterization of her behavior. The Judge’s material findings of security concern, including those findings contained

in his Analysis,<sup>2</sup> are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 09-08083 at 3 (App. Bd. Jul. 15, 2011).

Applicant contends that the Judge failed to consider, or mis-weighed, record evidence favorable to her, for example her testimony that she was coerced into violating the protective order and evidence tending to demonstrate that she has distanced herself from her former partner. However, a Judge is presumed to have considered all of the evidence. *See, e.g.*, ISCR Case No. 04-12742 at 3 (App. Bd. Feb. 25, 2011). The Judge discussed evidence favorable to Applicant, but his ultimate conclusion that Applicant had failed to mitigate the security concerns is sustainable. Applicant had not rebutted the presumption that the Judge considered all of the record evidence, nor has she demonstrated that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant argues that a proper analysis of the mitigating conditions would have resulted in her receiving a clearance. Among other things, she cites to the Judge's conclusion that her most recent criminal arrest occurred four years ago, arguing that enough time has passed to demonstrate mitigation. However, the record in its entirety contains evidence of other security significant conduct since that arrest, which are relevant on the issue of rehabilitation. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, which 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 Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge

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<sup>2</sup>We will treat a finding of fact as such regardless of where it appears in the Judge's decision. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007).

Member, Appeal Board

Signed: James E. Moody \_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board