

KEYWORD: Guideline K; Guideline E

DIGEST: Applicant has not met his heavy burden of persuasion that the Judge was biased against him. The Judge did not err in holding against Applicant under Guideline E misconduct which was resolved in Applicant's favor under Guideline K. Adverse decision affirmed.

CASENO: 03-08257.a2

DATE: 05/16/2008

DATE: May 16, 2008

In Re:)	
)	
-----)	ISCR Case No. 03-08257
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 23, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Security Violations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 12, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. On February 8, 2007, the Board remanded the case to the Judge for a new hearing. On January 31, 2008, the Judge issued her remand decision, again denying Applicant a security clearance. Applicant submitted a timely appeal pursuant to the Directive.

Applicant raises the following issues on appeal: whether the Judge’s conclusions under Guidelines K and E are inconsistent; whether the Judge erred in concluding that Applicant’s case raised Guideline K security concerns; whether the Judge erred in concluding that certain of the Guideline E allegations constitute security concerns; and whether the Judge’s whole-person analysis is arbitrary and capricious. We also construe Applicant’s appeal as alleging that the Judge was biased against him.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant worked for a government contractor from July 1986 to March 1987. He was counseled and/or issued “deficiency notices” for such infractions as poor work performance, failure to follow procedures, failure to meet production deadlines, and unprofessional demeanor. His employer fired him in March 1987 for having violated its business practices and ethics. Specifically, Applicant had signed the names of fellow employees to a volleyball roster without their knowledge or consent. Applicant then went to work for a second employer but left his job “under threat of termination.” Decision at 5.

From 1996 until 2005 Applicant worked for a government contractor as an electrical engineer. He was responsible for protecting classified information, although he did not have classification authority. Therefore, he had to rely upon agency guidance in determining what was and was not classified.

In 1999 Applicant received a spreadsheet. Pursuant to his official duties, he put information on it and then passed it to another individual, who put the spreadsheet on an unclassified website. Later that year, after Applicant had updated the spreadsheet, he sent it by e-mail to officials in another office. These officials stated that the spreadsheet contained classified information. Although Applicant’s supervisors did not agree, “they eventually acceded to the designation proposed by the other office.” *Id.* In 2000, Applicant, on three occasions, committed security

¹The Judge’s favorable decision as to SOR ¶¶ 1(a) through (e) and 2(b) is not at issue in this appeal.

infractions by failing to initial a security checklist prior to closing the office and twice failing to secure combination locks and take other measures to secure his work facility.

In May 2000 Applicant was observed at a meeting attempting to copy an unclassified file from a classified laptop without using appropriate security procedures. He also used unmarked disks to store briefing files and left the briefing room without securing the classified laptop.² Finally, in July 2000 Applicant attended a briefing, some of which was classified. He prepared a summary of the matters discussed and sent it to two military officers who had conducted the meeting. Not hearing back from the officers except upon a collateral matter, Applicant sent the summary by e-mail on an unclassified network to several people in his office. It was later determined that the summary contained classified information. Applicant was reassigned to another office.

We have examined Applicant's allegations of error in light of the record as a whole. Applicant has not met his heavy burden of persuasion that the Judge was biased against him. The record would not lead a reasonable person to question the fairness or impartiality of the Judge. *See* ISCR Case No. 05-04923 at 2 (App. Bd. Apr. 24, 2007). We conclude that the Judge did not err in holding against Applicant under Guideline E for misconduct she has resolved in his favor under Guideline K. "An Applicant's security related conduct can be alleged under more than one Guideline and, in an appropriate case, can be given independent weight by an administrative judge under different Guidelines." ISCR Case No. 04-09251 at 3 (App. Bd. Mar. 27, 2007). In the case under consideration, the Judge has articulated a rational basis for her conclusions under Guideline E, and her adverse decision on those matters is sustainable.³

The Judge properly concluded that Applicant's case raised security concerns under Guidelines K and E. Furthermore, she has drawn a "rational connection between the facts found" and her conclusion that neither the various mitigating conditions nor the whole-person factors support a decision favorable to Applicant. *See 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 presence of some mitigating evidence does not alone compel a favorable overall security clearance decision. *See, e. g.*, ISCR Case No. 05-03452 at 3 (App. Bd. Jul. 3, 2007). The record supports the Judge's conclusion that Applicant has failed to meet his burden of persuasion that it is "clearly consistent with the national interest" for him to have a clearance. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²*See* Government Exhibit 2-10, E-Mail Communication Concerning Security Issues, Nov. 7, 2000. "I have continuing concerns over the way [Applicant] handles classified information. Today, during the . . . meeting, he started to copy an unclassified file from a classified laptop to move it to the unclassified projection computer—without using secure copy. Had he continued, the projection computer would have become classified. Second, he had an unmarked disk he was using to store the files for the briefing."

³Department Counsel also interprets Applicant's appeal as alleging that certain of the Judge's findings of fact are erroneous. The Board concludes that the Judge's material findings of security concern are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board