

KEYWORD: Guideline K

DIGEST: The Judge made sustainable findings that Applicant had inappropriately disclosed sensitive information. The record supports the Judge's findings and adverse conclusions. Adverse decision affirmed

CASENO: 11-00541.a1

DATE: 12/05/2012

DATE: December 5, 2012

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In Re: )	
)	
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Applicant for Security Clearance )	
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Steven H. Levin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 4, 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 August 28, 2012, after the hearing, Administrative Judge Marc E. Curry 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 credibility determination; whether the evidence was sufficient to raise security concerns; whether the Judge failed to consider all of the record evidence; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant served in the U.S. military from 1974 until his retirement in 1995. He has held a security clearance for more than 35 years. From March 2002 until February 2010, Applicant worked for a Defense contractor (Employer). From September 2004 until August 2005, Applicant worked part time as a consultant for an independent contractor, a person named in the record but identified in the Decision as X. X became the subject of a criminal investigation, due to concerns that he had improperly received proprietary information which gave his company an unfair advantage in competing for contracts.

As part of their investigation, investigators searched X’s computer, discovering six e-mails from Applicant to X that were labeled as “source selection sensitive,” “Distribution D,” or FOUO. These designations impose limitations on the scope of release of the documents. During a subsequent interview, in December 2007, Applicant was presented with copies of these e-mails. He admitted having sent all of the e-mails but one, which he claimed not to remember having sent. Applicant did not deny, however, having sent this one as well. He stated that neither the Government nor Employer authorized him to send the information to X.

At the hearing, Applicant stated that he had received permission from Employer to engage in part-time consulting. However, both Applicant’s supervisor at Employer, and the president of that company, stated that they were unaware of his part-time work. They also stated that they did not know X.<sup>1</sup>

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<sup>1</sup>Government Exhibit (GE) 3 is the report of the criminal investigation giving rise to this DOHA proceeding. It contains summaries of investigative activity, to include detailed summaries of witness interviews. Both the president and vice-president of Employer were interviewed at the same time. Although their names were redacted, one of these officials stated that he had no knowledge of Applicant’s off-duty consulting work. The summary also avers that both of these officials stated that it “would have been inappropriate at best for [Applicant] to obtain information in his . . . employment related to government work and share that information with others outside the government or persons not authorized to receive the information.” Interview Summary, May 5, 2009.

Applicant also testified that he had only provided to X information from the public domain which he obtained from the internet. He attributed the contradiction between his December 2007 interview and his hearing testimony to a misunderstanding as to whether or not X was a DoD contractor. He testified that before the interview, one of the agents advised him that X was not a contractor. He stated that later he was told the contrary. Accordingly, he said that his earlier answers had been predicated upon misinformation, in that, on the assumption that X was not a contractor, it would have been improper to have given him the information at issue here. An agent who was involved in Applicant's December 2007 interview denied that X's status had come up during the interview.

A witness, who had been a project manager for the DoD agency that Applicant supported, testified that Applicant was authorized to release four of the six e-mails referenced above. He stated that he did not know if X was a contractor who was authorized to receive the information in these e-mails. Another witness testified concerning one of the e-mails, a message the witness had sent to another Government employee and that Applicant had forwarded to X. He stated that, while Applicant would have been allowed to have seen the e-mail, he should not have forwarded it to X, who, to the witness's knowledge, was not part of the program.

Another witness, a lead contracting officer for the military service involved in the contract at issue in this DOHA proceeding, stated that it was improper for Applicant to have sent out the documents in question. He also stated that Applicant's conduct did not affect the procurement process, because it occurred after contractors were already selected.

In the Analysis, the Judge concluded that Applicant's conduct did not violate the Procurement Integrity Act, since it occurred after the award of the contract. However, the Judge concluded that Applicant had, nevertheless, made unauthorized disclosures of protected information to X. He found Applicant's claim to have had his employer's permission to work part-time to be lacking credibility. On the other hand, he concluded that the agent who had testified as to the circumstances of his December 2007 interview was credible. The Judge concluded that Applicant had failed to demonstrate mitigation.

#### Credibility Determination

Applicant contends that the Judge erred in his credibility determination. He states that the record as a whole supports Applicant's testimony at the hearing, including his contention that he had received permission from his employer to work off-duty. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. *See* ISCR Case No. 11-00180 at 5 (App. Bd. Jun. 19, 2012).

We have reviewed the record in its entirety. As Department Counsel argues in his reply brief, there are significant differences among various statements Applicant made concerning the conduct at issue in this case. We note Applicant's December 2007 interview, in which he admitted that the documents were sensitive and that he should not have provided them to X. These

admissions are corroborated by other evidence contained in the criminal investigation report, including statements by officials in a position to know the facts. On the other hand, Applicant's June 2010 security clearance interview contains some significant discrepancies from his prior statement. In this interview, a summary of which is included in GE 2, Applicant stated that the documents were not marked sensitive, etc. He stated that he had obtained them in meetings while working for Employer, saying nothing about having downloaded them from the internet. He also stated that he had given similar documents to others, and that this was not an isolated incident. It is unlikely that a reasonable person would conclude that the discrepancies between Applicant's 2007 interview, his 2010 security clearance interview, and his hearing testimony could be explained simply by Applicant's claim that he was misinformed by the criminal investigating agent as to X's status as a contractor.<sup>2</sup> Furthermore, Department Counsel notes that Applicant never raised this claim in his June 2010 security clearance interview but did so for the first time only at the hearing.

The portions of the e-mails that were included in GE 3 do not support Applicant's contention that they only contained public domain information that X could easily have obtained himself from the internet. As stated above, the sender of one of the e-mails that Applicant had forwarded to X stated explicitly that Applicant's having done so was not authorized. Indeed, this e-mail advises the recipient not to transmit it outside the office, and there is a paucity of record evidence to explain how it would have been obtained through the internet. Additionally, Applicant's acknowledgment during his 2007 interview that the documents were marked "source selection material," FOUO, etc, appears inconsistent with his hearing testimony that he had obtained them from the internet.

Applicant's claim to have had permission to work off-duty was not supported by the statements of his supervisor and the company president. There is no countervailing record evidence in corroboration of Applicant's claim on this matter. On the other hand, the Judge's favorable evaluation of the agent's testimony that he had correctly memorialized Applicant's interview as reflected in GE 3 is consistent with the record evidence. As the Judge stated, this testimony was not seriously undermined by cross-examination. We find no reason to disturb the Judge's credibility determination.

#### Other Issues

Applicant argues that his conduct in transmitting the e-mails to X was not improper. To the extent that he is contending that his conduct did not constitute a security concern, we note that the Government must produce substantial evidence to establish controverted allegations. Directive ¶ E3.1.14; ISCR Case No. 11-10988 at 3 (App. Bd. Sep. 11, 2012). In this case, Applicant denied the allegations contained in the SOR. In attempting to meet its evidentiary burden, the Government

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<sup>2</sup>As stated above, Applicant testified that he had been advised prior to the 2007 interview that X was not a Government contractor. In the interview, however, he stated that he had known X for years, and that X was a consultant for companies that did business with the Government. Interview at 3, included in GE 3. There was nothing in the interview report to suggest that Applicant's answers about his transmission of sensitive information were predicated upon an assumption that X was not a contractor.

presented several pieces of documentary evidence, including GE 2, which contains Applicant's clearance interview, and GE 3, the criminal investigation report, which is lengthy, detailed, and internally consistent. The Government's case also included the testimony of one of the criminal investigators. The Government has presented substantial evidence that Applicant had disseminated sensitive information concerning a Government procurement action without justification or excuse, even if the conduct did not violate a criminal statute. Accordingly, the Government has presented substantial evidence of the sole concern alleged under both Guideline K and Guideline E.

Applicant contends that the Judge failed to consider all of the record evidence, citing, *inter alia*, the testimony of the DoD project manager. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 09-07219 at 5 (App. Bd. Sep. 27, 2012). The Judge made findings about the project manager's testimony, but he plausibly explained why he concluded that Applicant's conduct established security concerns and why Applicant had failed to mitigate those concerns. Applicant has not rebutted the presumption that the Judge considered all of the record evidence.

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 decision is AFFIRMED.

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

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

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