

KEYWORD: Guideline E

DIGEST: Applicant, who is married, had an extra-marital affair and as a result, he fathered a child. While Applicant revealed the affair and his child to the government, his wife remained unaware of them and Applicant had used his mother's address when corresponding with the government about his clearance. The Judge concluded that Applicant's revelation of the affair to the government failed to mitigate the security concerns arising out of Applicant's wife's lack of knowledge. Such conclusion is sustainable. Adverse decision affirmed.

CASENO: 07-16240.a1

DATE: 10/01/2008

DATE: October 1, 2008

In Re:))	
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Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 24, 2008, 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 June 30, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr., 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 issue on appeal: whether the Judge's unfavorable clearance decision is arbitrary, capricious, or contrary to law.

The Judge made the following factual findings: Applicant is 42 years old and is an employee of a Defense contractor. Applicant is married, and he and his wife have two children, ages 13 and 14. Applicant had an extra-marital affair with an old friend between late 2003 and late 2004, and at that time he fathered a child who was born in January 2005. No one is aware of the affair and the paternity of the child except the mother of the child, although Applicant is listed as the child's father on the birth certificate. Applicant sees the child monthly and makes a \$1,000 cash deposit in the child's mother's bank account monthly to cover child care expenses. At present, there is no formal agreement governing child support, although Applicant agrees that the child's mother could seek a court order or other formal agreement for additional support in the future. Applicant does not want his wife to learn of the affair and is convinced that she would divorce him if she learned of it. Applicant's wife was unaware of the clearance hearing, because Applicant had the papers related to the case mailed to his mother's address. Applicant did not present any evidence regarding his job performance.

Applicant admitted the allegations against him, and those admissions were sufficient to establish the government's case against him. The burden of proof then shifted to Applicant to rebut, explain, extenuate, or mitigate the case against him. Directive ¶ E.3.1.15.

Applicant argues that he should have been granted a clearance because he demonstrated honesty and trustworthiness by revealing his affair and his illegitimate child. He states that the government probably would not have become aware of the affair and the child if he had not mentioned them. While the Judge stated that Applicant was subject to coercion because of the affair and the child, Applicant maintains that he revealed the information to the government to "mitigate the possibility for bribery or coercion (*sic*)."

Applicant testified at the hearing regarding his honesty in revealing his affair, and he stated that he would not compromise the interests of the United States. That was mitigating evidence for the Judge to consider, and there is a rebuttable presumption that the Judge considered it unless he specifically stated otherwise. However, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance. 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*. 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. 07-10454 at 2 (App. Bd. Aug. 12, 2008).

Most of the testimony at Applicant's hearing involved the fact that his wife was unaware of his affair and the existence of his young son. While Applicant revealed the affair and his young child to the government, his wife remained unaware of them at the time of the hearing, and Applicant had used his mother's address when corresponding with the government about his clearance. The Judge's conclusions that Applicant's wife's lack of knowledge was a continuing security concern and that Applicant remained vulnerable to exploitation, manipulation, or duress in that regard are sustainable.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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