

KEYWORD: Guideline E

DIGEST: Applicant contends that the Judge erred in concluding that his conduct, which consisted of his physically and emotionally abusing detainees during an interrogation, raised security concerns. Applicant further argued that the military’s disciplinary goal was achieved by removing him from federal service, and the reason for the removal had no connection with Applicant’s security worthiness. In this case, the record contains substantial evidence that Applicant abused detainees in violation of policy and that he attempted to persuade a fellow agent not to report him. Applicant’s conduct could raise in a reasonable mind a belief that Applicant had questionable judgment and was unwilling to abide by rules and regulations. Adverse decision affirmed.

CASE NO: 11-00801.a1

DATE: 02/07/2013

DATE: February 7, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-00801
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Lawrence Berger, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 24, 2012, DoD 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 October 26, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean 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 Applicant's conduct raised security concerns; whether the Judge erred in his application of the mitigating conditions; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant served in the U.S. military for six years as a security officer and criminal investigator. After leaving active duty he worked at various jobs, including that of explosive ordnance technician. He became a civilian special investigator with the military. In September 2008 he volunteered for an assignment in a country in which the U.S. was engaged in military operations.

While serving in this overseas assignment, Applicant physically and emotionally abused detainees during an interrogation. Among other things, he applied a choke hold to a detainee, asked several of them why he should not kill them, and drew his service pistol, touching a detainee on the arm with it. Applicant asked his partner several times not to report him for this behavior. However, his partner reported Applicant's conduct to appropriate authorities. After an investigation, Applicant was proposed for removal from Federal employment. He appealed his removal to the Merit Systems Protection Board (MSPB), which upheld the removal.

During this assignment, Applicant was not in uniform, and he was not a combatant. Applicant's command policy required that he comply with the Law of War regarding treatment of detainees. Detainees who refused to answer questions were not permitted to be threatened, insulted, or exposed to "unpleasant or disadvantageous treatment." Decision at 3. Only the minimum force necessarily to deal with a threat was to be used. Command policy also required that violation of detainee policy had to be promptly reported through command channels and investigated.

During the initial investigation and MSPB hearing, Applicant initially denied involvement in detainee abuse. However, in a written statement he admitted questioning the detainees because of his belief that they were responsible for the deaths of some of Applicant's co-workers. He admitted placing his pistol on the forearm of one of the detainees. He did not deny that he had touched a detainee with his arm, although claiming that he had tripped and fallen against the victim rather than having placed him in a choke hold.

Several witnesses testified at the hearing on Applicant's behalf. They commended him for his excellent duty performance, his honesty, and his trustworthiness. In addition, the commander who recommended him for removal from Federal service opined that Applicant should not lose his clearance.

The Judge concluded that Applicant's having abused detainees in violation of military policy with the result that he was terminated from employment was sufficient to raise security concerns under Guideline E. In evaluating the mitigating conditions, the Judge concluded that the offense

in question was not minor because it violated policy “and potentially the Law of War.” Decision at 9. He also concluded that the circumstances were not unique. The Judge acknowledged that Applicant was serving in an environment that posed possibly life-threatening challenges. However, such high stress as Applicant undoubtedly experienced was not unique but, rather, part of his job and the jobs of others assigned there. The Judge stated that it was precisely because of such stress that authorities promulgated rules requiring the humane treatment of detainees. Moreover, Applicant was aware that his conduct was not acceptable, and he compounded the problem by trying to persuade a fellow agent not to comply with reporting requirements. In the whole-person analysis, the Judge acknowledged the favorable evidence that Applicant submitted in his own behalf. He also acknowledged Applicant’s military service and his having volunteered for dangerous duty overseas. However, he stated that Applicant’s security-significant conduct constituted a serious breach of command policy and repeated his opinion that this conduct could “potentially” constitute a violation of the Law of War. He also noted that Applicant did not report his conduct to his superiors, as he should have, but rather attempted to prevent another person from complying with reporting requirements. The Judge stated that the record left him with questions and doubts about Applicant’s suitability for a clearance.

Applicant contends that the Judge erred in concluding that his conduct raised security concerns under Guideline E. He argues that the military’s disciplinary goal was achieved by having removed Applicant from Federal service. He stated that the reason for the removal, however, had no connection with Applicant’s security worthiness.

The Government is not required to provide a direct nexus between an applicant’s circumstances and the pertinent security concern. The Directive presumes a nexus or rational connection between proven conduct under any Guideline and an applicant’s security eligibility. *See, e.g.,* ISCR Case No. 09-07565 at 3 (App. Bd. Jul. 12, 2012). In this case, the record contains substantial evidence that Applicant abused detainees in violation of policy and that he attempted to persuade a fellow agent not to report him. Applicant’s conduct could raise in a reasonable mind a belief that Applicant had questionable judgment and was unwilling to abide by rules and regulations. *See* Directive, Enclosure 2 ¶ 15.

Applicant contends that the Judge erred in his statement that Applicant’s conduct was a potential violation of the Law of War. The Judge’s two non-specific references were unnecessary because there is no allegation in the SOR with regard to a violation of the Law of War. However, a reading of the Judge’s decision as a whole leads us to believe that the references were harmless. The Judge’s conclusions relied on facts surrounding Applicant’s conduct. Applicant has not demonstrated harmful error.

Applicant cites to evidence favorable to him, including that he had cooperated with officials investigating his misconduct and that he served in a dangerous part of the world, etc. The Judge acknowledged the cited evidence, making a finding that Applicant did make a written statement admitting some aspects of his treatment of the detainees. He also acknowledged the danger inherent in Applicant’s deployment and made extensive findings regarding Applicant’s character evidence. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.,* ISCR Case No. 10-08604 at 2 (App. Bd. Dec. 12, 2012).

We find no reason to disturb the Judge’s treatment of the mitigating conditions. The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is AFFIRMED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

Applicant contends that the Judge’s comment about a possible violation of the Law of War was “untenable as a matter of law.” I am not persuaded by this argument. The Judge’s comment appears to have been based in part upon a finding by the MSPB Administrative Judge, contained in Government Exhibit 9. This finding pertained to the status of the persons whom Applicant maltreated, that they were civilian detainees in civilian custody. I believe that it is binding on us, under the principle of *res judicata*. Accordingly, I do not believe that the Judge’s comment, qualified as it was, constituted an erroneous interpretation of the record before him. To the extent that Applicant is contending that the Judge raised a security concern not addressed in the SOR, my reading of the Decision is that his comment was simply part of his evaluation of Applicant’s case for mitigation and of the whole-person factors, particularly “the nature, extent, and seriousness of the conduct.” Directive, Enclosure 2 ¶ 2(a)(1). *See, e.g.*, ISCR Case No. 09-07291 at 5 (App. Bd. Sep 27, 2012), listing the reasons for which a Judge may consider matters not alleged in the SOR. In any event, Applicant’s security significant conduct, viewed in light of the entire record, supports the Judge’s adverse holding.

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board