

KEYWORD: Guideline E

DIGEST: The Judge based his ultimate holding upon the extent to which Applicant's conduct with a particular woman (W) evidences poor judgment or subjects him to the possibility of duress, rather than simply upon the nature of the relationship itself. The Board finds no reason to disturb the Judge's conclusion that the record as a whole in Applicant's case raises Guideline E security concerns. Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. The Judge articulated a satisfactory explanation for his decision including a rational connection between the facts found and the choice made. The Judge explicitly considered Applicant's stellar 40-year career. However, he reasonably explained why Applicant's recent conduct with W weighs more heavily than his prior good record. The Judge's conclusion that Applicant had failed to meet his burden of persuasion as to mitigation, either under the pertinent mitigating conditions or the whole-person factors, is sustainable on this record. After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. Adverse decision affirmed.

CASENO: 08-03960.a1

DATE: 04/13/2009

DATE: April 13, 2009

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In Re:)	
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-----)	ISCR Case No. 08-03960
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Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

James H. Shoemaker, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 19, 2008, 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 January 29, 2009, after the hearing, Administrative Judge LeRoy F. Foreman 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 concluding that the Government had presented substantial evidence of Guideline E security concerns; whether the Judge erred in concluding that Applicant had failed to mitigate any security concerns contained in his case; and whether the Judge’s whole person analysis was erroneous. Finding no error, we affirm.

The Judge made the following unchallenged findings of fact: Applicant is a 64-year-old employee of a defense contractor. He retired from the U.S. Marine Corps in the 1980s, having risen to the grade of E-9. He is married, but he and his wife have been legally separated since 2005.

Applicant currently lives with a woman (W). He met her on a computer network in May 2005, and they began a romantic relationship the following July, prior to his separation from his spouse. Applicant’s wife is aware of the relationship.

W has a lengthy criminal record. Between 1994 and 2004, she was arrested and/or convicted of such offenses as theft, receiving stolen property, forgery, illegal possession of a firearm, having a concealed firearm, possessing a firearm with an obliterated serial number, unauthorized use of a motor vehicle, burglary, distribution of methamphetamine, possession of drug paraphernalia, bank fraud, and violation of probation. In 2005, she stated to Applicant that, despite treatment for drug addiction, she had relapsed and had used crack cocaine. Applicant attributed her criminal record to her drug addiction. After the 2005 incident, she underwent detoxification and attended narcotics anonymous (NA) for 90 consecutive days. She has not attended NA since then, nor has she received other counseling or treatment. Applicant stated that W is “a changed person,” (Decision at 4) and that he would know if she relapsed. Were that to occur, Applicant stated that he would place her in a rehabilitation program.

The Judge concluded that Applicant's having developed and maintained a long-term relationship with a person having such an extensive criminal record evidences questionable judgment. Additionally, he stated that, while Applicant had disclosed his affair to his wife and to his immediate supervisor, "the record does not reflect whether he disclosed the full extent of [W's] criminal record. In the broader community, including the military community with whom he must interact, it is likely that his personal and professional standing would be adversely affected."¹ *Id.* at 7. Furthermore, he stated that under the facts of this case, Applicant has made himself vulnerable to duress or exploitation, either by W or his wife. The Judge noted that Applicant's claim that his wife actually agreed to his relationship with W, rather than merely having acquiesced, is not corroborated by testimony or other evidence from her. Applicant argues on appeal that the Judge erred in relying upon the extramarital nature of his relationship with W. However, after reading the Judge's decision as a whole, the Board concludes that the Judge based his ultimate holding upon the extent to which Applicant's conduct with W evidences poor judgment or subjects him to the possibility of duress, rather than simply upon the nature of the relationship itself. Considering the record as a whole, the Board finds no reason to disturb the Judge's conclusion that the record as a whole in Applicant's case raises Guideline E security concerns.²

In support of his appeal, Applicant points to decisions by the Hearing Office, which he argues support his request for a favorable determination. The Board gives due consideration to these cases. However, each case "must be decided upon its own merits." Directive ¶ E2.2.3. Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). 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)).

¹*See, e.g.*, Applicant Exhibit A, a letter of recommendation provided by Applicant's supervisor. "In regard to his personal relationship with [W], [Applicant] early on advised me of her addiction and I am well aware of the situation." *See also* Tr. at 82, testimony by a friend and colleague: "When [Applicant] first met the young lady . . . we got together for lunch and he told me what was going on and that he was involved with her and that she had some problems and he wanted to help her along the way." Neither of these persons unequivocally demonstrates awareness of the full extent of W's criminal history.

²*See* Directive ¶ E2.16(d): "credible adverse information that is not explicitly covered under any other guideline . . . which supports a whole-person assessment of questionable judgment[.]" Directive ¶ E2.16(e): "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the persons' personal, professional, or community standing[.]" Directive ¶ E2.16(g): "association with persons involved in criminal activity." *See also* ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008): "The disqualifying conditions listed under each Guideline are illustrative only, not exhaustive and exclusive. In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. The general security concern raised by Guideline E is that "[c]onduct involving questionable judgment . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

The Judge explicitly considered Applicant’s “stellar 40-year career.” Decision at 9. However, he reasonably explained why Applicant’s recent conduct with W weighs more heavily than his prior good record. The Judge’s conclusion that Applicant had failed to meet his burden of persuasion as to mitigation, either under the pertinent mitigating conditions or the whole-person factors, is sustainable on this record. See *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’”). See also Directive ¶ E3.1.15 (After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns.)

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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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