

KEYWORD: Guideline E

DIGEST: The Judge’s material findings of security concern are supported by substantial record evidence. The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant’s worthiness for a clearance. Applicant has not rebutted the presumption that the Judge considered all of the evidence. Adverse decision affirmed.

CASE NO: 14-00114.a1

DATE: 09/30/2014

DATE: September 30, 2014

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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**

Brett K. Williams, Esq.

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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 17, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy 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 erred in concluding that Applicant's circumstances raised security concerns; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

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

Applicant is an employee of a Defense contractor, having worked in that capacity since 2013. He has been married for 25 years. Applicant has held a security clearance without incident since 2001, and his retaining his clearance is a condition precedent for an upcoming promotion.

From 1990 until 2013, Applicant worked for a previous Defense contractor. He was director of a department within the company. In early 2013, Applicant had an inappropriate relationship with a female subordinate (Y). Although she did not work directly for him, she was employed within his department. On three occasions, the two met in parking lots away from the workplace, engaging in kissing and other sexual contact.

In June 2013, officials of Applicant's employer became aware of the relationship. They conducted an investigation, during which Applicant was asked if he had exchanged text messages with Y's husband. He answered "no." When the husband was asked the same question, he replied that he and Applicant had exchanged text messages. In these messages, Y's husband sought a pay raise for Y. The messages also alluded to the inappropriate relationship. The husband stated that another female employee that learned of Applicant's relationship with Y, expressing concern that Y would get a promotion due to the relationship. The husband stated that Y had become "hysterical" upon learning that Applicant had told another employee about the matter. Decision at 3. The Judge quoted one of the messages from husband to Applicant: "Give me one good reason why I shouldn't tell your wife and give her pictures and show her all of the emails." *Id.*

In June 2013, Applicant signed a notice from his employer advising him that he was being fired. The notice contained the following language:

#### **Details of Incident:**

You were interviewed during the course of an investigation into whether you had engaged in an inappropriate and personal relationship with a subordinate employee. During the course of the investigation you repeatedly denied the relationship and made other statements in support of the denial. The investigation revealed, however, that these denials and other statements that you made were knowingly and intentionally false. *Id.*

The facility security officer (FSO) entered the above information into the Joint Personnel Adjudication System (JPAS). In his Answer to the SOR, Applicant stated that he told company investigators that the husband had called him upset, stated that Y had had an affair in the past, and expressed fear that she was doing it again. Applicant stated that he told husband that he was not having an affair with Y, but husband did not believe it. Applicant stated that husband called him

later, leaving a voicemail in which he apologized, stating that he had been told that there was no foundation for his suspicion of an extramarital affair between Applicant and Y.

Applicant's Answer to the SOR stated that investigators inquired as to the last time he had heard from husband, and he replied that it had been the previous Tuesday. At the hearing, Applicant testified that he had admitted the inappropriate relationship to the investigators. He denied having provided false information to them, denied that he told them he had not exchanged text messages with husband, and stated that the only false information he provided during the investigation was an inadvertent mistake as to the last time he had communicated with husband. Applicant testified that he had sought to have Y perform more of her duties in the office rather than at home. He stated that he was told that this was a form of harassment, for which he could be fired. He also stated that a Human Resources (HR) official told him that his dishonesty consisted of having given investigators the wrong day of the week for his last contact with husband.

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

In concluding that Applicant's job termination raised concerns under Guideline E, the Judge noted that Applicant had admitted the inappropriate relationship. He also noted Applicant's testimony that his employer's law department characterized his actions with Y as a form of harassment. Concerning Applicant's contention that he had not made false statements during his company's investigation, the Judge concluded that it was not credible. "Substantial evidence was presented to show that he repeatedly denied to investigators that he had an inappropriate relationship with [Y] and that he denied exchanging text messages with . . . husband." *Id.* at 7. He stated that Applicant's conduct is recent and demonstrates a lack of honesty, trustworthiness, and good judgment. In the whole-person analysis, the Judge noted Applicant's favorable evidence, for example his lengthy employment history, his having held a clearance for many years without incident, and that he had been endorsed by a member of the state legislature. However, the Judge stated that Applicant had failed to present evidence sufficient to support a conclusion that his security-significant conduct was behind him.

### **Discussion**

Applicant contends that the Judge erred in finding that he had made false statements to the investigators about his relationship with Y. We examine a Judge's findings of fact 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. *See also* ISCR Case No. 12-03415 at 3 (App. Bd. Jul. 25, 2014). The Judge noted that Applicant acknowledged an inappropriate relationship with Y. He also found that Applicant was in Y's supervisory chain. *See* Tr. at 45. Government Exhibit (GE) 4, Investigation Report, includes the notice of termination containing the language quoted above about the circumstances underlying the firing. This description is detailed and specific as to the reason for the employer's action, and a reasonable person could find it believable. We have previously stated that an employer's characterizations of events underlying an adverse action are entitled to "some deference." ISCR Case No. 10-03886 at 3 (App. Bd. Apr. 26, 2012).

We note the Judge’s determination that Applicant’s testimony lacked credibility, to which we are required to give deference. Directive ¶ E3.1.32.1. In this regard, Applicant testified that the description of his misconduct contained in the termination notice was “not accurate” and that he did “not agree with” it. Tr. at 83. However, he also admitted that the HR person who drafted the description in GE 4 was “honest and truthful,” providing no explanation for her to have misrepresented his conduct. *Id.* Furthermore, Applicant’s SOR response advised that he had “run into” Y at a department store parking lot on one occasion and had met her in a parking lot of a gym on two others. He stated that he had denied to Y’s husband that he was having an affair with Y, and that the husband subsequently apologized for his accusation to the contrary. Nowhere does the response acknowledge a relationship with Y that was obviously inappropriate, much less one that included sexual contact. The Judge cited to this excerpt from the SOR response in his findings of fact. It supports his adverse credibility determination, in that it amounted to a denial of impropriety with Y and therefore constituted a statement inconsistent with his hearing testimony.<sup>1</sup> The SOR Answer excerpt also lends force to the quoted language from GE 4. The evidence, viewed as a whole, supports the Judge’s finding that Applicant had falsely denied his inappropriate relationship with a subordinate. The Judge’s material findings of security concern are supported by substantial record evidence, or they constitute reasonable inferences that could be drawn from the evidence.

Applicant contends that the evidence does not raise concerns under Guideline E. The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant’s security worthiness. *See, e.g.*, ISCR Case No. 11-10255 at 4 (App. Bd. Jul. 28, 2014).

The concern in Guideline E is that conduct

involving . . . lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Directive, Enclosure 2 ¶ 15.

In this case, evidence that Applicant abused his supervisory authority by conducting an inappropriate relationship with a subordinate and that he repeatedly provided false statements during the subsequent investigation is sufficient to raise a concern that he lacks candor and is unwilling to comply with rules and regulations. Applicant’s presentation is not sufficient to rebut the presumption of nexus.

Applicant’s brief recites in considerable detail his response to the SOR. To the extent that he is contending that the Judge failed to consider this response or other evidence, he has not rebutted the presumption that the Judge considered all of the evidence in the record. Neither has he demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 10-06824 at 2 (App. Bd. Apr. 9, 2012).

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<sup>1</sup>*See also* GE 1, Security Clearance Application, dated October 28, 2013. Section 13A of this document asked if Applicant had been fired from a job within the prior seven years. He answered “yes.” The application then asked for the reason Applicant was fired. Applicant stated “For not reporting harassment and following through with it.”

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