

KEYWORD: Guideline K; Guideline E

DIGEST: Applicant was not denied due process. DOHA Judges enjoy a presumption of regularity and good faith in the performance of their duties. Applicant has not shown that the Judge mis-weighed the evidence. Adverse decision affirmed.

CASE NO: 14-00683.a1

DATE: 01/28/2015

DATE: January 28, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-00683
)	
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 April 28, 2014, 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). Applicant requested a hearing. On October 31, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is the president and chief executive officer of a company contracting with the Government. He possessed a security clearance from 1981 to May 2012, when his clearance expired. In September 2012, Applicant attended a classified, yearly trade conference, as he had done for the previous 12 years. Attendees are required to have a current secret clearance to attend the conference. Applicant failed to submit a "visit request" prior to the conference that would have enabled security personnel at the conference to confirm that he had a current secret clearance.

At the inception of the conference, Applicant was recognized as a recurrent conference attendee. He asked for, and was given, an unclassified badge enabling him to attend the ice breaker and other social events taking place on the first day of the conference. The unclassified badge had a red stripe at the bottom of the badge to identify him as an uncleared participant. He was informed he could not attend classified briefings or to participate in conversations containing classified information. Security personnel asked Applicant to return to the registration desk on the morning of the second day of the conference to be issued a cleared badge after his security eligibility was resolved.

On the morning of the second day, Applicant failed to report to the security personnel desk as requested. Instead, he clipped (or had someone clip) the red stripe off his badge and attended classified seminars for the next three mornings of the conference. Applicant was seen coming out of a classified briefing on the fourth day of the conference. He was confronted by a security officer and asked to surrender his badge. The officer then noted that Applicant had clipped off the red stripe from the badge. The officer asked him why he had clipped the badge, and whether he knew he was in trouble. Applicant did not deny clipping the red stripe from the badge, and responded by saying that he did not think too much about it because he knew he had a valid clearance. Applicant was asked to leave the conference.

The subsequent security violation investigation revealed that Applicant's clearance expired in May 2012, that he had not submitted an SCA request for the continuation of his clearance, and he had never submitted a visit request to attend the conference. Applicant also failed to check his access eligibility in JPAS before attending the conference.

Applicant was subsequently interviewed by a government investigator. At that time, he denied clipping the red stripe off his badge and denied that he attended classified briefings during the conference. At his DOHA hearing, Applicant acknowledged knowing that the conference was classified, and that attendees were required to have at least a secret clearance. He also knew that he was required to submit a visit request prior to attending to have his eligibility confirmed. He stated he believed he had a valid security clearance to attend the conference, and that his FSO had submitted the visit request. He admitted attending classified briefings at the conference. He again denied that he clipped off the red stripe of his badge.

The Judge reached the following conclusions: Applicant used the clipped badge to conceal that he lacked a clearance. He deliberately attended briefings knowing that he was not cleared to attend. His actions at the conference constituted security violations. They are recent and happened under normal circumstances. Applicant expressed no remorse for the security violations. On the contrary, he continued to make false statements to investigators and at his DOHA hearing by denying that he clipped the red stripe off his uncleared badge. He has taken no responsibility for his actions. Under Guideline K, Applicant's violations are likely to recur and they cast serious doubt on his current reliability, trustworthiness, and judgment. Under Guideline E, Applicant's false statements are unmitigated.

Applicant asserts that there were "questionable procedural steps" that took place during the hearing. The Board construes this assertion as a claim that Applicant was not afforded the requisite due process during the hearing. Applicant states that Department Counsel "made several leading questions resulting in statements and allegations that influenced the Judge's ruling." There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Judge committed factual or legal error. *See, e.g.*, ISCR case No. 03-18711 at 2 (App. Bd. March 23, 2005). Applicant's assertion fails to identify specific instances in the record where he maintains the Judge erred. Thus, the Board is not in a position to review any specific rulings by the Judge regarding Department Counsel's questioning of witnesses. In any event, Department Counsel's questioning included a lengthy examination of Applicant. The use of leading questions was appropriate in that setting.

Applicant argues that he never acknowledged that he altered the security badge and that the Government witness's testimony that he did not deny it when confronted would have been the basis for a valid objection, had Applicant been experienced enough to make it. Having chosen to represent himself at the hearing, Applicant cannot fairly complain on appeal about the consequences of that decision. *See* ISCR Case No. 08-03110 at 2 (App. Bd. Jan. 27, 2009). Moreover, after a review of the record, the Board is unable to conclude that a valid objection to the Government witness's testimony exists on this point.

Applicant states broadly that the Judge made incorrect interpretations of facts and events, and failed to fairly evaluate his testimony. There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Applicant is unable to rebut these presumptions. Applicant, in essence, has reasserted on appeal his hearing version of events, wherein he maintains he did not commit a security violation and did not falsely represent the same to an investigator. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012).

The Board does not review a case *de novo*. The evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board