

KEYWORD: Guideline K

DIGEST: We give deference to Judge’s credibility determinations unless the record contains evidence that would undermine the determination. The Judge’s reservations about Applicant’s claims not to recall at least two of the allegations is consistent with the record that was before her. We find no reason to undermine the Judge’s credibility determination. Adverse decision affirmed.

CASENO: 16-01077.a1

DATE: 04/25/2018

DATE: April 25, 2018

In Re:)	
)	
-----)	ISCR Case No. 16-01077
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 27, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 17, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant has worked in the Defense industry since 1983 and has worked for his current employer since early 2017. He has held a clearance since 1987. His SOR contains three allegations of security infractions. In late 2014, he violated his previous employer’s Special Security Agreement (SSA) by failing to submit a timely request for persons to visit his employer’s facilities and by failing to prepare a timely after-action contact report. In mid-2015, he emailed proprietary information without prior authorization and failed to comply with approval and reporting requirements for foreign travel. A month later, Applicant was issued a letter of warning and advised that additional infractions could result in more serious consequences. In late 2014, he took his cell phone into a secured area, used the phone despite having been told that he could not possess it there, and attempted to reenter the secured area with the phone.

The Defense Security Service (DSS) placed Applicant’s employer on probation for six months due to security shortcomings. Although Applicant’s home unit was not placed on probation, DSS gave it a “major point hit” due to Applicant’s mid-2015 infractions. Decision at 8. Applicant’s 2014 and 2015 efficiency reports did not reflect his security infractions. Applicant enjoys an excellent reputation for the quality of his work performance. He received security training in 2017 and sought advice from his previous facility security officer (FSO) regarding the proper handling of controlled unclassified information. He signed a statement of intent not to commit future security infractions, with automatic revocation of his clearance should he re-offend.

The Judge’s Analysis

The Judge commended Applicant for having contacted his previous FSO for guidance and for his current compliance with security rules and requirements. She stated, however, that he did not show an appropriate level of accountability for his security-significant conduct. She found Applicant’s claim that he did not recall his failure to have submitted a timely visitor request to be lacking credibility. She also noted that Applicant initially testified that the email did not contain protected information but upon further questioning admitted that it did. She cited to evidence of Applicant’s good work performance, but she concluded that Applicant’s having held a clearance for

many years should have placed him on notice of the requirements for handling protected information.

Discussion

Applicant cites to record evidence that he contends the Judge failed to consider. This includes the nearly three years that have elapsed since the most recent security infraction, his letter of intent, and his having sought advice from the previous FSO. He also states that his misconduct was not intentional.

On this last point, the Judge did not characterize Applicant's misconduct as intentional, although we note Applicant's possession and use of a cell phone in a secured area soon after having been told that such conduct was not allowed. This is a significant infraction, even if one accepts Applicant's explanation that it was due merely to absent-mindedness. Applicant's arguments are not enough to rebut the presumption that the Judge considered the entirety of the record evidence, nor are they sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017).

Applicant challenges the Judge's conclusions about his credibility. We give deference to Judge's credibility determinations unless the record contains evidence that would undermine the determination. *See, e.g.*, ISCR Case No. 15-05565 at 4-5 (App. Bd. Aug. 2, 2017). In this case, the Judge's reservations about Applicant's claims not to recall at least two of the allegations is consistent with the record that was before her. We find no reason to undermine the Judge's credibility determination.

Applicant cites to a Hearing Office case that he believes supports his effort for a favorable decision on appeal. We give due consideration to this case. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 16-03219 at 2 (App. Bd. Nov. 15, 2017). The case that Applicant has cited does not provide a reason for disturbing the Judge's adverse decision. It has significant factual differences from Applicant's own.

The record supports a conclusion 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 Judge's adverse decision is sustainable on this record. Once it is established that an applicant has committed security violations or infractions, he or she has a "very heavy burden" of persuasion as to mitigation. Such violations or infractions "strike at the heart of the industrial security program." Accordingly, a Judge must give any claims of reform or rehabilitation "strict scrutiny." *See, e.g.*, ISCR Case No. 15-04340 at 3 (App. Bd. Jan. 30, 2017).

“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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered national security eligibility 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