

KEYWORD: Guideline E; Guideline F

DIGEST: The Judge’s challenged findings are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 11-10474.a1

DATE: 09/05/2014

DATE: September 5, 2014

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In Re:	)	
	)	
-----	)	ISCR Case No. 11-10474
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James E. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Nicole A. Smith, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 3, 2013, 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). DoD subsequently amended the SOR to add an allegation under Guideline E and to add security concerns under Guideline F (Financial

Considerations). Applicant requested a hearing. On June 4, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 contained errors and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

### **The Judge's Finding of Fact**

The Judge made the following findings pertinent to the issues raised on appeal: Applicant works for a Defense contractor. Prior to her current employment, she worked for another Government agency (AGA), resigning in late 2010. She has held a clearance since 1986 and has completed several security clearance applications (SCA). She possessed a Government travel card from 1988 to late 2010.

In the latter part of 2010, the Inspector General (IG) for AGA interviewed Applicant about alleged misconduct. This misconduct included misuse of her Government travel card. Applicant resigned from AGA under unfavorable circumstances due to the misconduct at issue in the IG investigation. Applicant testified that she possessed a Government travel card during the time in question; that she knew it was improper to use the card when not on official travel; and that she had known for several years that she could not withdraw funds for more than five days in advance of official travel. She also admitted that she had misused her travel card. She stated that at the time her personal credit cards were at their limits and her husband was having health problems. Applicant testified that the IG advised her that he would report only two substantiated findings of credit card misuse, which would not likely affect her clearance. She subsequently signed a resignation agreement that, among other things, indicated her misuse of the Government credit card. This document (Applicant Exhibit C) does not support her claims that the IG would only report two instances of credit card abuse. Neither does this document show that the IG provided an opinion as to the likely outcome of any clearance adjudication.

Applicant completed an SCA in 2011. Section 13C asked if, within the previous seven years, she had left a job under unfavorable circumstances. She answered "no," failing to disclose her resignation. Applicant was subsequently interviewed by a clearance investigator. She claims that she volunteered that she had been the subject of an IG investigation, although the interview summary does not corroborate that claim. When asked about the reason she left her previous employment, she stated that there were two instances in which she misused her travel card. The Judge stated that "Applicant's explanations for claiming only two incidents of misusing the [G]overnment credit cards are inconsistent and not credible." Decision at 7. The Judge also found that Applicant is remorseful for having misused her card and has not done so since 2010.

Applicant enjoys a good reputation for the quality of her work and for her civic activities. She established a program to provide food and clothing for employees affected by a hurricane. She is noted for her professional expertise and leadership abilities.

### **The Judge's Analysis**

The Judge cited to evidence that Applicant was well aware that a travel card was to be used for official travel only. He stated that her reasons for misuse—her husband's health and the credit limits on her own cards—"strongly suggest that her misuse of the [G]overnment card was much more than she is willing to admit." Decision at 11. He also stated that Applicant's claim that she answered her SCA as she did due to advice from the IG was not credible and that her interview admission of only two instances of credit card misuse was a deliberate understatement of her misconduct. The Judge stated that Applicant's credit card misuse "demonstrated seriously poor judgement." Decision at 12. He concluded that insufficient time had passed to permit a favorable finding. The Judge stated that Applicant's evidence was not sufficient to mitigate the concerns arising from her misconduct. Although acknowledging Applicant's good character evidence, he found it insufficient to outweigh her misconduct. He stated that her extensive prior experience in submitting SCAs and holding a clearance should have placed her on notice of the need to provide truthful information during all phases of a clearance adjudication.

### **Discussion**

Applicant challenges the Judge's findings of fact. She states that he erred in finding that she had misused her Government travel card more than she had admitted. She also denied that she had deliberately provided false information during that interview and in the SCA. We examine a Judge's findings of fact to see if they are supported by substantial evidence, that 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." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012). In analyzing an applicant's *mens rea*, a Judge must consider the applicant's false answers or omissions in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-05232 at 3 (App. Bd. Jun. 30, 2014).

The SOR alleged that Applicant had misused her travel card more than 65 times. SOR ¶ 1(a). It also alleged that she deliberately failed to disclose to her interviewer that she had misused the card over 65 times. SOR ¶ 1(e). Applicant contends that the evidence did not support such extensive misuse. The Judge himself never explicitly mentioned the number 65 in describing Applicant's travel card misconduct. However, he did find that Applicant had misused her card much more than the two times she confided to her interviewer, and he entered adverse formal findings for both of the allegations that pertained to the travel card. He also entered an adverse formal finding for the allegation pertaining to Applicant's omission of her resignation from the SCA.

Applicant's argument is based in large part upon her contention that the Judge erred in considering certain portions of her testimony. Prior to the hearing, the Government had presented its documentary evidence, that included Government Exhibit (GE) 3, a letter by the IG describing

Applicant's misconduct, and GE 5, a memo by the IG recommending that appropriate officials report Applicant's conduct to the central adjudication facility. The Government also presented GE 9, a list of instances in which Applicant purportedly misused her travel card, that had originally been Enclosure 2 of GE 3 but was later separated out as a separate exhibit by Department Counsel. The Judge admitted GE 3 without objection and GE 5 and 9 over Applicant's objection. GE 9 was subsequently used as a basis for some of the questions posed to Applicant both on direct examination and on cross examination.

However, in his Decision, the Judge reversed his ruling on GE 9. He stated that the document had not been authenticated and that it lacked indicia of reliability. Accordingly, he stated that his Decision would not rely on GE 9 but, rather, on Applicant's testimony and that of her character witnesses. Applicant contends that the Judge erred in considering that portion of her testimony that was based on GE 9, arguing, in effect, that doing so shoe-horned inadmissible evidence into the record. She also contends that, without this testimony, the Judge's finding that she had misused her card more than she was willing to admit was not sustainable. The Government did not file a cross-appeal regarding the Judge's decision to exclude GE 9. Therefore, the propriety of this ruling is not before us.

Applicant's brief cites to no case law in support of her argument that the Judge should not have considered the part of her testimony that was given in reference to GE 9. However, his conclusion that Applicant had minimized her travel card misuse is supported by other evidence, as Department Counsel argues in his reply brief. For example, prior to being presented with GE 9 by her counsel, Applicant acknowledged that she had used her travel card more than twice, although she was not able to say how many times. Tr. at 144. She testified about her extensive financial difficulties resulting from her being the sole provider due to her spouse's illness and consequent inability to work for a two-year period. Applicant's brief quotes her hearing testimony that, in 2009 and 2010, she used the travel card because "[f]unds were tight, and that was the only resource I had at the time." Applicant Brief at 13, quoting Tr. at 150-151. Moreover, in GE 2, Answers to Interrogatories, she attributed her financial problems to "gambling during 2009 and 2010" and other things.<sup>1</sup> These long standing financial problems support a reasonable inference that Applicant misused her card significantly more than twice and that her claims of only two such instances were an effort to minimize her security-significant conduct.

Other evidence supports the challenged finding. GE 3 and GE 5 both described Applicant's extensive personal use of the travel card. Moreover, the Judge's finding that Applicant lacked

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<sup>1</sup>"At various times we did have financial problems. We had numerous financial problems . . . first being my husband being out of work for 2 years prior to being approved for disability. Second our child . . . has mental and emotional problems . . . He had gotten into trouble and we helped pay for bail bonds and lawyer fees. I did borrow money from friends to help pay for bail bonds and lawyers at various times . . . we have overcome our gambling problems and spend more time with family and friends . . . I did use the [G]overnment card inappropriately and if ever issued one in the future, will never do that again." GE 2.

credibility is consistent with the record that was before him, given her inconsistent statements.<sup>2</sup> See Directive ¶ E3.1.32.1. (“[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge[.]”) Given the above, we conclude that, even if the Judge had not considered Applicant’s testimony that was in explicit reference to GE 9, he would have denied Applicant a clearance anyway.

Concerning the two allegations of deliberate falsification, the Judge’s findings about Applicant’s extensive experience with security clearances, her lack of credibility, and her desire not to lose her access to classified information support his finding that her falsifications were deliberate. Overall, the Judge’s material findings of security concern are supported by substantial record evidence or constitute reasonable inferences that could be drawn from the record. Any variance between his finding that she had misused her travel card much more than she had admitted and the explicit language of the SOR allegations is not material. See, e.g., ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. An applicant’s failure to provide full, frank, and truthful answers to lawful questions of investigators “will normally result in an unfavorable clearance action[.]” Directive, Enclosure 2 ¶ 15. 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 Ra’anan  
Michael Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett

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<sup>2</sup>Applicant advised the investigator of two instances of misuse, both in 2010. Interview Summary at 2, included in GE 2. During the hearing, she testified that she had misused her travel card during the “2009 - 2010 time frame.” She stated that she “was under distress during that time. So many things were going on in my life. I don’t even know how I juggled everything at that time.” Tr. at 200-201.

Administrative Judge  
Member, Appeal Board

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