

KEYWORD: Guideline D; Guideline E

DIGEST: The Judge found that Applicant is married and having an affair with a married woman. Neither of them has told their spouse of the affair. Also, Applicant's business partner is not aware of the relationship. Applicant's conduct left the Judge ample to doubt Applicant's eligibility to protect classified or sensitive information. Adverse decision affirmed.

CASENO: 08-01431

DATE: 05/28/2009

DATE: May 28, 2009

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

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

Charles T. Mathews, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 30, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 5, 2009, after the hearing, Administrative Judge Wilford H. Ross denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his application of the pertinent mitigating conditions and whether the Judge’s whole-person analysis was erroneous. Finding no error, we affirm.

The Judge found that Applicant, who is married, has been conducting an extramarital affair with A, who is also married. Applicant has given A \$16,000 to enable her to purchase a home. Neither Applicant’s spouse nor A’s spouse is aware of the affair. Applicant’s business partner does not know about the affair either. The affair was ongoing at the close of the record. In the Analysis portion of his decision, the Judge concluded that Applicant’s circumstances render him subject to coercion.

Applicant specifically argues that he has nothing to hide with his extramarital relationship. However, the Judge found that Applicant’s relationship is not known to his wife, his business partner, or his girlfriend’s husband. These sustainable findings undermine Applicant’s claims on appeal. Also, Applicant says that it was “contradictory for Judge Ross to criticize” Applicant for having dinner with an employee when on a trip with his girlfriend. Applicant’s argument is not persuasive. It is Applicant’s conduct which appears contradictory. On the one hand he has chosen not to disclose the information to all the interested parties, on the other hand he is not being discreet about the situation. Applicant’s conduct left ample room for the Judge to doubt Applicant’s eligibility to protect classified or sensitive information.

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)). Applicant contends that Applicant did not properly weigh the mitigating evidence, *i.e.*, the testimony of two witnesses concerning Applicant’s susceptibility to coercion and his fitness for a security clearance. The record does not support a conclusion that the Judge weighed the evidence 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 Judge’s decision that “it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 8. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security’”).

**Order**

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairman, 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