

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge’s challenged findings are based on substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. Adverse decision affirmed,

CASENO: 08-08823.a1

DATE: 04/21/2010

DATE: April 21, 2010

In Re:	)	
	)	
-----	)	ISCR Case No. 08-08823
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq, Chief Department Counsel

**FOR APPLICANT**

Daniel C. Minutillo, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 23, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline

E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 8, 2010, after the hearing, Administrative Judge Roger C. Wesley 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's findings of fact were supported by substantial record evidence; whether the Judge mis-weighed the evidence; and whether the Judge erred in his application of the pertinent mitigating conditions. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a quality engineer for a Defense contractor. She immigrated to the U.S. and became a naturalized citizen. She obtained a degree in computer science from a U.S. university. She is married and has two children.

In the mid-2000s Applicant was working for her current employer, though in a different state from her current place of employment. She became friendly with a male colleague, A, and the relationship between the two became a social one. Applicant and her husband regularly invited A to their home, and A would give gifts to Applicant's children at holiday time and on birthdays.

Applicant and A's relationship developed, and they would attend events such as concerts together, without the knowledge of A's husband. Once, they traveled to the west coast for a shopping trip without A's husband knowing about it. A began to make sexual advances upon Applicant and started calling her names, such as "Babe." Some of this took place in the workplace, and Applicant filed sexual harassment charges against A.

In December 2005 A asked Applicant if she would come by his residence to pick up presents for Applicant's children. When she did, Applicant and A had sexual relations. Later, Applicant reported the incident as rape, claiming that A pushed himself on her. However, subsequent investigation led authorities to the conclusion that rape did not occur, finding A's account of consensual relations to be more credible. Applicant ultimately pled guilty to false reporting, a misdemeanor. The Judge found that, in light of the totality of the record evidence, Applicant had falsely reported the rape.

Applicant enjoys an excellent reputation for the quality of her work performance, her conscientiousness, trustworthiness, and dependability.

Applicant challenges the Judge's finding that she falsely reported the rape, claiming that she pled guilty only to avoid the stress of litigation. We have examined the record evidence, including the police report which the Judge considered in arriving at his finding of false reporting. The report is detailed and internally consistent. Its credibility was not seriously impugned at the hearing. We have also examined Applicant's testimony at the hearing. We conclude that the Judge's findings are based upon substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.")

Although Applicant contends that the Judge did not properly weigh the evidence, we find no reason to disturb the manner in which he evaluated the evidence and judged the credibility of Applicant's testimony. 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. 06-21819 at 2 (App. Bd. Aug. 13, 2009).

Applicant notes that the Judge's statement, contained in the Findings portion of the decision, that "[b]ecause Applicant declined to elaborate on the circumstances surrounding her reported account of the incident when pressed by the [police] and [the OPM investigator] . . . all of the circumstances surrounding the . . . incident may never be fully revealed." Decision at 5. Applicant contends that the Judge should have resolved these ambiguities in favor of Applicant. However, in cases brought under the Directive, once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard governing security clearance adjudications is in *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.'") "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive ¶ E2.2(b). Accordingly, we find no error in the challenged statement.

We have examined the Judge's decision, both as to its application of the mitigating conditions and the whole-person factors. We conclude 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)). The Judge's adverse decision is sustainable on this record.

### Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael D. Hipple  
Michael D. Hipple  
Administrative Judge  
Member, 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