

KEYWORD: Guideline E; Guideline M

DIGEST: There is no requirement that a judge discuss or mention every piece of evidence in reaching a decision. Adverse decision affirmed.

CASENO: 09-03983.a1

DATE: 12/21/2010

DATE: December 21, 2010

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In Re: )  
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----- ) ISCR Case No. 09-03983  
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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**

James W. Green, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 30, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline M (Use of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2010, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law. Specifically, Applicant contends that the Judge did not consider or did not give adequate weight to Applicant’s evidence of mitigation. In support of his argument, Applicant cites other Hearing Office decisions which he maintains support the granting of a security clearance in his case.

The Judge made the following findings of fact: Applicant is forty years old and is a graduate of a military service academy. Applicant served as a military officer until he received a dismissal from a general court-martial in 2007. During 2004-2005, Applicant had an affair with the wife of another officer. Using government computer equipment, Applicant sent sexually explicit pictures to that woman and received similar pictures from her. Over a period of several months, Applicant was asked several times by his commanding officer if he had an improper relationship with the woman. Applicant lied on each occasion. At the general court-martial, Applicant pleaded guilty to, and was convicted of, violating a military general regulation by misuse of government computer equipment with respect to offensive material, making multiple false statements to his commanding officer, and committing adultery. In addition to his dismissal from the service, Applicant spent 23 days in confinement. Other than the actions just described, Applicant’s military service was outstanding. Applicant’s performance in his subsequent civilian job has been excellent. Applicant submitted letters of reference. The writers of those letters attest to his character.

Applicant argues that he has mitigated any security concerns that might exist under Guideline E and Guideline M and that the Judge either did not consider or did not give adequate weight to his evidence of mitigation. There is a rebuttable presumption that the Judge considered all the record evidence, unless the Judge specifically states otherwise; and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 08-03845 at 2 (App. Bd. Feb. 24, 2009). Applicant admitted the SOR allegations against him. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. 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*. 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 that 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. 07-18303 at 2-3 (App. Bd. Nov. 13, 2008).

Applicant cites two other Hearing Office decisions which he maintains support the granting of his security clearance. The Board gives due consideration to these cases. However, each case must be decided on 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). Nothing in the cases cited by Applicant establishes error on the part of the Judge.

After reviewing the record as a whole, 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)). “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). Accordingly, the Judge’s ultimate unfavorable security clearance decision is sustainable.

### Order

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

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, 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