

KEYWORD: Guideline E

DIGEST: Applicant possessed private firearms in violation of a general order while in Iraq. He was involved in an incident in which two Iraqi nationals were shot. The Judge considered Applicant's military career but concluded that Applicant had failed to meet his burden of persuasion. Adverse decision affirmed.

CASENO: 07-03828.a1

DATE: 04/29/2010

DATE: April 29, 2010

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In Re: )  
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 ----- ) ISCR Case No. 07-03828  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ronald C. Sykstus, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On April 9, 2009, DOHA issued a statement of reasons (SOR) 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 February 22, 2010, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings pertinent to the issues raised on appeal: After retiring from a 30-year career as an active duty military member, Applicant obtained employment with a defense contractor. He worked in Iraq from 2005 to 2006. While there, he came into possession of two nine-millimeter pistols. He did not purchase the firearms, but obtained them from an unknown member of the U.S. military. Applicant’s possession of the firearms was wrongful because possession of privately-owned firearms was a prohibited activity in violation of a general order, which applied to Applicant in his capacity as a civilian serving with the U.S. armed forces while under the operational control of the military command in Iraq. While in Iraq, Applicant was involved in an incident while off-duty where he shot two Iraqi nationals with one of his weapons. Applicant and others in his party were approached by two Iraqis, one of whom displayed a pistol, and proceeded to pull back the pistol’s slide and release it. Applicant then withdrew his pistol and shot the armed Iraqi and then turned and shot the other Iraqi, who was able to flee on foot. Applicant and his companions left the scene and returned to the U.S. embassy compound, where they went their separate ways. Applicant did not report the shooting to any civilian or military authority at the embassy.

Applicant claims he reported the shooting to some Marines the next day at his workplace, but he was unable to provide any corroborating information on that point. Some months later, while on a trip back to the U.S. to attend to some personal business, Applicant recounted the shooting incident informally to a fellow employee while at his company’s headquarters. The information was passed along to the company’s management officials, who held a meeting with Applicant about the incident. The company concluded that Applicant had been forthright and cooperative during the interview. The company placed Applicant on administrative leave with pay, and subsequently told him he was being laid off. He was given 30 days severance pay. Applicant was subsequently interviewed by other government agencies and gave detailed accounts of the shooting incident, maintaining that he acted in self-defense. During the course of these interviews, Applicant indicated that he did not notify anyone the night of the shooting because “nobody wanted to get anyone else in trouble.” Applicant also stated that if he thought he had committed a crime then he would have reported it, but he didn’t think he had committed a crime.

The Judge concluded that, with regard to the possession of firearms, Applicant knew, or should have known, that his actions were unlawful. The Judge concluded that it was difficult to believe that Applicant was not briefed on the prohibited activities listed in the general order. The

Judge also concluded that Applicant willfully withheld information about the serious shooting incident, despite numerous opportunities to report it. The Judge concluded that given his background and experience, Applicant knew or should have known a full report to his employer or an appropriate U.S. authority was required for such a serious incident. Applicant elected not to take action (other than the unofficial action of mentioning it to some of the Marines he worked with) because he was concerned about the potential for negative consequences to himself and others involved. The Judge concluded that, taken together, Applicant's conduct amounts to inappropriate workplace behavior that calls into question Applicant's judgment, reliability, and trustworthiness. The Judge stated that he gave due consideration to Applicant's military career and civilian service in light of the whole-person concept, but any credit due him is not enough to overcome the security concerns.

Applicant asserts that the Judge's decision is not supported by the evidence. He points out that he had an exemplary military career without a blemish on his record. Applicant also contends that he was not aware of the general order or its contents, and he had not been briefed concerning the issue of privately-owned firearms. He claims that he did not intentionally disregard any order and it was common knowledge and practice that contractor employees were carrying weapons in order to protect themselves. Regarding the shooting incident, Applicant asserts that the only way the government has any information regarding the shooting incident is from himself. Applicant states that he did, in fact, report the incident in a timely manner and to appropriate authorities, and at no time did he intentionally withhold any information concerning the incident. Applicant's arguments do not establish error.

After a review of the record, the Board concludes that the Judge's conclusions are sustainable. Applicant testified that he was aware of the general order and knew that his employer did not favor private possession of handguns in Applicant's duty area in Iraq. These facts undercut Applicant's assertion that his possession of the handguns was innocent and reasonably support the Judge's conclusion that Applicant's actions constituted lack of judgment. Likewise, the Judge's conclusions that Applicant did not properly inform the authorities through official channels about his involvement in the shooting of two Iraqi civilians and that his failure to do so constituted poor judgment and lack of trustworthiness are also supported by the record.

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).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of the mitigating factors listed under Guideline E, but indicated why those mitigating conditions could not be invoked in this case to alleviate the government's security concerns.

The Board does not review a case *de novo*. The favorable 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 his 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 denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board