

KEYWORD: Guideline K

DIGEST: Applicant's claim that he was denied due process is not supported by the record evidence.. Adverse decision affirmed.

CASENO: 09-01617.a1

DATE: 11/24/2010

DATE: November 24, 2010

In Re:)
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 -----) ISCR Case No. 09-01617
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 Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 28, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On April 22, 2010, DOHA issued an amendment to the SOR, adding security concerns raised under Guideline E (Personal Conduct). Applicant requested a hearing. On September 15, 2010, after the hearing, Administrative Judge Mark Harvey 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 Applicant was denied due process; whether the Judge failed to consider all the record evidence; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

Applicant is an employee of a Defense contractor, working as an analytical chemist. He holds a Ph.D. in chemistry from a well-known university. He began working for his current employer approximately two years prior to the close of the record. Before that, he was employed by another defense contractor, C.

In 2004, Applicant received a memo citing him for unprofessional behavior in the workplace. This behavior included posting signs with personal comments about management, as well as communicating by e-mail “negative comments” about a large company project. Decision at 4. In 2008, Applicant’s employment with C was terminated, due to a reduction in force. Subsequently, management found in Applicant’s office four documents that demonstrated failure to comply with procedures and policies set forth in DoD Manual 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), February 28, 2006. These documents consisted of a memo attached to a classified cover sheet; a document on blue paper, of a kind used to designate a classified document; a document with classified headers and footers removed by tearing; and a classified document with marker blackouts of some of its classified content.

Applicant enjoys an excellent reputation for reliability, trustworthiness, and leadership. His Director of Security at his current employer finds him to be “100% security compliant.”

In the Analysis portion of the Decision, the Judge considered evidence favorable to Applicant, such as his character references, his good security record during his current employment, and his lengthy history of security compliance. However, he also noted that Applicant had improperly stored classified information, which entailed a risk of compromise. Additionally, the Judge cited Applicant’s history of intemperate, insubordinate, and disrespectful comments, which raise questions about his judgement and reliability. Accordingly, the Judge denied Applicant a clearance.

Applicant contends that the Judge denied him due process. Specifically, he states that he had little time to respond to the amendment to the SOR before his hearing. The record does not support this allegation. As stated above, Applicant was sent the amendment to the SOR on April 22, 2010. His hearing occurred on June 1, which gave him ample time to prepare for the hearing. There is nothing in the record to suggest Applicant was unprepared, and he made no reference to any such

concerns at any point in the hearing. There is no evidence to indicate that Applicant was denied due process.

Applicant contends that the Judge failed to consider all the record evidence. However, his brief is not sufficient to rebut the presumption that a Judge has considered all of the evidence in the record. *See, e.g.*, ISCR Case 09-01735 at 2 (App. Bd. Aug. 31, 2010).

Applicant has cited to a number of Hearing Office decisions which, he argues, support his case for mitigation. We give due consideration to these cases. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). The cases Applicant cites have significant differences from his own. Moreover, one of them was reversed on appeal. These cases do not demonstrate that the Judge's decision was arbitrary, capricious, or contrary to law.

The record supports a conclusion 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. "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).

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