

KEYWORD: Guideline E

DIGEST: The Judge’s challenged findings are supported by substantial evidence. The Judge’s favorable findings on some allegations are not inconsistent with the Judge’s ultimate adverse decision. Adverse decision affirmed.

CASENO: 05-02422.a1

DATE: 04/19/2007

DATE: April 19, 2007

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| In Re:                           | ) |                        |
|                                  | ) |                        |
| -----                            | ) |                        |
| SSN: -----                       | ) | ISCR Case No. 05-02422 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |
|                                  | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 21, 2005, DOHA issued a statement of reasons 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 August 9, 2006, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s

request for a security clearance. Applicant timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred in finding that Applicant was fired by a previous employer for violating company policy by conducting an affair with, and showing favoritism toward, a subordinate employee. Applicant's brief also contains matters which we construe as alleging that the Judge's unfavorable clearance decision was arbitrary, capricious, and contrary to law. In support of his appeal, Applicant submits an additional piece of evidence not offered at the hearing, in the form of an affidavit. We affirm the decision of the Judge.

### **Whether the Record Supports the Judge's Factual Findings**

#### **A. Facts**

The Judge made the following findings that are pertinent to this appeal: Applicant is a 47 year old senior network engineer employed by a Defense Department contractor. In April 1997 Applicant began working for a previous employer, becoming a senior network engineer.

Applicant's relationship with a female subordinate came to the attention of his previous employer's management. The Vice President of the company presented credible evidence at the hearing that Applicant showed the subordinate disparately favorable treatment; that he conducted an extramarital affair with her; and that he misused company resources by submitting petty cash receipts and travel receipts for expenses incurred in carrying on the affair. Because of this activity, Applicant's previous employer fired him.

#### **B. Discussion**

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

We have examined the challenged findings in light of the record as a whole and conclude that they are supported by substantial evidence. Therefore, we conclude that there is no error with respect to the Judge's material findings of security concern.

### **Whether the Record Supports the Judge's Ultimate Conclusions**

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices 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 general standard is that a clearance may be granted only when ‘clearly consistent with the interests

of national security.” *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. We review matters of law *de novo*.

We have examined the Judge’s findings of fact and conclusions in light of the security concerns addressed under Guideline E—that conduct reflecting “unreliability” or an “unwillingness to comply with rules and regulations” indicates that a person may not properly safeguard classified information. *See* Directive ¶ E2.A5.1.1. Applicant contends that the Judge’s favorable findings on other allegations contained in the SOR are inconsistent with those at issue on appeal. However, we have examined these findings and conclude that they are logically separable from those which underlie the Judge’s ultimate decision. We conclude that there is a rational connection between the Judge’s adverse findings and his decision to deny Applicant a clearance. Therefore, we hold that the Judge’s decision is not arbitrary, capricious, nor contrary to law. We cannot consider the new evidence which Applicant has submitted in support of his appeal. Directive ¶ E3.1.29.

**Order**

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, 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