

KEYWORD: Guideline E

DIGEST: Error in Judge’s findings is harmless. Judge’s material findings are sustainable. The Government met its burden of producing substantial evidence of security concerns.

CASE NO: 11-10988.a1

DATE: 09/11/2012

DATE: September 11, 2012

In Re:)	
)	
-----)	ISCR Case No. 11-10988
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 2012, DOHA 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 June 27, 2012, after the hearing, Administrative Judge Robert Robinson Gales 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 certain of the Judge’s findings were in error; whether the Government met its burden of production; whether the Judge conducted a

proper whole-person analysis; 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 is an employee of a Defense contractor. He served in the inactive reserve of the Army from 1987 to 2002. He received a security clearance in 1988 and again in 2004.

Applicant was married in 1998. He and his wife separated in 2000 and divorced two years before the close of the record. For many years he led his family to believe he was divorced. He has a girlfriend with whom he has a son.

Applicant attended a university off and on from 1994 to 1998. He never received a degree. In 2003, he completed a SF 86, in which he stated that he had received a bachelor's degree in 1996. This statement was false. Applicant attributed the falsification not to imply receipt of a degree "but to support the timeline of [his] having left the University on a full-time basis and [his] reentering the workforce." He also stated that he answered the SF 86 as he did in order to show that "I'm going to school, identify a period of time and I identify the degree that I'm pursuing, not that I had completed the degree." Decision at 4.

The Judge also found that, in an interview with an OPM investigator, Applicant had stated that he had obtained a bachelor's degree in computer science in 1996. The Judge found this statement to be false.

In 2009, Applicant was fired by a previous employer for "mischarging." Applicant was not able to verify that he had worked on official business during a one-month period. In response to his employer's request for copies of his work product, he claimed first that it was on a thumb drive that he had lost. He later submitted some materials which his employer determined was old work and not sufficient to justify Applicant's claim. He filed a claim with the state office of unemployment insurance, which found that his conduct was "either a deliberate and willful disregard of the standards of behavior which the employer has a right to expect or a series of repeated violations of employment rules[.]" Applicant appealed, and the Appeal Division found Applicant's testimony and documentary evidence to be not credible. The Appeal Division found that Applicant had engaged in "deliberate and willful disregard" of his employer's standards. Decision at 5.

Applicant's employer has rated his work performance as either "meets expectations" or "exceeds expectations." He was periodically promoted and/or given increased salary.

As stated above, the Judge found that Applicant had falsely stated to the OPM investigator that he had received a degree in computer science in 1996. Applicant contends that this finding is in error. He notes that, in certifying the accuracy of his interview summary, he stated that he had told the investigator that he was not certain of his undergraduate status and that he had since determined that he had additional credit hours to complete before receiving his degree. Government Exhibit (GE) 3, Interrogatories. We agree with Applicant that the Judge erred in citing to this portion of the interview summary without taking into account Applicant's qualifying language. On

the other hand, the Judge made this erroneous finding in support of his conclusion that Applicant's had deliberately falsified his SF 86. Even without the erroneous finding concerning the OPM interview, the record supports the Judge's conclusion as to the deliberate nature of Applicant's SF 86 claim to have received a bachelor's degree in 1996. Therefore, the Judge's error is harmless. The Judge's material findings of security concern are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 10-10045 at 3 (App. Bd. Jan. 17, 2012).

Applicant also contends that the Judge erred in stating that the hearing had been conducted by video teleconference when, in fact, he had appeared before the Judge in person. Applicant is correct that this statement by the Judge was in error. However, considering the Decision in light of the record as a whole, we conclude that this error resulted from mere inadvertence and did not impair the Judge's findings or his analysis of Applicant's circumstances.

Applicant contends that the Government had failed to meet its burden of production. He contends that the record does not demonstrate any security-significant conduct. In a DOHA case, the Government must produce witnesses and other evidence to establish controverted facts in the SOR. Directive ¶ E3.1.14. We have previously stated that the Government's burden is to produce "substantial evidence" regarding any controverted allegation. 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 record." *See, e.g.*, ISCR Case No. 10-10045 at 3, *supra*, quoting Directive ¶ E3.1.32.1.

In the case before us, we have already concluded that the record supports a finding that Applicant deliberately falsified his SF 86. Failure to provide truthful and candid answers during the security clearance process is of "special interest" in evaluating an Applicant's security worthiness under Guideline E. *See* Directive, Enclosure 2 ¶ 15. The SOR also alleged Applicant's having been fired for charging for work not performed. The record contains a document from Applicant's employer setting forth the pertinent facts. It contains a document from the state department of labor establishing that Applicant had been fired for misconduct. Applicant himself submitted a copy of the appeal decision, which asserted that he had falsely charged for thirty-eight hours of work. All in all, the record contains substantial evidence of Guideline E security concerns.

Applicant cites to other aspects of the record which he believes support his case for a security clearance. He claims, for example, that the SF 86 submitted by the Government is not authentic. He also argues that the Government submitted a time sheet which was not signed, which renders it invalid. Applicant has raised the authenticity of his SF 86 for the first time on appeal. There is nothing in the record to lead to a conclusion that the SF 86 in question is not authentic. The copy of the time sheet is attached to a letter from Applicant's former employer describing in detail their reasons for concluding that he had falsified his work hours. The letter refers to the time sheet in question. Applicant has not provided a reason to discount this time sheet as evidence of his security significant conduct. To the extent that Applicant is contending that the Judge did not consider aspects of the case which he believes are favorable to him, he has failed to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 10-02671 at 3 (App. Bd. Jun. 19, 2012).

Considering the Judge's decision in light of the record as a whole, we conclude that his whole-person analysis complied with the requirements of Directive, Enclosure 2 ¶ 2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See, e.g.*, ISCR Case No. 04-12678 at 4 (App. Bd. May 7, 2007). 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). *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 Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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