

KEYWORD: Guideline E; Guideline K

DIGEST: Applicant testified that he had never worn his invalid classified badge at site 1. This is not consistent with statements that he made during the inquiry. This badge allowed him access to classified areas, and he would wear it over his unclassified badge to give the impression that he had an active clearance. "He did this fourteen times between October 10 and October 29, 2013. While in the secret-closed area, Applicant logged onto a classified network system eleven times between October 18 and October 29, 2013, logging 499 minutes." Decision at 4. Applicant did not advise his supervisor where his classified badge came from, and he did not seek clarification of the status of his clearance. Adverse decision affirmed.

CASENO: 17-04251.al

DATE: 03/01/2019

DATE: March 1, 2019

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 22, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 9, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Caroline E. Heintzelman 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 contained errors 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 55 years old. He held a DoD security clearance from about 1985 until 2013. He has a master's degree. In late 2013, Applicant was debriefed from his TS/SCI clearance and downgraded to unclassified access. This was based upon a pending incident report concerning an allegation of domestic assault.¹ He was told that he could not perform classified work and had to be debriefed from any special access programs. Before this debriefing, Applicant had worked at three different sites. One of the sites was the clearance authority for all three, and employees were issued a single badge to be used at all sites. In addition, Applicant had a classified badge from a previous job that he had not turned in before moving to another state. This badge was not valid at the sites at issue in this case.

As stated above, Applicant was debriefed on a special program upon which he was working. This occurred at site 1. He then went to site 2 and met with the Facility Security Officer (FSO), who told him that there was still jurisdiction for his clearance and that he would not be debriefed from a program that he was working on there. However, later that day, he was advised by an FSO at site 1 that he was in a “no determination” status and that he had to re-sign the debriefing documents. It was not clear to Applicant whether he had a clearance or not.

Even later the same day, Applicant attended a meeting at site 1. At this meeting, the other persons in attendance discussed classified matters in Applicant's presence. Applicant did not report this to the appropriate FSO, nor did he advise other people at the meeting that there were possible problems with his clearance. Applicant testified that he had been told that his clearance was in a “no determination” status prior to attending this meeting.

The next day, Applicant re-signed the debriefing documents. The documents stated, in pertinent part, the following:

¹This case was eventually closed after Applicant agreed to attend family counseling. Decision at 2.

This debriefing is executed because you no longer have a continuing need for access to classified information at [company] and does not reflect a negative security profile. Document Control has checked your accountability for classified holdings and by execution of this debriefing you certify that you do not have any non-accountable classified material in your possession. Once you sign this debriefing, your access to classified information will terminate. Decision at 3-4.

Applicant was issued a non-classified badge. He did not turn in the invalid classified badge that he had retained from his previous employment. He did not advise security officials at each of the three sites where he worked that he had received conflicting information about the status of his clearance. Moreover, he did not include this matter in the statements that he made during a subsequent inquiry concerning his alleged security violations.

After his second debriefing, Applicant continued to work at both classified and unclassified tasks and attended multiple meetings in which participants discussed classified information. He wore the invalid classified badge at these meetings in order to avoid questions about the status of his clearance. He stated that he did not want to have to explain to his colleagues why he had only an unclassified badge.

Applicant testified that he had never worn his invalid classified badge at site 1. This is not consistent with statements that he made during the inquiry. This badge allowed him access to classified areas, and he would wear it over his unclassified badge to give the impression that he had an active clearance. "He did this fourteen times between October 10 and October 29, 2013. While in the secret-closed area, Applicant logged onto a classified network system eleven times between October 18 and October 29, 2013, logging 499 minutes." Decision at 4. Applicant did not advise his supervisor where his classified badge came from, and he did not seek clarification of the status of his clearance.

Eventually his FSO advised him that he did not have access to classified information. He felt remorse for his conduct and advised officials to pull his name from the program access list. By this time his domestic assault charge had been dropped, and Applicant believed that his clearance would soon be restored. In addition to his inconsistent statements, during his clearance interview in December 2013, he said nothing about his purported confusion as to the status of his clearance due to conflicting guidance. During the inquiry that his company conducted in connection with Applicant's conduct, he provided several explanations: he was afraid of losing his job, the stigma of not having a clearance, and to escape personal issues outside the company.

Before the matters at issue here, Applicant had committed no security infractions or violations, and he had received regular security training. He testified that he should not have done what he did and that it was a mistake.

The Judge's Analysis

The Judge noted that Applicant's last incident was nearly five years in the past. However, she concluded that, given the seriousness of the misconduct, it still raised questions about his reliability, trustworthiness, and reliability. She cited to evidence of Applicant's age at the time of his offenses and to his having held a clearance for many years. She stated that Applicant had not mentioned any confusion as to the status of his clearance during his December 2013 interview and that there is no evidence that he brought this issue to the attention of his employer during the inquiry. She found that Applicant's disclosures of his misconduct were not prompt. In evaluating Guideline E, the Judge characterized Applicant's excuses as those of "someone who places his own ego over the well-being of the national interest." Decision at 10. She stated that he minimized his errors and has taken no positive steps to reduce his vulnerability to manipulation or duress.

Discussion

Applicant challenges the Judge's findings about the extent to which he knew, or should have known, that he did not have access to classified information during the course of his misconduct. He contends that the Judge did not consider, or that she mis-weighed, evidence that he had received conflicting guidance about his access to classified information. We have examined the Decision in light of the entirety of the record. The Judge made findings about Applicant's claim, and she discussed these findings in the Analysis. That Applicant knew, or reasonably should have known, that he did not have access to classified information is born out by the content of the inquiry report, among other things.² Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Neither has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). We conclude that the Judge's material findings of security concern 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.

Applicant has cited to a Hearing Office case that he believes supports his effort to obtain a favorable result. We give due consideration to this case. However, each case must be decided on its own merits. Hearing Office decisions are binding neither on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018). There are significant differences between the cited case and the one at issue here, including the multiple nature of Applicant's misconduct and an absence of reasonable mistake. Applicant challenges the Judge's conclusion that he lacked credibility. We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. In the case before us, the Judge's findings about Applicant's inconsistent statements undermine Applicant's claim that he was honestly confused about the status of his clearance and support her adverse credibility determination. We find no reason to disturb the Judge's conclusion that Applicant's presentation lacked credibility. *Id.*

²"[Applicant] admitted holding onto an old Top Secret [employer] badge and using that badge to give the appearance he was still cleared Top Secret when meeting with [colleague] . . . [Applicant] stated that a good portion of the conversation with [colleague] on 13 January 2014 was classified." Government Exhibit 2, Inquiry Report, at 2-3.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Once it is established that an applicant has committed a security violation, he or she has a “very heavy burden” of persuasion as to mitigation. Such violations “strike at the heart of the industrial security program.” *Id.* 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, Encl. 2, App. A ¶2(b): “Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board