KEYWORD: Guideline L; Guideline B; Guideline K; Guideline E

DIGEST: Even if the Board considers Applicant's new evidence for jurisdictional purposes and reads it in the light most favorable to Applicant, we do not conclude that there was a current investigation or adjudication of Applicant when the SOR was issued in 2009. We decline to conclude that DOHA was precluded from considering past conduct in the current adjudication. Adverse decision affirmed.

CASENO: 04-12742.a1

DATE: 02/25/2011

DATE: February 25, 2011

In Re:	)	
------	)	ISCR Case No. 04-12742
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Daniel C. Schwartz, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 27, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline L (Outside Activities), Guideline B (Foreign Influence), and Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). DOHA amended the SOR on January 12, 2010, raising security concerns under Guideline E (Personal Conduct). Applicant requested a hearing. On September 29, 2010, after the hearing, 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 issues on appeal: whether the Judge failed to consider all of the record evidence; whether the Judge erred in his application of the Guideline K mitigating conditions; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. At the hearing, Department Counsel withdrew the Guideline L and Guideline B concerns. Additionally, the Judge made favorable findings under Guideline E. Therefore, the allegations presented under those Guidelines are not at issue in this appeal. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is employed by a Federal research and development contractor. Additionally, she owns and operates a consulting firm. She previously served as an employee of another Government agency for 30 years.[1] In that capacity, she held a security clearance, which was last adjudicated by the other Government agency in 1995. In 2003 she submitted a security clearance application (SCA) to the Department of Defense for a periodic reinvestigation.

Applicant committed four security infractions while serving in a high-level Government position in 1998. Each time she was warned that continued infractions could result in disciplinary action. These incidents involved circumstances in which classified materials were not properly safeguarded. However, there was no actual or probable compromise of them. These four infractions formed the basis of the SOR allegations under Guideline K. In addition to those alleged in the SOR, Applicant committed eleven other security infractions from 1985 to 1997. Almost all of them occurred in a U.S. facility abroad. These incidents resulted in warnings, counselings, or briefings by security officials. The Judge quoted a security officer who, in regard to a 1990 incident, briefed Applicant that unless her "habits change more violations will be likely." Decision at 4. Applicant committed about ten more infractions subsequent to this briefing.

Applicant's current duties include access to classified information during meetings and briefings. She has not physically handled classified information since retiring from the Government.

[1]Applicant testified that she retired from Government service in 1999. Tr. at 188-189. *See also* Government Exhibit (GE) 1, SCA dated Feb. 25, 2002, at 2.

In the Analysis portion of the Decision, the Judge considered three mitigating conditions: 35(a),[2] 35(b),[3] and 35(c).[4] Concluding that the first of these was the most pertinent, he acknowledged that over ten years had elapsed since Applicant's last security infraction. He characterized ten years as "a commonsense measurement of recency and remoteness." Decision at 12. However, he also noted that, since retiring from the Government, Applicant has not had an opportunity actually to handle classified information, with the result that she has not had an opportunity to demonstrate that she had corrected her poor habits. "[W]ithout substantial evidence of change or reform of Applicant's security habits, it is reasonable to expect Applicant's future to be more like the past, which is a record of repeated security infractions despite repeated cautions to the contrary." *Id.* He stated that, under the facts of this case, the mere passage of time in and of itself was not sufficient to demonstrate changed conduct.

Applicant contends that the Judge failed to consider all of the record evidence, for example evidence that her infractions occurred under difficult circumstances not likely to recur and evidence that the other Government agency granted Applicant a clearance despite her infractions. Also, Applicant has submitted a letter from an official of her previous agency, which is not contained in the record.

A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). A Judge is not required to discuss every piece of record evidence, a practical impossibility in any event and especially in a record as voluminous as this. The Judge discussed record evidence of the high quality of Applicant's service to the Government, acknowledging that some of it "was quite powerful." Decision at 15. Applicant's submission on appeal provides no reason to conclude that the Judge did not consider her testimony as to the trying circumstances surrounding many, but not all, of her infractions.

Neither is there any reason to conclude that the Judge failed to consider record evidence of the prior adjudication by the other Government agency. Applicant herself casts her argument more in terms of the weight which the Judge assigned to the evidence rather than an absolute failure to consider it *per se*. Viewing Applicant's argument in light of the entire record, we find no reason to conclude that the Judge mis-weighed the evidence.

The new evidence which Applicant has submitted consists of a letter which refers to events in 1999. We have repeatedly held that jurisdictional defects can be raised at any time including on appeal. *See, e.g.*, ISCR Case No. 07-05632 at 2 (App. Bd. May 13, 2008); ISCR Case No. 06-19169 at 2 (App. Bd. Nov. 2, 2007). For that limited purpose only, we have considered Applicant's new

[2]Directive, Enclosure 2 ¶ 35(a): "so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

[3]Directive, Enclosure 2 ¶ 35(b): "the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities[.]"

[4]Directive, Enclosure 2 ¶ 35(c): "the security violations were due to improper or inadequate training."

evidence. Even if we read that statement in a light most favorable to Applicant, we do not conclude that, when DOHA issued the SOR in 2009, there was any *current* investigation or adjudication of Applicant in place by any other agency. Therefore, the reciprocity provisions of Executive Order 13467 and the National Industrial Security Program Manual cited by Applicant on appeal are not pertinent on these facts. We also decline to conclude that DOHA was precluded from considering past conduct in the context of a current adjudication. This is the case even where the past conduct was considered in a prior favorable adjudication. *See, e.g.*, ISCR Case No. 06-10859 at 4 (App. Bd. Sep. 2, 2010); ISCR Case No. 08-09163 at 4-5 (App. Bd. Dec 21, 2010).

We have considered Applicant's challenge to the Judge's treatment of the mitigating conditions, paying special note to her argument that sufficient time has passed so as to justify the favorable application of 35(a). However, once it is established that an applicant has committed a security violation, he or she has a "very heavy burden" in her efforts to demonstrate mitigation. *See* ISCR Case No. 06-21537 at 4 (App. Bd. Feb. 21, 2008). In the case under consideration here, the Judge's conclusion that Applicant has had no opportunity in the years since her last infraction to demonstrate rehabilitation is reasonable. *See, e.g.*, ISCR Case No. 07-08119 at 8 (App. Bd. Jul. 8, 2010) (The years intervening between the applicant's last known security infraction and the date of the SOR included an 18 month period in which Applicant did not hold a clearance, thereby vitiating his argument that the absence of infractions during the intervening years demonstrated rehabilitation).

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. "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).

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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