

KEYWORD: Guideline K; Guideline E

DIGEST: Applicant's prior experience completing security clearance applications support the Judge's conclusion that Applicant had deliberately provided false information about prior security violations. Adverse decision affirmed.

CASENO: 07-04504.a1

DATE: 07/31/2008

DATE: July 31, 2008

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In Re:	)	
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	)	ISCR Case No. 07-04504
	)	
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

James P. Fleisher, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 28, 2007, DOHA 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 March 12, 2008, after the hearing, Administrative Judge Philip S. Howe denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in concluding Applicant had deliberately falsified his security clearance application; whether the Judge’s adverse security clearance decision under Guidelines K and E is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings: Applicant is 58 years old, married with three adult children, and is a retired military officer with 24 years of active service. He has a master’s degree. Since his retirement in 1994, he has worked for several defense contractors. While in the military, Applicant had a security clearance and never had any incidents or problems with the clearance. During his career, Applicant completed several security clearance applications. A former supervisor evaluates Applicant as a dependable and conscientious employeewho always delivered a quality product for him. Decision at 2.

From May 2004 to February 2006, Applicant failed to properly secure classified information at his place of work on six occasions. No loss or compromise of classified information occurred as a result of those incidents. After the incidents, he attended additional training regarding security procedures. *Id.*

Applicant’s access to classified information was suspended in February 2005, and restored in March 2005. Applicant submitted a written response to the suspension. He stated he did not deliberately disregard procedures, and offered his version of the incidents up to the suspension. Applicant also admitted he had no explanation for the security violations, but he thought he fully performed the security procedures. *Id.* at 3.

Applicant’s employer removed him in April 2006, after the sixth incident involving violations of security procedures. The employer found all prior incidents were of a similar nature, and that “[Applicant’s] repeated failure to comply with statutory requirements to protect classified information by following established processes and procedures is well documented.” Applicant was removed “to prevent future incidents and potential compromise of classified information.” Applicant resigned from that job in May 2006. He obtained employment with another defense contractor in a test evaluation position in May 2007. *Id.*

In August 2007, Applicant offered a new explanation for his security lapses from 2004 to 2006. Applicant explained in this response to the DOHA interrogatories, and again at the hearing, that his younger sister died unexpectedly in February 2004. He was the estate executor, and had to spend three weeks working at her home to organize her possessions to settle the estate. Applicant’s wife described him as tired during that period, and not sleeping well. Applicant described himself as numb over her death, but he had no breakdowns at work because he compartmentalized his life and focused on his work. He obtained no counseling during 2004, nor when his father-in-law was

ill and died in the period of January to May 2006. Applicant considered his work performance from 2004 to 2006 to be high. Applicant had a physical examination in November 2007, and in December 2007, an evaluation by a clinical neuropsychologist. The tests results were normal. One test indicated some increasing stress, situational distress, and “some underlying depression and anxiety,” but nopsychotherapeutic intervention was deemed warranted, “as the situational distresses have dissipated.” *Id.* at 4.

Applicant completed his security clearance application on April 6, 2006. Question 26(b) of the application asked: “To your knowledge, have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment?” Applicant answered “no” even though he had his access suspended from February 2005, to March 2005. He stated that he did not disclose the access suspension because he interpreted the question to apply only to his security clearance, which remained in effect. *Id.*

(1) Applicant argues that he did not deliberately falsify Question 26(b) of his security clearance application by failing to disclose the fact that his access to classified information had been suspended. In support of that argument, he asserts that the Judge was required to accept, as a matter of law, his explanation that he had misinterpreted the question. Applicant’s argument does not demonstrate that the Judge erred.

A review of the Judge’s decision indicates that he considered Applicant’s explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant’s explanation. The Judge considered Applicant’s explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omission was deliberate and intentional. Given the plain language of the question at issue, Applicant’s prior experience completing security clearance applications, and the totality of the record evidence, the Judge’s conclusion that Applicant had deliberately falsified his security clearance application is sustainable. *See, e.g.,* ISCR Case No. 07-02163 at 2 (App. Bd. Feb. 28, 2008); ISCR Case No. 06-16159 at 2 (App. Bd. Jan. 10, 2008).

(2) Applicant also argues that the Judge’s adverse decision is arbitrary, capricious and contrary to law because the Judge failed to examine relevant evidence and factors, failed to consider an important aspect of the case, and failed to articulate a satisfactory explanation for his decision, including a rational connection between the facts found and the choice made. Additionally, he also argues that the Judge reached an overall decision that ran contrary to the record evidence and reflected a clear error in judgment. The Board does not find these arguments persuasive.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. 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). An applicant’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).

Applicant specifically challenges the Judge's application of Guideline E in this case. However, the Board has previously addressed the interpretation of Guideline E proffered by Applicant. In ISCR Case No. 06-20964 at 5-6 (App. Bd. Apr. 10, 2008), the Board declined to read paragraph 16 as limiting the scope of paragraph 15 or Enclosure 2, paragraph 2(d). Applicant's argument has not persuaded us to alter our view.

The Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 04-08623 at 4 (App. Bd. Jul. 29, 2005). He is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 04-01961 at 2 (App. Bd. Jul. 12, 2007). The Judge's decision is not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 03-01009 at 5 (App. Bd. Mar. 2005). A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. 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). Accordingly, the Judge's adverse decision under Guidelines K and E is sustainable.

### **Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairman, 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