

KEYWORD: Guideline E

DIGEST: The Judge’s material findings are supported by substantial evidence. Applicant was not denied due process. We give deference to a Judge’s credibility determinations. Adverse decision affirmed.

CASE NO: 15-01999.a1

DATE: 04/13/2017

DATE: April 13, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 15-01999
---	---------------------------------	------------------------

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Gregory F. Greiner, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 15, 2015, 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 January 4, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 his findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. While he was working for another defense contractor in 2012, an investigation conducted by the Inspector General (IG) of a defense agency revealed discrepancies in his timecard reporting and badge in-and-out readings. For over a period of approximately 18 months, he billed the Government for about 350 hours that he did not work. His company supervisors confronted him concerning the discrepancies, and he admitted that he did not work all the hours recorded in his timesheets. When hired at that job, he received training on timecard policies. He was also repeatedly counseled about his failure to comply with those policies. Applicant's employer determined that he engaged in fraudulent timekeeping and offered him the opportunity to resign or be terminated. Applicant resigned his job.

Applicant claimed some of the timecard discrepancies were explained by him attending approved meetings or completing other work outside the office. He also claimed he was unaware of his employer's expectations associated with his work hours and work location, and he did not receive any training about completing timesheets. His claims were not supported by any record evidence. At the hearing, Applicant denied that he admitted committing timesheet fraud, but admitted he was "too relaxed and not in compliance with the timekeeping policy . . . (he) did not understand the degree of accuracy to which he was supposed to be recording (his) time, and no one had ever remediated (him) on the degree of accuracy." Decision at 4, citing Tr. at 77.

The Judge's Analysis

Applicant's conduct triggered security concerns under Disqualifying Conditions 16(c)¹ and 16(e).² The Judge did not accept Applicant's claims that he did not know how to accurately complete a timesheet. The evidence showed he was trained on the company's timekeeping policies and he was counseled about those policies. His claim of checking with supervisors before leaving

¹ Directive, Enclosure 2 ¶ 16(c) states: "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources[.]"

² Directive, Enclosure 2 ¶ 16(e) states: "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing"

for the day are not supported by the evidence. Applicant's conflicting testimony is not credible and undermines his otherwise favorable evidence.

Discussion

We examine a Judge's findings to see if they are supported by "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. In this case, Applicant contends that the evidence did not support the following findings of fact:

(1) "Applicant admitted to his company supervisors that he did not work all of the hours he recorded on this timesheets. He charged to the defense contract many hours he had not worked. Applicant told his supervisors during a meeting he was charging the contractor for time he knew it was not appropriate to charge for." Appeal Brief at 8, citing Decision at 2.

(2) "Applicant's employer determined that he engaged in fraudulent timekeeping" Appeal Brief at 8, citing Decision at 3.

Applicant's contentions, however, lack merit. First, the IG investigation reflected that Applicant "admitted that he did not account for a number of hours worked on a weekly basis" and "substantiated that [Applicant] committed the offenses of false official statement; false, fictitious, or fraudulent claims; and theft of public funds (cost mischarging - labor hours) when he knowingly prepared and submitted fraudulent timesheets" The contractor reimbursed the Government over \$37,000 due to the overpayments. Government Exhibit (GE) 3. Second, letters from Applicant's former employer stated that, in a 2012 meeting, "[Applicant] admitted that [he] had not worked the hours recorded on [his] timesheet"; "there are numerous hours throughout [his] employment that [he] charged directly to the contract . . . but did not work"; and "[his] employment was being terminated because of fraudulent timekeeping." GE 4 and Applicant's Exhibit G. Additionally, Applicant's former supervisor testified that new hires are provided timesheet training; that Applicant performed work at other Government facilities about once month and work performed away from his place of duty was to be noted on the timecard; and that, when confronted about the IG investigation, Applicant admitted he had been charging for time he was not working on the contract. Tr. at 16-25, 35-37, 41-43. From our review of the record, the Board concludes that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also contends there is no written prohibition or proof that he could not work away from the defense agency facility and bill hours to the contract. This claim likewise lacks merit. The IG investigation reveals that the defense contract required work to be performed in a cleared Government or contractor facility within a certain geographic region. GE 3. Applicant presented no evidence that he performed the work hours in question at a cleared contractor facility.

Applicant further asserts that he is being judged by an IG investigation that he was not given an opportunity to rebut and that was significantly flawed. However, he did not identify any record evidence that supports his claim of a flawed investigation. Moreover, IG investigations merit certain deference. Defense Inspectors General are military members or federal employees trained for, and charged with, conducting fair and impartial investigations, inspection, and audits to promote the effective and efficient management and operation of DoD.³ There is a rebuttable presumption that federal employees, such as IGs, perform their duties in good faith and with regularity. *See, e.g.*, ISCR Case No. 09-05486 at 3 (App. Bd. Aug. 1, 2012). In this case, Applicant failed to establish that the IG investigation was flawed.

To the extent that Applicant is making a due process argument, the record of the hearing does not support this assertion. Applicant had a hearing in which he was represented by counsel. The IG report was admitted into evidence. Tr. at 11-12. Applicant was given the opportunity to object. He did not do so. Before the close of the hearing, Applicant was asked if he had any additional evidence. He said he did not. Tr. at 120. There is no reason to believe that Applicant was denied due process.

Applicant argues that he presented substantial evidence in mitigation. For example, he cites to his successful handling of classified material for years, his misunderstanding and lack of training on timecard policies and procedures, the amount of time that has passed since the conduct in question, and subsequent changes in his behavior. These arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor are they sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-04856 at 2-3 (App. Bd. Mar. 9, 2017). In this regard, we also note that the Appeal Board gives deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant has not identified any harmful error likely to change the outcome of the case. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. "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." The decision is sustainable on this record.

³ DoD Directive 5106.04 (May 22, 2014), Defense Inspectors General.

Order

The Decision is **AFFIRMED**.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board