KEYWORD: Guideline E

DIGEST: Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their duties. Adverse decision affirmed.

CASENO: 14-00996.a1

DATE: 07/16/2015

DATE: July 16, 2015

In Re:	)	
	)	ISCR Case No. 14-00996
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel
Alison O'Connell, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 2, 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). Department Counsel moved to amend the SOR, and that amendment was granted. Applicant requested a hearing. On March 19, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to the same provisions.

Applicant raises the following issues on appeal: (1) whether there is sufficient evidence to support the Judge's formal finding under SOR subparagraph 1.(a)[1]; (2) whether a Report of Investigation was properly admitted into the evidence by the Judge; and (3) whether Applicant was denied due process. Department Counsel raises the following issue on cross- appeal: whether there is sufficient evidence to support the Judge's finding under SOR subparagraph 1.(d).[2] Consistent with the following, we affirm the Judge's adverse decision.[3]

The Judge made the following findings: In 2005, while employed by Company A, Applicant developed an application for his government client to better manage their workforce. The client decided to go in another direction and the human resources (HR) application was never fully developed. Applicant kept the HR application because it contained coding he had written that he believed could potentially be useful on future projects. He did not get Company A or the government client's permission to keep the HR application. Applicant testified that others in the information technology (IT) field routinely keep code they develop for use on future projects and share it with other developers without first getting approval from their employer or the government. Applicant's current supervisor, who has worked in the government IT field for about 30 years, testified that Applicant's conduct in downloading software without permission and retaining the HR application without first getting approval would be considered a minor infraction, at best.

In 2006, Applicant left Company A because his employer was no longer able to pay him a six-figure salary. The company had submitted a low offer to successfully fend off a competitor's bid for the government contract Applicant was working on. After Company A succeeded in retaining the contract, Applicant's salary was reduced by nearly half. Applicant left Company A

[1]That allegation reads, "During an interview conducted by an Other Government Agency on February 12, 2007, you stated that after you left employment with a U.S. Government contractor in 2006, you took a copy of the database structure/applications you developed which contained Personally Identifiable Information (PII), uploaded a version of the database to the NIPRNET, which was later deleted, and may have maintained a copy of that database on a CD ROM at your home."

[2]SOR allegation 1.(d) initially alleged that Applicant falsified a security clearance application on June 15, 2012 by failing to reveal that he had been terminated from his employment in June 2006. The amended SOR allegation 1.(d) alleged that Applicant falsified a security clearance application on June 15, 2012 by failing to reveal that he had left the employment of Company A in June 2006 by mutual agreement with the company following charges or allegations of misconduct.

[3]The Judge's resolution of the allegations in subparagraphs 1.(b) and 1(c) of the SOR is not at issue on appeal.

after someone else was selected for the lead project position and after he received a six-figure salary offer from Company B.

Applicant listed his employment with Company A on his current security clearance application (SCA). He reported that his reason for leaving was a better offer and better pay. Company A's vice president and Applicant's former supervisor corroborate Applicant's version of events leading to his resignation from Company A. Applicant's last performance appraisal from Company A reflects that he consistently exceeded expectations in all areas. The appraisal specifically notes that the government customer rated Applicant and his team as being "truly outstanding." The appraisal further stated that the government customer was looking for an expanded role for Company A due to Applicant's performance and leadership.

In 2007, Applicant's application for access to sensitive compartmented information (SCI) was denied by another government agency (AGA) due to his personal conduct and misuse of IT systems. The AGA found, in part, that while employed by Company A, Applicant downloaded software without permission and kept the HR application without approval. Additionally, the AGA noted that during interviews with government agents, Applicant stated that the HR application contained the personally identifiable information (PII) of the government client's workforce. Following these interviews, Applicant deleted all copies of the HR application, including one that was saved on his Company B work computer. Also, after the interviews, Applicant contacted his former client to seek permission to keep the HR application. Applicant was eventually informed by his former client that Company A did not give permission for his possession of the application.

When answering his SCA in 2012, regarding the HR application from Company A, Applicant wrote that the HR application "may have contained PII or it may have been test data." At the hearing, Applicant testified that the HR application only contained "dummy" or test data, not PII.

When working for his current employer, Applicant has successfully completed and routinely receives refresher training on the proper handling and safeguarding of sensitive information, including PII. He is highly regarded by his current and former supervisors, co-workers, and neighbors. He has not been involved in any misuse of IT systems beyond those matters that led to the denial of SCI access in 2007.

The Judge concluded: Applicant refuted the falsification allegation in the SOR. He was not fired from Company A, nor did he leave under unfavorable circumstances. Instead, the record evidence established that Applicant left Company A for the reason he listed on his SCA, to wit: "better offer, better pay."

The Judge further concluded: Applicant's questionable judgment in downloading software and retaining the HR application without his former employer's approval raises the personal conduct security concern. Applicant submitted evidence that would tend to indicate reform and rehabilitation, to include the passage of time without a repeat of the underlying conduct at issue. Such favorable evidence would generally mitigate the personal conduct security concerns. However, Applicant's testimony was in direct conflict with the statements he previously made to

government investigators and during the current security clearance investigation as to whether the HR application contained PII. His inconsistency on such a material point undercuts the favorable evidence of rehabilitation and reform, and raises continuing concerns about his reliability and trustworthiness. Doubts persist about Applicant's continued eligibility for access to classified information.

SOR subparagraph 1.(a).

Applicant argues that there was insufficient evidence to support the Judge's adverse finding under SOR subparagraph 1.(a), and that he erroneously concluded that Guideline E, ¶ 16(c)[4] and ¶ 16(f)[5] apply to the case. The Board disagrees.

The record evidence indicates that when Applicant left Company A, he took with him an HR database that he had created for the government client when he went to Company B. There is no evidence that Applicant had permission to take the database. Notwithstanding Applicant's assertion that there was no evidence indicating that his conduct was proscribed by his employer, there is evidence indicating that Applicant's actions were improper and formed a sufficient basis to raise the issue of questionable judgment on his part. Following the initial interview with AGA investigators, Applicant began to question whether he had permission to retain the HR database, and then he deleted it from his Company B computer. He then contacted a representative of the government agency to determine whether he had permission to retain the database. This conduct is evidence that he knew he had engaged in some impropriety regarding the HR database. Also, there is some evidence in the record indicating that Applicant's conduct was proscribed by his employer, although the evidence does not reveal a rule violation that speaks directly to Applicant's specific conduct .[6] Even without evidence of a specific rule, regulation, or agreement that Applicant violated, there is sufficient evidence to establish misconduct. It is unnecessary to establish a specific rule violation when an Applicant's conduct clearly raises security concerns. *See*, ISCR Case No. 11-05079 at 3 (App. Bd. Jun. 6, 2012).

[4]"[C]redible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness ro comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

[5]"[V]iolation of a written or recorded commitment made by the individual to the employer as a condition of employment."

[6]An e-mail sent to Applicant from the government representative responded to Applicant's inquiries about the propriety of keeping the HR database he developed at Company A. The e-mail contained a section from a Company A manual which identified processes, methods, and tools developed or created by Company A employees as the sole property of Company A and the government client. (Gov. Exhibit 3).

Applicant's various statements regarding the contents of the HR database constitute another aspect of the government's case. Applicant asserts that his statements were not inconsistent on the issue of whether the HR database contained PII, and any perceived variance was a result of mistake or his attempts to respond with complete candor to questions posed by AGA investigators. The evidence reveals that Applicant's statements about the existence of PII on the HR database range from a representation that the HR database contained the PII of up to 13,000 military members to statements that he did not know whether or not the database contained PII to testimony at the hearing that the database absolutely did not contain PII.[7] The Judge found Applicant not credible on the issue of the contents of the database and his knowledge thereof, which he reasonably concluded were material points in the case, and determined that the lack of candor raised continuing concerns about Applicants reliability and trustworthiness. He concluded that these concerns undercut any mitigating evidence of reform and rehabilitation, notwithstanding the passage of time since the incident. The Judge's credibility determination is entitled to deference on appeal. Directive ¶ E3.1.32.1. The Judge's conclusions regarding the lack of mitigation are reasonable and are supported by the record.

SOR subparagraph 1.(d).

Department Counsel challenges the Judge's conclusion that Applicant did not falsify a security clearance application question that was potentially applicable to the circumstances of Applicant's departure from Company A. Department Counsel argues that those circumstances required Applicant to reveal that he left Company A by mutual agreement following charges or allegations of misconduct, instead of answering "no" to the question, thereby denying leaving as a result of any unfavorable circumstances. After a review of the record evidence and the Judge's decision, the Board finds that the Judge's conclusion that Applicant did not falsify his SCA is sustainable. On the issue of whether Applicant should have revealed the circumstances of his departure from Company A, the evidence cuts both ways.

Department Counsel principally relies on two sentences from what appears to be a summary of a report of investigation (ROI) produced by AGA (Govt. Ex. 3). That language reads, ". . the. . . . . representative requested that subject be removed from the contract based on the allegations that Subject was not responsive and was conducting personal business during billable time. Based on the request and to maintain the contract, SUBJECT was dismissed on 5/26/2006 with his pay ending on 06/22/2006." Department Counsel also relies on evidence of a conversation between Applicant and his superiors wherein Applicant asked, "So, am I fired today or simply on the bench and fired in four weeks if [Company A] cannot find me something?" In reply, his supervisor stated, "you are not fired today, consider yourself on the bench for the next four weeks. If we cannot place you in four weeks, we will have to lay you off." (Govt. Ex. 2). When arguing that this evidence required the Judge to make a finding against Applicant on the falsification issue, Department Counsel states

[7]Applicant insists that the inconsistencies are the result of aggressive and intimidating interviewing techniques that he experienced at the hands of AGA investigators. However, as the Judge points out, in a non-coercive environment (his completion of his SCA) five years after the AGA interviews, he stated that the database might have contained PII, a statement that is directly at odds with his hearing testimony.

that Company A's leadership "may have chosen the path of least resistence" by speaking favorably of Applicant or they may have had positive feelings for him. Department Counsel also asserts that the derogatory ROI summary language that she relies on was adopted as true by Applicant.

Applicant points to the following countervailing evidence, much of which was relied on by the Judge: (1) the AGA ROI does not contain information about the source of the two sentence statement relied on by Department Counsel; (2) the AGA did not list the purported adverse employment information as a basis for their clearance denial; (3) numerous descriptions from Company A personnel, including a vice president and a supervisor described Applicant as an excellent employee, and their interview statements corroborate Applicant's version of events, namely that his salary had been cut in half when the contract he was working on was renegotiated, and, at about the same time, he accepted an offer from another company for better pay. These facts were also corroborated by contemporaneous e-mails found in the record; (4) Applicant's last performance appraisal from Company A, which reflected outstanding performance; (5) evidence suggesting that the persons who removed Applicant from the contract had a motive to provide false derogatory information about him; and (6) statements by Company A personnel that Applicant's removal from the contract in question was unfair.

In reviewing the record evidence, the Board notes the following: (1) the language contained in the two sentences in the AGA ROI summary relied upon by Department Counsel does not appear anywhere else in the record, including the main body of the AGA ROI; (2) when describing the circumstances of Applicant's final days at Company A, Applicant's supervisor gave no indication that Applicant was removed from the contract for misconduct, and he questioned the motives of the contract personnel who made the removal decision. The supervisor also stated that comments of the government contracting officers should not be regarded as official Company A comments regarding Applicant's work history (Govt. Ex. 3); (3) Applicant's salary reduction was the result of vagaries in the contract termination and re-awarding process and had nothing to do with his performance; and (4) after he was made aware of Applicant's removal from the contract, a Company A manager expressed his wish that the company could continue Applicant's long term goals with them. (Hearing Exhibit 4).

The Board also notes Department Counsel's claim that Applicant affirmatively acknowledged as true the portion of the AGA ROI summary that contains the derogatory two sentence language. This claim is without merit. The record contains no such acknowledgment.[8] Similarly, Department Counsel's claim that the two sentences were an admission by Applicant is without merit. It is impossible on this record to determine the source of the information in the two

[8]Department Counsel may be conflating Government Exhibits 2 and 3. Government Exhibit 2 was an Interview Verification Interrogatory wherein Applicant was asked to verify the accuracy of an ROI prepared by an investigative body other than the AGA. He did so. However, the derogatory two sentence language found in Government Exhibit 3 is not found in Government Exhibit 2. Government Exhibit 3 is styled, "Interrogatories" but it contains only a request that Applicant supply written documents to the investigating agency. He did so. The acknowledgment Applicant then made in Government Exhibit 3 went only to his answer to the question, "Have you provided the requested documentation?" His affirmation did not go to the truthfulness or accuracy of any of the contents of Government Exhibit 3.

sentences upon which she relies. Also, Department Counsel's suggestion that Company A's management was taking "the path of least resistance" when speaking favorably of Applicant or was acting as a result of positive feelings toward him is without a basis in the case record and is speculative.

With this evidentiary record as background, the Board concludes that the Judge did not err by finding in Applicant's favor on SOR subparagraph 1(d). On these facts, it was not arbitrary or capricious for the Judge to discount the assertion that Applicant left his employment with Company A by mutual agreement following charges or allegations of misconduct. The falsification issue was controverted, and as such, Department Counsel bore the burden of proof to establish the underlying facts. Directive ¶ E3.1.14. Here, Department Counsel developed some evidence in support of the allegation, but there was also significant evidence that detracted from the allegation. Determining the weight and credibility of the evidence is the special province of the trier of fact. *See* ISCR Case No. 02-02892 at 4 (App. Bd. Jun. 28, 2004). 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Department Counsel is essentially arguing for a different interpretation of the record evidence.

Government Exhibit 3

Applicant objects to the Judge's admission of a portion Government Exhibit 3, the ROI from the AGA. He essentially alleges lack of reliability and lack of completeness. Applicant cites several perceived irregularities, such as the fact that the reasons for the many redactions are not given in the exhibit's documents, there are no representations that the ROI is a true copy, there is no statement that the documents contained therein were produced in the regular course of business, and the ROI is dated seven months after the interview sessions. Applicant also asserts that the document is incomplete. His theory is that changes were made to the document after he requested it, and the document "bears every indication of having been generated in anticipation of litigation." The Board concludes that the document was admissible.

Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See* ISCR Case No. 06-06496 at 3 (App. Bd. Jun. 25, 2009). Applicant's blanket assertions that the document may have been altered or was not prepared in the ordinary course of business do not overcome this presumption. The items that Applicant enumerates as missing from the ROI, while of some benefit in conclusively establishing reliability, are not prerequisites to admissibility. Applicant has made no assertion and provided no evidence that would enable the Board to determine whether or not the document is incomplete.

The Board notes that the document in question was actually supplied by Applicant in response to a request by the government. Also, as Department Counsel points out, the AGA ROI in Government Exhibit 3 essentially speaks to the allegation in subparagraph 1.(d). of the SOR,

which was adjudicated in Applicant's favor. Thus, even assuming that the AGA ROI was improperly admitted, any resulting error would be harmless.

Due Process

Applicant argues that the amending of SOR allegation in subparagraph 1.(d). deprived him of procedural due process as did Department Counsel's pursuit of a case against him under subparagraph 1.(d). The latter assertion appears to be predicated on Applicant's belief that there was no evidence on which to base the allegation. Applicant's claims lack merit.

A Judge's decision whether or not to allow an SOR amendment is reviewed for an abuse of discretion. The Board concludes that the Judge's decision to allow the amendment, which took place pre-hearing, was sustainable. Again, the SOR subparagraph that was amended was resolved in Applicant's favor. Applicant's claim that Department Counsel brought forth a frivolous case under subparagraph 1.(d) is undercut by the fact that there was some evidence tending to establish the allegation. Given the existence of some evidence to support the allegation, Department Counsel cannot reasonably be accused of proceeding in bad faith.

Conclusion

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, 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge 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