

KEYWORD: Guideline E

DIGEST: The Judge’s finding of deliberate falsification is supported by substantial evidence. Moreover, given the seriousness of Applicant’s misconduct, his various inconsistent statements, and the Judge’s adverse credibility determination, we find no reason to disturb the Judge’s analysis of the security concerns raised in this case. We are required to give deference to Judges’ credibility determinations. Adverse decision affirmed.

CASENO: 17-00323.a1

DATE: 11/20/2018

DATE: November 20, 2018

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In Re:	)	
	)	
-----	)	ISCR Case No. 17-00323
	)	
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 September 21, 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) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On August 31, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 was biased against him; whether the Judge erred in finding that his omissions from his security clearance application (SCA) were deliberate; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law.<sup>1</sup> Consistent with the following, we affirm the Judge’s adverse decision.

### **The Judge’s Findings of Fact**

Thirty-four years old, Applicant has a wife and a child. He served in the military from 2001 to 2008, deploying overseas three times in support of U.S. military objectives. He has also deployed overseas while in the employ of Government contractors.

In 2010, officials at Applicant’s place of employment conducted a forensic analysis of three unclassified hard drives and two unclassified external drives from Applicant’s work station. The reason for the analysis was that Applicant had loaned a hard drive to another employee, who discovered classified documents on it and reported it to security officials. The officials found over a million classified documents on the drives that they examined. Applicant speculated that someone may have taken a drive from his office and placed classified information on it. He also stated that he “had no idea of how [the classified information] got there or why it was there.” Decision at 3. He suggested that the Government reuses hard drives and that one of them that was provided to Applicant contained classified information on it. He also suggested that they could have come from Wikileaks or a similar website. He blamed security officials for having lax security practices.

On his SCA, Applicant denied that he had ever provided financial support to any foreign national. In fact, he sent about \$40,000 to recipients outside the U.S. He also sent about \$26,000 to his girlfriend, a Columbian national, and about \$7,000 to a foreign account for the benefit of a woman in Columbia. Some of the recipients were Applicant’s wife and her parents. Applicant attributed his omission to haste in completing his SCA. During his clearance interview, Applicant stated that he did not understand the question, that he had been in a hurry to complete his SCA, and that he was embarrassed about the fund transfers.

### **The Judge’s Analysis**

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<sup>1</sup>Applicant submitted a second appeal brief for our consideration. The Directive permits only one brief per party. Directive ¶ E3.1.30.

The Judge concluded that none of the Guideline K mitigating conditions applied to Applicant's circumstances. He stated that Applicant did not provide a credible explanation for how classified documents came to be on his personal media. Regarding his omissions from his SCA, the Judge noted Applicant's statement during his security clearance interview to the effect that he did not understand the question. At the hearing, however, Applicant admitted that he understood the question. The Judge characterized Applicant as intelligent and found that Applicant intentionally decided not to disclose the information in question. He described the omission as recent, serious, and unmitigated.

In the whole-person analysis the Judge reiterated that Applicant's explanations for his omissions were not credible and cited to the provision of the Directive to the effect that failure to provide truthful answers during security investigations is of special concern. He also reiterated his adverse credibility determination regarding Applicant's explanation for the presence of classified information on Applicant's personal electronic media.

### **Discussion**

Applicant's brief includes information from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant contends that various security personnel were biased against him. Among other things, he asserts that the Judge failed to mention that security officials did not revoke his clearance upon discovery of his security infractions. He argues that this demonstrates the Judge's bias. We have evaluated the Judge's decision in light of the record as a whole. We find nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. Adverse rulings and decisions do not establish judicial bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017). Applicant has not met his heavy burden of persuasion on this issue. *See, e.g.*, ISCR Case No. 17-02391 at 2 (App. Bd. Aug. 7, 2018).

Applicant's brief draws our attention to record evidence that he believes is favorable to him, such as his claims about the possible origin of the classified data on his computer drives and his denial that he deliberately falsified his SCA. He argues that the years that have elapsed since his last security-significant conduct contradict the Judge's finding that the misconduct was recent. The Judge's finding of deliberate falsification is supported by substantial evidence. *See* ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018). Moreover, given the seriousness of Applicant's misconduct, his various inconsistent statements, and the Judge's adverse credibility determination, we find no reason to disturb the Judge's analysis of the security concerns raised in this case. We are required to give deference to Judges' credibility determinations. Directive ¶ E3.1.32.1. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02145 at 3. Applicant states that without a clearance he will be unemployed. We are not permitted to consider the impact of an unfavorable decision. *See, e.g.*, ISCR Case No. 17-01950 at 2 (App. Bd. Aug. 7, 2018).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Security violations “strike at the heart of the industrial security program” and must receive a Judge’s strict scrutiny. ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018). Moreover, failure to provide truthful answers to lawful questions in connection with a security clearance investigation is of special concern and “will normally result in an unfavorable . . . determination.” Directive, Encl. 2, App. A ¶ 15. 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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for 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