KEYWORD: Guideline K; Guideline E

DIGEST: The Judge's material findings of fact are sustainable.. Applicant's attorney waived any objection to the Judge taking notice of US statutes. The Judge was obliged to consider all the record evidence. Adverse decision affirmed

CASENO: 05-14135.a1

DATE: 12/07/2007

DATE: December 7, 2007

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT
Joyce E. Peters, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 21, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline K (Security Violations),

Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 26, 2007, after the hearing, Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings that Applicant had deliberately transported classified material to his private residence and stored it there are based upon substantial record evidence; whether the Judge's adverse conclusion under Guideline E was arbitrary, capricious, and contrary to law; whether Applicant was denied due process of law; and whether the Judge's adverse conclusions under Guidelines K and E are arbitrary and capricious in that the Judge did not establish employer policies or NISPOM applicability during the times alleged in the SOR and in absence of evidence that Applicant stored classified material at his residence. Finding no harmful error we affirm.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is employed by a defense contractor. From 1978 until 1989 he served as an officer in the U.S. Navy. One of his Naval assignments was that of Engineer Officer for a nuclear submarine. In October 1989, Applicant received nonjudicial punishment (NJP) under the Uniform Code of Military Justice (UCMJ) for having failed to take prescribed actions in response to a valve problem on the submarine. His punishment consisted of a punitive letter of admonition. Applicant appealed the punishment, which was denied. His appeal was classified "CONFIDENTIAL" and was not included in the report of nonjudicial punishment. Applicant was subsequently detached for cause from the submarine for misconduct and unsatisfactory performance. Applicant resigned his commission and began working for the defense contractor who is his current employer.

In 2001 Applicant spoke with a polygraph examiner as part of an investigation for Sensitive Compartmented Information (SCI) access. He stated to the examiner that, during his NJP hearing, he took notes and made photocopies of submarine operating procedures and that the information contained in these documents was classified. He told the polygrapher that he took the documents home with him after the hearing and that he had maintained them at his residence ever since. He further stated that he was unhappy with the Navy for having administered what he believed to be unjust punishment and that he kept the classified documents at his home due to having a "vendetta" against the Navy. He stated that he had never compromised the information in any fashion. Applicant was subsequently denied access to SCI. The Judge found that Applicant's statements to the polygrapher were credible and that Applicant did knowingly transport classified documents from his duty section to his private residence, maintaining them there from 1989 until 2001.

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 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 finding 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.

Applicant contends that the Government failed to present substantial evidence that he had knowingly transported and stored classified information at his private residence. We have examined the Judge's findings and compared them with the record evidence. The Judge based his findings in large measure on documents supplied by the Government, consisting of Applicant's NJP record; the detachment for cause record; and the SCI denial record. These documents are detailed, internally consistent, and consistent with one another. Furthermore, they constitute records of a regularly conducted activity, an exception to the hearsay rule.[1] Applicant has not met his burden of demonstrating that the Judge's material findings do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See* ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

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 the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 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 and E3.1.33.3.

Once there has been a concern articulated regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.,* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Applicant contends that he was denied due process in that the Judge concluded that his improper storage of classified material at his residence violated 18 U.S.C. § 793(f) and 10 U.S.C. § 933.[2] Appellant argues that he did not have adequate notice that the Government intended to rely

[1]Fed. Rule Evid. 803(6). The Federal Rules of Evidence serve as a guide in DOHA hearings. Directive ¶ E3.1.19.

[2]Article 133, Uniform Code of Military Justice (UCMJ), Conduct Unbecoming an Officer.

upon these statutes, insofar as they are not referenced in the SOR, nor were they provided to Applicant as part of the pre-hearing discovery process. However, at the beginning of the hearing, Department Counsel requested that the Judge take official notice of 18 U.S.C. § 793, in response to which Applicant's attorney stated that she had no objection. Department Counsel did not request official notice of 10 U.S.C. § 933. After considering the briefs of the parties and the record, we conclude that, by lodging no objection to the Judge's consideration of 18 U.S.C. § 793, Applicant waived the opportunity to seek a continuance or some other form of relief if, in fact, at the time, he viewed Department Counsel's request for official notice as an infringement upon his procedural rights.[3] Regarding the Judge's references to Article 133 of the UCMJ, concluding, *sua sponte*, that Applicant's conduct violated the UCMJ, such error is harmless in that it clearly did not affect the outcome of the case. ISCR Case No. 03-09915 at 5 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 at 5 (App. Bd. Aug. 26, 2002). While the Board believes that the better course of action under Guideline J would be for the SOR to cite the specific criminal statutes which an applicant is alleged to have violated, under the facts of this case we find no merit in Applicant's assertion that Applicant was prejudiced by a denial of procedural due process rights.

Applicant asserts that the Judge's adverse decision under Guidelines E and K is arbitrary, capricious, and contrary to law. He argues first of all that he had successfully mitigated the Guideline E security concern pertaining to his NJP action.[4] Were this the only concern listed in the SOR Applicant would have a point, the incident having occurred a relatively long time in the past. However, the Judge was required to examine this allegation not in a piecemeal fashion but in light of the record evidence as a whole.[5] Viewed in this context, the Judge's decision on this allegation is sustainable.

Applicant also contends that the Judge's decision under Guidelines K and E is arbitrary and capricious in that he had made no findings (1) that Applicant had stored classified information at his residence; (2) that Applicant violated his employer's policies concerning the storage of classified information; and (3) and that Applicant had violated the NISPOM. On this last point, Applicant contends that he was not provided copies of all the various NISPOM provisions referenced in the SOR.

The sole Guideline K allegation reads as follows: "You deliberately stored classified information at your private residence from about 1989 to at least July 6, 2001, without authorization, in violation of your employer's policies and procedures and in violation of paragraph 14(5) of DoD 5220.22-M, Industrial Security Manual for Safeguarding Classified Information, March 1989; paragraphs 5-106, 5-300 and 5-306 of Department of Defense 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), January 1991 and paragraphs 5-100 and 5-304 of

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[3]*See* ISCR Case No. 02-24965 at 4 (App. Bd. Aug. 19, 2003) (An applicant has a right under the Directive and Executive Order to have a reasonable opportunity to respond to adverse evidence. However, this right is subject to waiver through failure to take "reasonable timely steps to exercise it.")

[4]SOR ¶ 2(b). There are three allegations under Guideline E. The other two will be discussed below.

[5]*See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006); ISCR Case No. 05-00488 at 3 (App. Bd. Oct. 1, 2007) ("[A] judge's application of mitigating factors must be conducted in light of the record as a whole.") *See also U.S. v. Bottone,* 365 F. 2d 389, 392 (2d Cir. 1966), *cert. denied* 385 U.S. 974 (1966) ("The trier is entitled, in fact bound, to consider the evidence as a whole. . .")

Department of Defense 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), January 1995, while employed at [federal contractor]." The SOR incorporates this paragraph *in toto* as a Guideline E security concern, in addition to the NJP allegation discussed above. It also includes under Guideline E the following allegation: "You deliberately transported classified information to your private residence in about 1989 after serving on [a submarine]."

We conclude that the first of the three alleged errors is without merit, in light of our previous discussion of the sufficiency of the Judge's factual findings. As regards the second, Applicant is correct, in that the allegation alleged a violation of the policies of his current employer, yet there is no evidence in the record, and therefore no finding by the Judge, as to what these policies are.

Concerning the third claim of error it is true that the Judge made no explicit factual finding regarding which portion of the NISPOM Applicant's conduct violated. However, the Judge properly took official notice of that portion of 1995 version of the NISPOM which includes the paragraphs cited in the SOR. Applicant did not object. These paragraphs describe procedures for storing classified information and permit a reasonable conclusion that Applicant's conduct was in violation of those procedures. Furthermore, the Judge stated on the record that he would compare the 1995 version with earlier ones cited in the SOR to ensure that the provisions were similar. Applicant did not object to this course of action, forfeiting any claim of error as to inadequate notice. The Judge's formal findings against Applicant under both Guidelines, at least as regards the NISPOM, are sustainable, viewed in light of the record as a whole. Therefore, the error regarding the employer's policies is harmless. We hold that the Judge's adverse security clearance decision is neither arbitrary, capricious, nor contrary to law.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody

Administrative Judge
Member, Appeal Board