

KEYWORD: Guideline E

DIGEST: Applicant also contends that the denial of his security clearance is tantamount to a punitive action that affects his “desire to increase [his] workplace market ability.” Security clearance decisions are not punitive in nature, but administrative eligibility determinations. The Directive does not permit the Board or Judges to consider the adverse impact an unfavorable decision may have on an applicant. Adverse decision affirmed.

CASE NO: 15-04386.a1

DATE: 05/10/2017

DATE: May 10, 2017

In Re:	)	
	)	
-----	)	ISCR Case No. 15-04386
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 11, 2016, 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 February 16, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance.

Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge found in favor of Applicant on two Guideline E allegations that are not an issue on appeal. Department Counsel also withdrew another allegation. Consistent with the following, we affirm the Judge's unfavorable security clearance decision.

### **The Judge's Findings of Fact Pertinent to the Appeal**

Applicant served as a law enforcement officer in a small town for about four years until he was terminated from that job in 2010. This termination arose from an incident that involved the filing of charges against a suspect for aggravated assault with a deadly weapon or dangerous instrument (a broken glass bottle) on a police officer as well as other charges. Those charges were primarily based on an oral report that Applicant gave to a county prosecutor, which resulted in a criminal complaint sworn to by Applicant. The suspect was convicted of the offense of aggravated assault on the police officer.

Post-trial, the prosecutor did not oppose a motion to vacate the judgment because newly discovered evidence revealed the victim was not a *bona fide* police officer at the time of the arrest. Applicant explained the victim had been a certified police officer and was assisting the police department pending recertification. The county attorney's investigation established that Applicant issued the victim a gun and a badge, although he was not a certified police officer, as his certification lapsed years earlier following his retirement from another police department. The victim was not on the town's payroll when the arrest occurred.

The county court dismissed the aggravated assault charge with prejudice because the integrity of the judicial system was compromised by misleading and false statements. The county attorney informed the town manager that his office would no longer work with Applicant or the town's police department. The town council moved to terminate Applicant based on a lack of confidence and trust due to the deterioration of relations with the county attorney's office and county court. After affording Applicant an opportunity to respond, the town council instructed the town manager to terminate Applicant's employment. The town manager refused because he thought Applicant did nothing wrong. The town council terminated the town manager and then appointed a new town manager who terminated Applicant's employment. Later, the county court found Applicant in contempt of court for acting in a manner to obstruct the administration of justice. He was ordered to pay over \$1,600 in fees.

Applicant requested a hearing to review the termination. A retired state appellate judge served as the hearing officer and concluded there was good cause for the termination because Applicant failed to disclose exculpatory evidence (the victim's status at the time of the assault) resulting in the suspect being denied due process and a fair trial. The Judge summarized the hearing officer's conclusions as follows:

Applicant knew the victim was not a certified police officer at the time of the assault; Applicant never notified the county attorney's office that the victim was not a certified police officer; the chief criminal deputy prosecuting attorney spoke with Applicant before issuing the complaint against [the suspect] and believed that the

victim was a certified police officer when [the suspect] assaulted him; Applicant swore to the truthfulness of the complaint; and a superior court judge later found the [suspect's] case was based on a complaint that Applicant knew was false.<sup>1</sup>

Applicant maintained that he never spoke to anyone at the county attorney's office before the complaint was issued and that his termination was a pretext for the town council to retaliate against him for zealous policing of drug cases that may have involved family members of the town council. He sued the town and others for breach of contract and wrongful termination, but his lawsuit ended when a U.S. District Court granted the defendants' motion for summary judgment.

### **The Judge's Analysis Pertinent to the Appeal**

Applicant demonstrated questionable judgment and lack of candor when he allowed a criminal case to proceed against a suspect based on false information. He swore to a criminal complaint the he knew or should have known was false. He maintains that he did not speak to anyone from the county attorney's office before he swore to the criminal complaint, but his statement is flatly contradicted in the hearing officer's decision. The facts and circumstances surrounding his termination create doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information.

### **Discussion**

Applicant contends the Judge erred in finding that his security clearance application was submitted to upgrade his clearance as a key management official for a company he owns and manages. He states his clearance was being upgraded for another company that he works for as a contractor and consultant. While the Judge may have erred in this regard, it is a harmless error that did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant's appeal brief contains documents and representations that go beyond the evidence of record. The Board cannot consider new evidence on appeal. Directive ¶ E3.1.29. Applicant also reiterates in detail information about the circumstances underlying his employment termination and the related proceedings. In doing so, he raises various arguments, including that he proposed the suspect be charged with aggravated assault, not aggravated assault on a police officer; that the county attorney's office authored the criminal complaint with the defective charge; and that "I signed the criminal complaint to the best of my knowledge" and believed the county attorney's office had done its due diligence in preparing the complaint. Appeal Brief at 7. His arguments, however, are neither sufficient to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-04553 at 3 (App. Bd. Apr. 13, 2016).

Applicant also contends that the denial of his security clearance is tantamount to a punitive action that affects his "desire to increase [his] workplace market ability." Appeal Brief at 8.

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<sup>1</sup> Decision at 4-5.

Security clearance decisions are not punitive in nature, but administrative eligibility determinations. The Directive does not permit the Board or Judges to consider the adverse impact an unfavorable decision may have on an applicant. *See, e.g.*, ISCR Case No. 14-04202 at 4 (App. Bd. Dec 24, 2015). Applicant also stated that he was “subjected to unsubstantiated and/or questionable evidence of misconduct that [he] was time and again not afforded the opportunity to disprove these allegations is a denial of due process.” Appeal Brief at 8. We note that, at the hearing below, Applicant did not object to the admission into evidence of Government Exhibit 5, documents concerning his employment termination that included the report of the hearing he requested to review that termination, or Government Exhibit 6, the U.S. District Court order granting the defendants a summary judgment in Applicant’s lawsuit. He testified during the hearing and, in a post-hearing submission, presented documents that were admitted into evidence. Applicant has not made a *prima facie* showing that he was denied due process in the hearing below. *See, e.g.*, ISCR Case No. 15-02933 at 2 (App. Bd. Sep. 23, 2016).

The Judge examined the relevant evidence 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: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board