

KEYWORD: Guideline B; Guideline E

DIGEST: The Judge's analysis misstates the period of time Applicant has worked at his current job as nine months. The Board cannot conclude the error is harmless. Adverse decision remanded.

CASENO: 11-15184.a1

DATE: 07/25/2013

DATE: July 25, 2013

In Re:)
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-----) ISCR Case No. 11-15184
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Leslie McAdoo Gordon, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 4, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for

that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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 made factual errors that impaired his application of Mitigating Condition 17(c) and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline B and his favorable findings under two of the three Guideline E allegations are not at issue in this appeal. Consistent with the following, we remand the case to the Judge.

The Judge’s Findings of Fact

The Judge found that Applicant has worked for a Defense contractor since August 2011. He previously worked for another Defense contractor from May 1983 to July 2011.

In late 2010 or early 2011, Applicant gained access to a proxy server. This enabled him to bypass his employer’s restriction on accessing personal e-mail accounts while using his employer’s unclassified computer. The purpose of this restriction was to reduce the risk of introducing malware into the employer’s information technology systems.

Applicant used the proxy server for his personal e-mail account, communicating with family and friends. At some point he began using it in connection with a personal business. This activity was uncovered by cyber-intelligence analysts conducting an investigation unrelated to Applicant. The investigation discovered that several employees, including Applicant, were using proxy servers to gain access to unauthorized internet sites. The analysts monitored Applicant’s computer for two weeks and discovered thirty-six hours of suspected non-work activity on his computer. Upon discovery that Applicant was “multi-tasking” during this two week period, they concluded that he had billed 16.9 hours of personal use, worth about \$1,076, to the Government.

Applicant admitted to having used the proxy server to access his personal e-mail account, to running an outside business during the workday, and to having charged Government contracts for time spent on personal business. Applicant elected to resign in lieu of termination.

According to a forensic examiner, Applicant’s use of the proxy server did not alter or damage his employer’s network in any way. He did not compromise or increase the vulnerability of the employer’s IT system.

Applicant’s new job entails the same duties as the one from which he resigned. Although he continues to operate his personal business, he is not seeking new business. He is the sole employee and sole member of his personal company.

Applicant enjoys an excellent reputation for his work performance, reliability, commitment to national security, and compliance with security policy. His current supervisor has known him for 20 years. He views Applicant's circumvention of his employer's internet restrictions as a one-time incident.

The Judge's Analysis

As stated above, the Judge resolved the Guideline B allegations in Applicant's favor, as he did with two of the allegations under Guideline E.¹ Concerning the Guideline E allegation pertaining to Applicant's having used the proxy server, however, the Judge concluded that Applicant had failed to demonstrate mitigation. In considering the possible effect of Mitigating Condition 17(c),² the Judge stated as follows:

Applicant's use of the proxy server was recent. Although it ended about two years ago, it ended because he was caught in the act, not because he chose to stop. He has worked for his new employer for only about nine months, during which he has been under pressure to prove himself and keep his security clearance. Under the circumstances, I conclude that his misconduct has not been mitigated by the passage of time without recurrence. Decision at 12.

Discussion

Applicant challenges the Judge's treatment of Mitigating Condition 17(c), particularly the statement he had worked at his current job for only nine months. He notes record evidence that he had worked at this job since August 2011, nearly two years by the close of the record. He states that the error impaired the Judge's analysis of the recency of Applicant's security-significant conduct.

We find this argument persuasive. In addition to the evidence cited by Applicant, we note the Judge's own finding, referenced above, that Applicant had worked in his new job since August 2011, which was about twenty-one months, more than twice the amount of time upon which the Judge relied in his analysis. Accordingly, the Judge's treatment of Mitigating Condition 17(c) was erroneous, and, reading the Decision in light of the record, we are not able to conclude that this error

¹These other Guideline E allegations pertained to two security violations. The Judge concluded that these violations were isolated, inadvertent, and unlikely to recur.

²Directive, Enclosure 2 ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]"

was harmless.³ *See, e.g.*, ISCR Case No. 10-01021 at 3 (App. Bd. Nov. 18, 2011) (An error is harmless if it did not likely affect the outcome of the case). Accordingly, we remand the case to the Judge for a new Decision consistent with the above.⁴

Order

The Decision is REMANDED.

Signed: Jeffery D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, 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

³Applicant also challenges the Judge's statement that he had been under pressure at his new job to keep his security clearance. This statement constitutes a reasonable inference from the record before the Judge. We find no error in it.

⁴In his reply brief, Department Counsel states that he does not object to a remand of the case.