KEYWORD: Guideline K; Guideline E

DIGEST: Once it has been established that an applicant has committed a security violation, that applicant has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Such violations strike at the heart of the industrial security program and the Judge must review any claim of reform or rehabilitation with strict scrutiny. The Judge's failure to recognize and apply this standard was error. Favorable decision reversed.

CASENO: 10-07070.a1

DATE: 04/19/2012

DATE: April 19, 2012

In Re:	)	
---------	)	ISCR Case No. 10-07070
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT
Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 8, 2011, DOHA 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 December 12, 2011, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: (a) whether the Judge's Decision is unsupported by the record evidence; (b) whether the Judge misapplied the Adjudicative Guidelines; and (c) whether the Judge analyzed the SOR allegations in an impermissible, piecemeal fashion. For the following reasons, the Board reverses the Judge's favorable security clearance determination.

The Judge made the following pertinent findings of fact:

Applicant is 58 years old, and had worked in her position with a defense contractor for 18 years. She served in the military from 1972 to 1974 and from 1979 to 1990.

On August 15, 2005, Applicant received an oral warning from her employer for not following proper procedures when entering information into a system, not paying attention to processing data and following prescribed procedures, and not filling out a log book correctly. No sensitive information was compromised as a result of this incident.

In February 2006, during a work day, Applicant left her work station to take a break. She left sensitive information about an individual in a folder on her desk under the computer keyboard and closed the door, asking a co-worker to make sure no one entered the room. When Applicant returned to her office five minutes later, she discovered that the folder and the information she had placed under the keyboard were gone. Another employee had entered the room through another door and, after searching, discovered the folder with the information. The office did not have a safe or other locked area to place or store such materials. After the incident, management placed a safe in the room to store equipment and data. Managers prepared an employee disciplinary report dated February 9, 2006, which showed written warnings and six months of probation for Applicant. The report was not signed by management, therefore it does not constitute a valid disciplinary report.

On February 24, 2009, Applicant left her office in a panic after being told that her elderly mother had passed out, had fallen and hit her head, and was being taken to the hospital. She drove away from her office without securing her seat belt and was given a ticket by a gate guard for the infraction. Management prepared an employee discipline report, dated March 31, 2009, for a safety violation, which was her first warning for a safety violation.

On a date in April 2009, Applicant reported to work at 3:00 a.m. She was assigned to a two-part program to take photographs. One program involved classified photographs and one program involved unclassified photographs. Applicant signed out a blank classified card which was to be inserted in a camera and on which photographs were to be taken. Applicant also had a blank

unclassified card for unclassified photos. At the work site it was determined that Applicant would only need to take unclassified photos. She removed the classified card from her camera without taking any photographs and placed it in her purse. At the end of a 13 hour work day, Applicant returned to her office, removed the unclassified card from her camera, and placed it in a process bin. She did paperwork and then went home more than six hours after her usual 10-hour work day. While asleep that evening, she received a telephone call from work asking about the classified card. Initially, she denied having a classified card, but then remembered that she had signed one out. She dressed and returned to her office before 5:00 a.m. with the card. At all times, the blank classification card remained within her positive control and no classified information was compromised. The next day, Applicant's supervisor removed her from the program. He also advised her that he had determined that as long as there was no data on the card, there was no compromise of national security. He also told her that as long as she had positive control over the card, which she did, the government would not issue a report if the card was returned in a timely manner. Her employer's administrative security clerk prepared an incident report. Applicant's supervisor gave her an oral warning at the time. She did not receive any other discipline for this incident in April 2009. Nearly 13 months later, on May 4, 2010, an unidentified supervisor prepared a discipline report, showing a written warning for this incident. It indicated that Applicant's failure to immediately improve her performance could result in time off or immediate termination. Applicant never saw the discipline report until she opened a package of materials from DOHA related to her hearing.

On January 21, 2010, significant flooding occurred at Applicant's work base, and the government closed the work base and sent employees home from work. Applicant worked 5.5 hours before the base was closed. She recorded her time worked and an additional 4.5 hours for weather issues on her time sheet. The next day, she asked her supervisor for instructions on how to charge her time, but did not receive clear instructions. Her time sheet revealed that she charged five hours for her time on January 22, 2010. Applicant's supervisor prepared a memorandum of record on January 25, 2010 in which he indicates that Applicant improperly charged her time on January 22, 2010, and that he counseled her about how to properly charge her time. On May 4, 2010, Applicant's supervisor submitted an employee discipline report indicating that Applicant reported improper time on January 21, 2010 and January 22, 2010. He indicated that the disciplinary action was an oral warning for violation of work rules and dishonesty. Applicant denies any knowledge of the disciplinary report until she received a package from DOHA. Her denial is supported by the fact that her signature is not on the report. On its face, the report states that her signature was indicative of her receipt of it. A human resources letter from Applicant's company dated July 21, 2011 advised that Applicant and the majority of the company's employees were not properly advised on how to charge their time during the two days of the flood. The employees were verbally warned to allow them to correct their time cards, but the oral discipline reports were meant to serve as a memorandum for the record only, and are not considered a written disciplinary report.

In April 2010, a second incident involving a classified camera card occurred. Applicant signed out both a classified and an unclassified card for a particular job. When Applicant drove to the work site, she was informed that the job had been cancelled. She removed the blank classified card from her camera when she learned it would no longer be needed. She secured it in a blue bag

and then secured the bag in her brief case. She drove back to her work site and went to her office, leaving the classified card in her locked brief case in her locked car. Applicant then obtained authorization to attend training classes for the rest of the morning, given the fact that she had no immediate work assignments. She attended class, during which time the classified card remained in her locked government vehicle. During the afternoon, although her work assignments were changed, she kept the classified card in her car as she had anticipated another photo assignment before the end of the day. She left work at 5:00 p.m. without returning the blank classification card to its secured box. Applicant acknowledged that she failed to follow procedures for returning the blank card. Applicant never took any pictures with the card. At all times in question, the card was blank and no classified information was compromised.

After this second incident, Applicant's employer suspended her from work for 14 days. Upon her return, during a counseling session management advised her not to complain about or to discuss any facts about her security incident beyond the managers present at the meeting. A disciplinary report was prepared, which included the admonition against discussing her security incident outside management. Applicant's signature is not on this disciplinary report. Applicant denies telling anyone about the incident and her resulting discipline. The record does not show that she has been disciplined for telling co-workers about the April 2010 security incident, as alleged in the SOR.

Applicant completed numerous training classes for information assurance awareness and for awareness training. Applicant also provided letters of recommendation from co-workers and test officers at her place of work. All describe her as trustworthy and reliable.

The Judge reached the following conclusions:

Regarding the Guideline K allegations, on two occasions, Applicant failed to return two blank classification cards used to take pictures of classified information or materials to their secured box at the conclusion of her mission. Because the cards remained blank at all times, and thus contained no classified images, Applicant's handling of the classified card did not violate the NISPOM or her company's standard operating procedures (SOP). Applicant believed that she violated the SOP by failing to maintain positive control or to properly store the media. It can therefore be assumed that the Government established AG ¶ 34(g)[1] and AG ¶ 34(h).[2] At the time of the first classified card incident, Applicant's 16-hour work day was unusual and such long work hours are not likely to recur. The second incident with the classified card occurred, in part, because Applicant's supervisor continued to give her work assignments and then would change his mind about the assignments. By retaining the photo card, Applicant was prepared for her next anticipated assignment. The confusion of the day was unusual and unlikely to recur. Applicant is very clear

[1]"[A]ny failure to comply with rules for the protection of classified or other sensitive information."

[2]"[N]egligence or lax security habits that persist despite counseling by management."

about her responsibilities toward safeguarding classified information and has a positive attitude toward the discharge of her security responsibilities. AG ¶ 35(a)[3] and AG ¶ 35(b)[4] apply. Even if the allegations are not mitigated under Guideline K, they are mitigated under the whole-person concept. Regarding Guideline E, the record contains four disciplinary reports concerning the security incident in April 2009, the time sheet incident in January 2010, the security incident in April 2010, and the counseling session in May 2010. The SOR incorrectly alleges that Applicant received these disciplinary reports, when she did not. The Government has not established the SOR allegations as written. Applicant's actions in filling out her time card in January 2010 reflect an honest mistake, not an attempt to violate the rules, and this SOR allegation (2b) is found in her favor. Regarding the May 2010 counseling by management to not discuss her security incident with anyone, the employee disciplinary report does not reflect any misconduct by Applicant, but references only possible discipline for a future violation. There is no evidence that Applicant violated the counseling given her. This allegation (2c) is found in favor of Applicant. Her failure to buckle her seatbelt is a rules violation (SOR allegation 2d) but not a security violation.[5]

Overall, the SOR allegations under Guideline E reflect a pattern of rules violations in the workplace and a failure to follow the employer's SOP for handling blank classified photo cards between August 2005 and April 2010. The Government has established its case under AG ¶ 16(d)(4)[6] and AG ¶ 16(f).[7]

Applicant has taken full responsibility for the actual incidents alleged in the SOR, even though she has denied receiving disciplinary reports for many of these incidents. The traffic violation is the only safety occurrence in 18 years of employment, and there is little likelihood that similar violations will occur. The traffic violation is mitigated. After the April 2010 incident, Applicant has been moved to another work area and continues to read the SOP provisions required for her work station, which keeps her current on her employer's procedures for handling classified information. After the incidents in August 2005 (failing to properly enter information into a system)

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[3]"[S]o much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

[4]"[T]he individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities."

[5]The Judge's decision incorrectly lists this as SOR allegation 1d.

[6]"[C]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for man adverse determination, but which, when combined with all other 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:

. . . . (4) evidence of significant misuse of Government or other employer's time or resources."

[7]"[V]iolation of a written or recorded commitment made by the individual to the employer as a condition of employment."

and February 2006 (leaving sensitive personal information unprotected at her work station), Applicant made suggestions to management to eliminate future problems. Applicant proposed simple solutions to prevent future problems of the type she experienced, and management found her solutions acceptable. These particular problems have not occurred for Applicant again. The evidence of record indicates that steps have been taken to eliminate future problems for Applicant. AG ¶ 17(d)[8] and AG ¶ 17(e)[9] are partially applicable. Even if the allegations are not mitigated under Guideline E, they are mitigated under the whole-person concept.

Under the whole-person concept, Applicant has worked for a photographer for many years. Until 2005, she performed her duties without any identifiable problems. Over the next almost five years, six incidents occurred, some of which are clear violations of workplace rules, even though the incidents in question did not result in a compromise of classified or proprietary information. Applicant acknowledges each incident and admits her actions. The information in the record provides troubling facts about the disciplinary reports and accompanying implications. The timing of disciplinary reports for the time card incident (May 2010 report for a January 2010 incident) and for the first blank classified photo card incident (May 2010 for an April 2009 incident) raises questions about the legitimacy of the reports and the lack of serious concern about the incidents when they occurred. These reports are given less weight inasmuch they contain discrepancies compared to records prepared contemporaneously with the events and they lend the appearance that Applicant's supervisor was attempting to create a record of prior disciplinary action when none had occurred. Applicant signed a very broad Last Chance Agreement in May 2010 and has complied with its terms. She has a long and generally favorable employment history with her company, and her employer gave her performance awards even after the April 2009 and April 2010 incidents. None of Applicant's references mentioned knowing that she had a problem with her security clearance or the reasons for the SOR. In light of the oral warning given to her in May 2010 about not discussing her security incidents with others, Applicant exercised good judgment in choosing not to violate the warning. Applicant is not a security concern despite her past carelessness and inattentiveness. She is fully aware of her responsibilities and the impact of any misstep by her in the future.

Department Counsel argues that the Judge erred in her application of the disqualifying and mitigating factors under Guideline K by (1) not applying AG ¶ 34(b)[10]; (2) by concluding that provisions of the NISPOM and the company's SOP did not apply to Applicant's situation; (3) by "second guessing" the employer and the employer's characterization of Applicant's violations of security procedures and by substituting her own judgment for that of the employer with regard to

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[8]"[T[he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]"

[9]"[T]he individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]"

[10]"[C]ollecting or storing classified or other protected information at home or in any other unauthorized location."

the existence, severity, or significance of security violations; and (4) by not applying the "very heavy burden" standard in the context of mitigation. With one exception, Department Counsel's arguments have merit.

The Judge's decision not to apply AG ¶ 34(b), not to apply ¶ 5-100[11] or ¶ 5-303[12] of the NISPOM, and not to apply provisions of the Company SOP to Applicant's violations of security policy in April 2009 and April 2010 is predicated on her finding that the classified media cards mishandled by Applicant were "blank" and did not contain any classified images.[13] The only evidence on this point is Applicant's testimony that the classified media cards contained no classified images or other material. Even assuming that the Judge's finding is supported by substantial evidence, however, the fact that the classified media cards were blank did not justify the Judge's conclusion that AG ¶ 34(b) and the cited regulations did not apply. A review of the company's SOP (Gov. Ex.5) reveals that precise procedures and protections were required for proper handling of the classified media cards regardless of their contents. This is borne out by the portion of the SOP that requires strict accountability, the placing of classified media cards in appropriate containers (a key locked bag, within a combination-locked briefcase) and positive control even before the person who signed out the media card arrives at the site where the media card is to be used.[14] The SOP also contains illustrations that indicate the placement of classified markings on classified media, including classified media cards. Thus, record evidence indicates that the media cards are essentially treated as classified information, regardless of their contents.[15] The Judge's conclusion that AG ¶ 34(b) does not apply, along with the pertinent NISPOM and company SOR provisions, was error.

Department Counsel asserts that the Judge "second-guessed" the company's evaluation of the media card incidents by concluding Applicant did not commit security violations, thus erroneously downplaying the severity of the violations. Although her analysis is not a model of clarity, the Judge stated in her decision that Applicant did not fail to protect classified information

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[11]"General. Contractors shall be responsible for safeguarding classified information in their custody or under their control. Individuals are responsible for safeguarding classified information entrusted to them. The extent of protection afforded classified information shall be sufficient to reasonably foreclose the possibility of its loss or compromise."

[12]"SECRET Storage. SECRET material shall be stored in a GSA-approved security container, an approved vault, or closed area. Supplemental controls are required for storage in closed areas. . ."

[13]The Judge's analysis on this point is confusing and contradictory. At one point she concludes that Applicant was in *technical* (emphasis supplied) violation of her employer's SOP. Shortly thereafter, she states categorically that Applicant's handling of the classified card did not violate her employer's SOP. Considering the Judge's analysis under Guideline K in its entirety, the Board construes the Judge's analysis as concluding that Applicant did not violate the SOP.

[14]Gov. Ex. 5 at 4-5, Paragraph 6 (Responsibilities), subparagraph 7.a., Prepare for Testing under Procedures.

[15]A clear determination, through expert testimony or otherwise, whether the classified media card, standing alone, was in fact a piece of classified information would have been helpful in this case.

or other sensitive information as required by Guideline K. This can reasonably be interpreted as a conclusion that Applicant did not commit security violations. Such a conclusion runs counter to the evidence discussed in the preceding paragraph as well as the company's official determination that Applicant committed security violations.

Department Counsel argues that the Judge cannot substitute her own judgment for that of an employer with regard to the existence, severity, or significance of security violations. To the extent that Department Counsel is postulating an absolute rule, the statement goes too far. However, because of the unique position of employers as actual administrators of classified programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contradicted without a cogent explanation.

Department Counsel argues that the Judge's application of Guideline K mitigating conditions ¶ 35(a)[16] and ¶ 35(b)[17] was erroneous. Regarding ¶ 35(a), Department Counsel asserts that there was nothing unusual or confusing about the circumstances surrounding these incidents to the degree that the incidents would be unlikely to recur. Department Counsel also argues that Applicant's recent, repeated conduct of security concern casts doubt on her current reliability, trustworthiness and good judgment. These points have merit. Although Applicant worked extra hours on the day of the first security violation, and had to deal with fluctuating work assignments on the day of the second incident, there is a paucity of evidence to support the Judge's conclusion that these were truly unique experiences in Applicant's day-to-day job routine. There is nothing in the record to support the Judge's conclusion that long work hours or dealing with management directives that might sometimes be confusing are situations that are unlikely to recur. The fact that Applicant committed essentially the same security infraction with the classified media card twice under different circumstances undercuts the conclusion that the infractions occurred in extraordinary settings. The Judge's statements that Applicant is very clear about her responsibilities toward safeguarding classified information and has a positive attitude toward the discharge of her security responsibilities belies the fact that Applicant has not had access to classified information since her 2010 security violation. Similarly, ¶ 35(b)'s requirement that Applicant demonstrate a positive attitude toward the discharge of security responsibilities is not satisfied by a situation where Applicant had not been given work assignments involving classified information for over a year. ¶ 35(b)'s requirement that Applicant respond favorably to counseling or remedial security training is not satisfied on this record, where Applicant committed a second security violation within a year after being counseled and disciplined for the first infraction.[18]

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[16]"[S]o much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

[17]"[T]the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities[.]"

[18]Department Counsel correctly points out that the Judge's application of ¶ 35(b) is in direct conflict with her application of ¶ 34(h).

Department Counsel asserts that the Judge erred by not applying the "very heavy burden" standard when evaluating Applicant's security violations and the effects of any mitigating conditions. Once it has been established that an applicant has committed a security violation, he (or she) has a very heavy burden of demonstrating that he should be entrusted with classified information. Such violations strike at the heart of the Industrial Security Program and the Judge must give any claims of reform and rehabilitation strict scrutiny. *See* ISCR Case No. 07-08119 at 3-4 (App. Bd. Jul. 8, 2010). The Judge's failure to recognize this standard and to include it in her analysis was error.

Department Counsel makes several assignments of error regarding the Judge's analysis under Guideline E. Department Counsel asserts that the Judge should have analyzed the Guideline E allegations under AG ¶ 16(c),[19] ¶ 16(d)(1),[20] ¶ 16(d)(3),[21] and ¶ 16(e)(1)[22] of the Directive. Department Counsel also asserts that it was error for the Judge to analyze the Guideline E allegations under ¶ 16(d)(4)[23] and ¶ 16(f).[24] These contentions have merit.

Under the Directive, an Administrative Judge must consider and apply pertinent provisions of the Adjudicative Guidelines. *See, inter alia,* Directive, Section 6.3; Enclosure 2, ¶ 2; and ¶ E3.1.25. Nothing in the Adjudicative Guidelines specifies how an adjudicator is to decide what disqualifying or mitigating conditions apply in a particular case. However, the absence of such a specific rule does not leave an adjudicator unfettered discretion in applying the Adjudicative Guidelines for or against a clearance. The proper application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires an adjudicator to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against the granting of a clearance are applicable to a given case. *See, e.g.,* ISCR Case No. 01-27371 at 2-3

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[19]"[C]redible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of condor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

[20]The language in the lead paragraph of ¶ 16(d) is set forth in footnote 6 on page 8 of this decision. The specific language of subpart (d)(1) states "[U]ntrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information[.]"

[21]"The lead paragraph language of ¶ 16(d) is set forth in footnote 6 on page 8 of this decision. The specific language of subpart (d) (3) states, "[A] pattern of dishonesty or rule violations[.]

[22]"[P]ersonal 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. . . ."

[23]See footnote 6 regarding the lead paragraph language of ¶ 16(d). Subpart (d)(4) states "[E]vidence of significant misuse or Government or other employer's time or resources[.]"

[24]"[V]iolation of a written or recorded commitment made by the individual to the employer as a condition of employment[.]"

(App. Bd. Feb. 19, 2003). Because AG ¶ 16(c) contains language that is similar to the language in the introductory paragraph to AG ¶ 16(d), which was used by the Judge, it was not error for the Judge not to apply AG ¶ 16(c). However, given the number of security violations and other workplace infractions in the record, and the fact that those violations directly relate to Applicant's trustworthiness and reliability, it was error for the Judge not to apply ¶ 16(d)(1) and ¶ 16(d)(3). Considering the facts in the case, the applicability of ¶ 16(d)(4) and ¶ 16(f) is far less clear. There is no record evidence that Applicant misused or wasted time or resources, unless it is the Judge's intent to consider Applicant's security violations and violation of workplace procedures as such. This is a mischaracterization of the nature of Applicant's actions, which are more akin to failure to follow security procedures and workplace rules. Thus, ¶ 16(d)(4) does not squarely relate to the record evidence. Applicant's actions are more accurately captured by the several Guideline E disqualifying conditions that the Judge did not apply. Regarding ¶ 16(f), it is not clear how this disqualifying condition relates to the record at all. Other than the Last Chance Letter[25] signed by Applicant and her employer, there is no evidence that Applicant made a written or recorded commitment to her employer as a condition of employment prior to the violations listed in the SOR, and, in her decision, the Judge does not mention the existence of any agreement that was later violated.[26]

Department Counsel argues that the Judge erred by concluding that Guideline E mitigating conditions ¶ 17(d)[27] and ¶ 17(e)[28] partially applied to the case. While the Judge's application of these conditions was not wholly erroneous,[29] any applicability is extremely limited considering that both conditions contemplate steps taken by Applicant to lessen the likelihood of future problems. The significant remedial measures put in place to prevent future violations by Applicant were the result of initiatives introduced by her employer, such as moving her to unclassified work stations after violations and the adoption of a Last Chance Agreement to provide an incentive for Applicant to improve her performance. While ¶ 17(e) arguably has general applicability, Applicant's vulnerability to exploitation, manipulation, or duress was not a principal concern in this case.

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[25]Gov. Ex. 3.

[26]The Last Chance Agreement was promulgated in response to the conduct listed in the SOR. There is no evidence that its terms have been violated by Applicant.

[27]"[T]he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]"

[28]"[T]he individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]"

[29]There is some record evidence to support the Judge's findings that Applicant reviewed company SOPs and that she received counseling from her employer.

Department Counsel also argues that the Judge's conclusions regarding SOR allegation 2.b.[30] and SOR allegation 2.c.[31] were in error, that the Government satisfied its burden to present substantial evidence in support of both allegations, and it was improper for the Judge to exclude them from consideration under Guideline E and the whole-person analysis. Department Counsel's assertions have mixed merit.

Regarding 2.b., Department Counsel takes issue with the Judge's conclusion that Applicant's overcharging on her time card in January 2010 was an honest mistake and not properly the subject of a disciplinary action by her employer. Applicant's testimony, although confusing and often difficult to follow, essentially stands for the proposition that she and her fellow employees were in a unique situation where there was no clear company policy on how to charge time in the event of a base closure. Documentary evidence in the form of an Employee Disciplinary Report, dated May 4, 2010, indicated that Applicant was counseled for putting time on her time cards that was not justified under company rules.[32] The report indicates that Applicant was informed as to correct time reporting procedures. No mention was made of any confusion on the part of Applicant or company policy. The record also contains a memorandum of record, dated January 25, 2010, wherein Applicant's supervisor documented the counseling session. The memo referenced a statement by Applicant that she added hours to her time sheet with the excuse that she was sent home because of the weather and thought she should still get paid. A third document from a company human resources deputy, dated July 21, 2011, indicated that during the dates in question, each employee had to make a judgment call about how to charge time and that Applicant was not properly advised on how to charge the "flood" time.[33]

When making findings of fact and reaching conclusions, it is the responsibility of the Judge to resolve conflicting evidence. In making findings of fact regarding 2.b., the Judge went into considerable detail about Applicant's version of events and the contents of the July 21, 2011 letter from the human resources deputy. While the January 25, 2010 memorandum for record from Applicant's supervisor is referenced, the Judge does not mention the supervisor's assertion that Applicant added hours to her time card because she thought she should still get paid even though she had been sent home. This statement is important evidence in that it reveals a possible dishonest motive on Applicant's part and undercuts the notion that the discrepancies on her time card were the result of confusion. Thus, the Judge's findings and conclusions on this point are contradicted by evidence in the same record. Without commenting on how the Judge should have resolved this clear conflict in the evidence, the Board concludes that it was error for the Judge to fail to address the full

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[30]"In May 2010, you received an oral reprimand for violating work rules and dishonesty by overcharging time on your time card in January 2010."

[31]"In May 2010, you received an oral warning for violating work rules by discussing the security violation set forth in subparagraph 1.a. above."

[32]Gov. Ex. 3.

[33]App. Ex. B.

contents of the January 25, 2010 memorandum in her decision, and to provide reasons, if any, why the evidence was being rejected or discounted.[34]

Regarding 2.c., Department Counsel asserts the Judge erroneously concluded that Applicant was not issued a warning for having violated any instruction or work rule. The evidence indicates that on May 3, 2010, Applicant was overheard talking to fellow workers about violating security rules and making a vague reference to her own problems with security. After the comments were overheard by a supervisor, Applicant was called into a meeting with management wherein she was instructed not to discuss her recent security infraction (the April 2010 classified media card issue) with anyone other than management. There is no evidence that Applicant received any similar warning prior to making the comments, or that she violated any established company rule by making the comments. Thus, although Applicant was counseled on the matter and the counseling resulted from actions of Applicant that management did not like, the Judge was correct in concluding that the counseling was solely prospective in nature. Despite an entry on an employee disciplinary report that the meeting was for a violation of work rules, absent further evidence that Applicant's comments were violative of an established rule or admonition that pre-dated May 3, 2010, the Government failed to establish that Applicant was guilty of violating work rules as alleged in the SOR and argued by Department Counsel. In the absence of evidence of culpability, the fact that Applicant was counseled in this instance is of no great import. Department Counsel has failed to establish error.[35]

Department Counsel asserts that the Judge's whole-person analysis did not cure the deficiencies in her analysis under Guidelines K and E, and challenges the Judge's assertion that, even if the SOR allegations are not mitigated under Guidelines K and E, they are mitigated by the whole-person concept. After a review of the record evidence and the Judge's decision, the Board concludes that nothing in the Judge's whole-person analysis cures the errors identified in the Judge's analysis under the specific guidelines. The Judge's consideration of the totality of Applicant's military and employment history is not sufficient to overcome those errors. Some of the errors committed by the Judge in other parts of the decision are repeated in the whole-person analysis.

The Judge spends considerable time in her whole-person analysis discussing what she terms "troubling facts" about some of the employee disciplinary reports in the record and "accompanying implications." While the Judge does not specify what those accompanying implications might be, her theory appears to be that, because some of the reports were prepared after long lapses of time following the underlying incidents, were placed in Applicant's file without her knowledge, and

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[34]The Board notes that the January 25, 2010 memorandum was prepared contemporaneously with the underlying incident, and the July 21, 2011 letter was prepared 18 months after the fact and 5 days prior to the hearing in this case.

[35]The May 3, 2010 employee disciplinary report that Department Counsel relies on is internally inconsistent. It indicates a violation of work rules by check block, but the narrative describing the facts or events clearly indicates that from that day forward, Applicant was not to discuss her security violation outside management. There is no mention of a violation of a previously instituted rule nor is any such rule identified. This SOR allegation, the state of the evidence thereunder, and the Judge's decision, provide an example of a justifiable "second-guessing" of a characterization of an incident by an employer.

appeared to be an attempt to create a record of prior disciplinary action where none existed, questions about the legitimacy of the reports arise, and they are entitled to less weight. Whatever irregularities occurred in management's handling of Applicant's violations of security and company policy, and whatever the merits or pitfalls of an apparent attempt to document Applicant's difficulties long after the fact, the only relevant issue is the basic accuracy of the facts cited in the reports. With the exception of the disciplinary report regarding SOR subparagraph 2.c, the Board concludes that there is no indication in the record that the brief statements of facts contained in the disciplinary reports are factually inaccurate, or that they convey a false impression as to how seriously management viewed Applicant's conduct at the time it occurred.[36] Most of the factual representations contained in the disciplinary reports are corroborated by other evidence, including Applicant's testimony. The Judge fails to support her conclusion that material inaccuracies exist in the reports, and she provides no other reasonable basis for concluding that the reports are entitled to less weight. Moreover, a lengthy discussion as to how much weight should be accorded to portions of the Government's evidence would seem to be more relevant to a determination of whether the Government established its case, as opposed to a determination of matters in mitigation when discussing the whole-person concept.

Department Counsel cites as a major flaw in the Judge's decision the fact that the Judge analyzed the SOR allegations separately, failed to address the pattern of Applicant's questionable judgment, unreliability and untrustworthiness, and engaged in a piecemeal analysis of the record. A review of the Judge's decision reveals several references to the collective body of Applicant's workplace difficulties. The Judge makes reference to "a pattern of rules violation in the workplace" when discussing the evidence under Guideline E. She states that "Applicant has taken full responsibility for the actual incidents alleged in the SOR." She acknowledges that "six incidents occurred, some of which are clear violations of workplace rules . . ."[37] This language, tends to indicate that the Judge did not engage in a piecemeal analysis of the record evidence. On the other hand, the Judge elected not to analyze the case under clearly applicable guidelines such as ¶ 16(d)(3), which would have required her to confront directly the overall pattern of Applicant's infractions. Given the errors discussed elsewhere in this decision, the Board need not decide whether the Judge analyzed the case in a piecemeal fashion to arrive at a disposition.

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[36]To cite two of the three examples provided by the Judge (the third is not specifically identified by the Judge, but appears to be the report relating to SOR allegation 2.c.), the Judge concludes that the disciplinary report and an earlier memorandum relating to SOR allegation 2.b. are fundamentally at odds, and that the report relating to SOR allegations 1.b. and 2.a. (the 2009 security violation) suggests a lack of serious concern on the part of management about the incident when it occurred. The Board concludes that while they differ in a few factual details, the disciplinary report does not differ materially from memorandum relating to the incident under allegation 2.b. The Board also concludes that the arguably belated creation of a formal disciplinary report relating to the incident under allegations 1.b. and 2.a. did not create a false impression of the severity of management's response. Evidence independent of the report indicates that after the violation, Applicant was required to write a detailed explanation of the events, was removed from the program she was working on, and was restricted to her office.

[37]There are actually seven separate incidents referenced in the SOR.

Order

Department Counsel has demonstrated several harmful errors by the Administrative Judge. The totality of the identified errors is sufficient to warrant reversal pursuant to the Directive, ¶ E3.1.33.3. Accordingly, the Board reverses the Administrative Judge's December 12, 2011 decision.

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