KEYWORD: Guideline K; Guideline M; Guideline E

DIGEST: An SOR is an example of notice pleading. It is not held to the same standards as a criminal indictment. So long as an SOR places an applicant on notice of the matters to be addressed in the DOHA proceeding, it satisfies the requirements of the Directive. We examine a Judge's decision regarding amending an SOR for an abuse of discretion.. A variance between pleading and proof constitutes harmful error only if the variance is material. Variances are material only in those cases in which the extent of the variance is so great that the SOR allegation fails to serve as reasonable notice to the applicant of the concerns against him, thereby subjecting him to unfair surprise when confronted with the Government's evidence. Adverse decision affirmed

CASENO: 14-05127.a1

DATE: 06/24/2016

DATE: June 24, 2016

In Re:	)	
	)	
----------	)	ISCR Case No. 14-05127
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Chris Morin, Esq., Department Counsel

FOR APPLICANT
Sheldon I. Cohen, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 31, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline K (Handling Protected Information), Guideline M (Use of Information Technology Systems), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 18, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant appealed, and Department Counsel cross-appealed, pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether there is a material variance between the Judge's formal findings and the SOR allegations; whether the Judge's findings of fact contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross-appeal: whether the Judge's favorable findings under Guidelines K and M were unsupported by the evidence. Consistent with the following, we affirm the Judge's ultimate adverse decision.

The Judge's Findings of Fact

Applicant is a retired official from the U.S. military. The Judge described his contributions to national security as "groundbreaking" and his character evidence as "the most impressive . . . I have seen." Decision at 3.

In his last position with the military, Applicant served as the head of an agency. He oversaw the work of thousands of persons and was responsible for numerous "concepts and programs." *Id*. One of the programs involved an innovative technological concept that the Judge called AB2. Applicant drew this concept to the attention of senior leadership and recommended that AB2 be developed and implemented. While Applicant was still serving the military, though on terminal leave, a contractor, whom the Judge designated as Company A, was awarded a contract for research and development of AB2. The award was accomplished by a different service branch from Applicant's. Applicant entered terminal leave a few days before this contract was awarded. He retired in late 2010.

A DoD Inspector General (IG) investigation found problems and irregularities in the manner in which the persons in Applicant's agency had handled the AB2 contract, including "off-loading" the contract to the other service. In late 2010, responsibility for AB2 was transferred back to the service in which Applicant had served and from which he had retired.

Three months later, Applicant was hired by Company A to serve as CEO. He submitted a request for post-Government employment advice from his service's General Counsel (OGC). Soon

after, Company A was again awarded the AB2 contract. After corresponding with Applicant, OGC issued its opinion, which included the following advice:

> [18 U.S.C. § 207] prohibits you **for life** from acting as agent or otherwise representing, formally or informally, anyone except the United States before any department, agency or office of the United States in connection with <u>any particular matter</u> involving <u>specific parties</u> and in which <u>you participated personally and substantially</u> for the government while you were a government employee.

The guidance went on to state that Applicant's activities concerning AB2 while he was serving in the military constituted personal and substantial participation and that he therefore was subject to the representation ban for the lifetime of the AB2 program. "This limitation does not preclude 'behind-the-scenes' participation in the program on behalf of [Company A]." The memorandum stated that the opinions contained therein were advisory only. *Id.* at 6-7.

The in-house counsel for Company A, as well as an outside counsel with expertise in conflict of interest laws, were of the opinion that Applicant was not subject to a lifetime ban. Company A's counsel sent OGC a letter explaining why he believed that the ban did not apply to Applicant and requesting reconsideration. Among other things, the letter stated that Applicant had not made the decision to implement AB2, or had not otherwise sponsored the program while serving in the military. The counsel sent follow-up emails to the OGC attorney who was handling the matter. Applicant himself requested a meeting with OGC and explained in a letter why he was uncertain about the ban. Among other things, he stated that AB2 was only a concept, rather than a program, during his service in the military.

OGC sent Applicant a second memorandum. In this memo, the attorney referenced

> a number of emails that . . . show you were significantly involved in bringing the program to [the service] and that this involvement occurred at a time when [Company A] . . . was a named bidder. Some of the emails may show a knowledge that [Company A] was a bidder in the contract, and that you, by direct action and by order to a subordinate, took actions that appear to be significant i[n] getting funding for the program. *Id.* at 10.

Later, OGC responded to Applicant by email, stating that there was nothing new in recent correspondence from or on behalf of Applicant and that the OGC opinion that Applicant was under a lifetime ban was not changed. The letter stated that the opinions therein were advisory only, although failure to abide by the advice "is at your peril." *Id.*

In response to additional queries from Applicant, OGC sent him a third memorandum. This was done in August 2011. The memorandum discussed in greater detail the meaning of the various terms contained in the statute. It also stated that the "particular matter" at issue was the AB2 contract. The memorandum reiterated that OGC advice on this matter was advisory.

In the meantime, the AB2 program ran into difficulties, specifically technical setbacks that were projected to cause it to exceed it costs and schedule. Contracting officials sent Company A a partial stop-work order in early 2012. A few weeks later, Applicant approached a senior official about moving AB2 to another branch of the service. A couple of months after that, a contracting officer sent Company A a cure notice that identified numerous problems with AB2 development. This notice advised that the Government had no plan to provide additional funding or to schedule any relief.

Following this cure notice, Applicant approached a military official requesting a telephone conversation about AB2. He also requested that contracting personnel rescind the cure notice, warning that Company A was considering legal action against the U.S. Subsequently, the partial stop-work order was extended. Applicant sent an email to an Under Secretary of Defense. Among other things, he requested additional funds for AB2 and an extension of the contract to enable successful development and testing.

He also sent an email to an Under Secretary of a military service, suggesting that this official call another service Under Secretary and request a delay in terminating the contract and consider the merits of transferring AB2 to another service. In May 2012, a contracting officer sent a letter to Company A directing it to "immediately stop all work [on AB2], cease and/or freeze all subcontracts, and place no further order except to the extent necessary to perform disassembly, packing, and shipping [the platform and equipment]." *Id*. at 14.

After all of this, OGC sent Applicant a fourth memorandum stating that it

> has come to my attention that you have approached the Undersecretary of [service] on behalf of [Company A], asking [for] an extension of the [AB2] program. This is in direct contravention of the advice given to you by [OGC] . . . Please refrain from continuing such communications with . . . leadership. Failure to comply will be at your own peril. *Id.*

Applicant later sent an email to the chief of another military service, stating that the service might want to acquire AB2 before the opportunity was gone.

The Department of Justice (DOJ) opened an investigation of Applicant's conduct. The FBI executed a search warrant and seized his computer. It appears that Applicant had been assigned unclassified laptop computers during his service as a senior official of the military. When he retired, information technology (IT) personnel transferred all data from Applicant's assigned laptop to one personally owned by him. IT personnel for Company A subsequently transferred all the data on his personally owned laptop to one assigned to Applicant by the Company for his use as CEO. This laptop, which was not classified, was found to contain classified documents.

Applicant eventually entered into an agreement with DOJ attorneys, whereby he would pay $125,000 to the U.S. in consideration of which the DOJ would drop any possible criminal or civil action. The Judge quoted the settlement agreement in pertinent part:

> The United States contends that . . . while he was [CEO of Company A], [Applicant] engaged in a prohibited conflict of interest in that he had improper communications or appearances on behalf of [Company A] before United States' officers regarding a U.S. military . . . program known as [AB2], a program in which the United States contends [Applicant] participated personally and substantially while he was with the [U.S. military]. *Id*. at 19.

The agreement stated that Applicant did not admit wrongdoing and the U.S. did not concede that its claims were not well founded.

In November 2014, the military service debarred Applicant from contracting for a period of 18 months. Among other things, the debarment memorandum, prepared by a Deputy GC, stated the following:

> The manner in which [Applicant] conducted himself is particularly egregious. [He] was told not once, but five times by OGC . . . that 18 U.S.C. § 207 restricted him from representing Company A on the [AB2] program back to United States Government representatives with an intent to influence . . . [T]he senior ethics official in the [service], the [service] General Counsel, concurred with the opinions provided by [his or her] office to [Applicant]. *Id* . at 17-18.

The Judge's Analysis

The Judge concluded that Applicant's conduct as CEO of Company A raised concerns under Guideline E. He did not accept the views expressed by Applicant that, insofar as the various memoranda from OGC were advisory only, that he had violated no duty. The Judge stated that, while Applicant was not bound to follow the advice of OGC *per se*, he was bound to follow the law as set forth in 18 U.S.C. § 207. The Judge concluded that Applicant had indeed violated this statute, adopting the above referenced DOJ settlement agreement as a concise statement of Applicant's misconduct.

The Judge found that Applicant had "participated personally and substantially" in the concept that became the AB2 program, citing to the memoranda from OGC and the debarment officials as credible and persuasive evidence. He also rejected Applicant's argument that his communications with various senior officials were without an intent to influence them. He noted evidence that the AB2 program was faltering and concluded that Applicant was attempting to save the contract before it was cancelled. The Judge stated that Applicant's conduct showed "dishonesty, poor judgment, and an unwillingness to comply with the law," thereby raising concerns about his ability to protect classified information. *Id*. at 23.

In evaluating Applicant's case for mitigation, the Judge stated that Applicant continues to deny that he did anything wrong. Applicant had numerous chances to conform his behavior to the requirements of the law but failed to do so, resulting in the settlement agreement with the DOJ and debarment from contracting. The Judge stated that, without an acceptance of responsibility by

Applicant, he could not find that similar incidents were unlikely to occur. *Id.* He resolved the Guideline E allegations adversely to Applicant.

Under Guideline K, the Judge stated that there "were numerous classified documents stored on Applicant's personal computer," thereby raising security concerns. *Id*. at 24. The Judge concluded that one mitigating condition, 35(a), was potentially applicable: "so 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[.]" The Judge noted evidence that over 30 people had access to Applicant's computer and that Applicant had vehemently denied intentionally placing classified information there. The Judge stated, "There is insufficient evidence to overcome those assertions. Handling protected information security concerns are mitigated."[1] *Id*.

Discussion

Applicant's Appeal:

Applicant argues that the Judge entered adverse formal findings that were not consistent with the language of the SOR. His argument can be summarized as follows: the SOR alleged that Applicant failed to follow the advice of the OGC regarding the post-government conduct. However, the Judge did not limit his analysis to whether Applicant had a duty to follow this advice but, instead, considered the entirety of Applicant's conduct. In finding against him, the Judge "went beyond the clear statement of the SOR." He argues that the Judge should have amended the SOR in order to make it conform to the evidence.

An SOR is an example of notice pleading. It is not held to the same standards as a criminal indictment. So long as an SOR places an applicant on notice of the matters to be addressed in the DOHA proceeding, it satisfies the requirements of the Directive. *See, e.g.*, ISCR Case No. 14-06440 at 3-4 (App. Bd. Jan. 8, 2016). We examine a Judge's decision regarding amending an SOR for an abuse of discretion. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014). A variance between pleading and proof constitutes harmful error only if the variance is material. Variances are material only in those cases in which the extent of the variance is so great that the SOR allegation fails to serve as reasonable notice to the applicant of the concerns against him, thereby subjecting him to unfair surprise when confronted with the Government's evidence. *See, e.g.*, ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

SOR ¶ 3(b) alleged the following:

> [Y]ou acted repeatedly in a manner contrary to post-government employment advice provided to you by the Office of General Counsel, by engaging in conversations and

[1]The Judge also found that security concerns had been raised under Guideline M (Directive, Enclosure 2 ¶ 40(d)) and mitigated by the same rationale as under Guideline K. *Id*. at 25.

> correspondence with senior Government officials in an effort to promote and preserve the [AB2] program."

At the hearing, Applicant contended that the issue raised by this allegation was simply whether or not he had an obligation to follow OGC advice concerning 18 U.S.C. § 207, rather than the broader question of whether his post-government actions as CEO of Company A raised concerns about his judgment and reliability. The Judge disagreed, stating that Applicant's view of the allegation was unreasonably narrow. He advised that Applicant's entire "post-retirement conduct . . . [was] what we're looking at." Tr. at 51. Applicant claimed that he was not prepared to meet the allegation as the Judge interpreted it. Though expressing scepticism about Applicant's argument,[2] the Judge gave him a continuance in order to ensure that Applicant had not been subjected to unfair surprise. Tr. at 54. The record shows that two months elapsed between the beginning of the hearing and its resumption after the continuance.

We are not persuaded by Applicant's argument on appeal. We conclude that the allegation as written was sufficient to have placed a reasonable person on notice that his post-government conduct was at issue. As the record shows and Department Counsel argues in his Reply Brief, Applicant was advised not once but five times–four by memorandum and another time by e-mail–to refrain from contacting Government officials, advice he repeatedly ignored. As a consequence, he came under investigation by the FBI, entered into a settlement agreement with the DOJ, and was debarred from contracting with the Government. All of this is fairly embraced by the allegation as contained in the SOR, and it is not reasonable to limit the allegation in the manner that Applicant urges. The Judge's adverse decision under this allegation did not constitute a material variance between his findings and the SOR pleading, and he did not abuse his discretion by declining to amend the SOR. In any event, even if he erred, such error did not cause Applicant to suffer prejudice, in view of the substantial continuance that the Judge granted him. We resolve this allegation adversely to Applicant.

Applicant challenges the Judge's finding that he had violated 18 U.S.C. § 207. He states that this finding was erroneous as a matter of law. Among other things, he argues that he did not violate the "particular matter" element of the statute, nor did he participate "personally and substantially" in AB2 while he worked for the military. He also contends that his contacts with Government officials were not made with the intent to influence their conduct but, rather, were merely in response to requests for information. 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.

We do not find these arguments to be persuasive. Applicant's contention that, as CEO of Company A, he had not acted in regard to any particular matter with which he had been involved while in the military relies in large measure upon evidence that there were two contracts awarded for AB2 development. He contends that, insofar as the first contract was replaced by a second, which was approved after he left the military, his post-government conduct did not involve the same

[2]"Frankly, I'm shocked that you don't see that that's part of what we're handling here[.]" Tr. at 51.

particular matter as that upon which he had worked before retiring. Admittedly, as the Judge found, in one memorandum OGC told Applicant that the particular matter was the AB2 contract. It is clear, however, that OGC ethics officials viewed the particular matter to be AB2 itself, rather than the specific contracts through which this technological innovation was expected to be realized.[3] This view is both implicit and explicit in the various communications that OGC conveyed to Applicant and is consistent with the language of the statute. Applicant's arguments are not sufficient to undermine this aspect of the Judge's findings.

Neither are we persuaded by Applicant's contention that he had not been involved personally and substantially in the implementation of AB2 while in the military. One of the Judge's findings consists of an extended quotation from AE LLL, a letter from a former official in Applicant's service branch. This exhibit states that Applicant recommended that the official support the concept underlying AB2 and consider a partnership with Company A in bringing it to fruition. The Debarment Memorandum, included in Government Exhibit (GE) 2 at 7 of 16, is in accord: "Although [Applicant] did not have the ultimate decision making authority, he made the recommendation to his supervisor . . . to sponsor the [AB2] program." In addition, we note the following colloquy between Applicant and the Judge:

> [Y]ou were advising that the [service] adopt the program? [Applicant]: Turn this concept into a deployable system, yes sir . . . [Judge]: [I]t appears that you were involved, the basis is that you advocated for this program . . . [Applicant]: Yes, sir. There's no law against advoca[cy]. Tr. at 689, 712.

Advocacy is an attempt to persuade, and the record shows that Applicant was instrumental in persuading his service to implement AB2, despite the initial reservations of the former official who wrote AE LLL. The evidence as a whole provides no reason to reject the OGC opinion that Applicant had been personally and substantially involved in AB2 development prior to his retirement, even if he had not actually made the decision to fund the program. Finally, we find no merit in Applicant's argument that his communications with Government officials while serving as CEO of Company A had been mere responses to the officials' requests for information.

Obviously, in making the challenged findings, the Judge extended considerable weight to the OGC advice, the Debarment Memorandum, the DoD IG report, and the DOJ settlement agreement, all of which support a conclusion that Applicant engaged in conduct that entailed a conflict of interest. Applicant's case relied, in large measure, upon legal opinions expressed by the

[3]Applicant's own evidence shows that the reason for the second contract was not to initiate a new matter but, rather, to resolve material errors in the first contract. The first contract, awarded to Company A while Applicant was on terminal leave, was found to have been "legally insufficient." When responsibility for AB2 was returned to Applicant's service branch, contracting officials did not transfer the first contract but initiated a new one in order to correct identified errors. Completed work under the first contract was treated as Government-furnished equipment. Applicant Exhibit (AE) HH, DoD IG Report, at pp. 13-15.

attorney who advised him regarding the debarment and during his interactions with the FBI.[4] These opinions are contained in the attorney's hearing testimony as well as in a detailed memorandum and in briefing slides, both prepared in response to the proposed debarment. *See* AE I, Response to Notice of Proposed Debarment, September 16, 2014; AE J, Briefing Slides In the Matter of [Applicant]. We have given Applicant's evidence due consideration. Applicant's argument is, in essence, a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge weighed the evidence in a manner that was erroneous as a matter of law. *See, e.g.*, ISCR Case No. 14-06686 at 2 (App. Bd. Apr. 27, 2016). The Judge's material findings, including the specific ones raised in this appeal issue, are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence.[5] Applicant has not cited to any harmful error in the Judge's findings of fact. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also argues that he should be credited with having sought out the advice of OGC and by having acted in accordance with legal advice he received from his own attorney. He also argues that the Judge's decision runs contrary to the weight of the record evidence, in light of his outstanding record of service to the DoD. We do not find these arguments to be persuasive. On the second point, the Judge acknowledged Applicant's achievements but concluded that they did not outweigh concerns that arose from his repeated violation of OGC ethics advice. The Judge's adverse decision under Guideline E 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."

The Government's Cross-Appeal

Department Counsel argues that the Judge's favorable findings under Guidelines K and M are not supported by the weight of the record evidence. He agrees with the Judge's conclusion that Applicant's possession of an unclassified computer containing classified information raised concerns about Applicant's ability to protect classified information. However, he argues that this concern is

[4]This attorney has considerable experience advising clients on conflict of interest laws, including the statute at issue here. He testified that, in his opinion, the OGC advice was mistaken, as was the Debarment Memorandum. Tr. at 623, 626. However, he also testified that the DOJ attorneys, in his opinion, arrived at their conclusions about Applicant's conduct independently of those in OGC. "They were looking at it completely independently . . . I'm confident . . . that they had no interaction with [OGC] or any of the ancillary proceedings[.]" Tr. at 630.

[5] We note Department Counsel's argument that the specific origin of the duty that Applicant breached is not essential in evaluating his conduct. He asserts that all we need to consider is that Applicant repeatedly acted contrary to the OGC advice that he had received, as a consequence of which he suffered significant legal consequences. However, unless Applicant had a duty to avoid a conflict of interest, and unless his conduct breached that duty, it is not likely that his conduct would have been alleged in the SOR *ab initio*. Hypothetically, it is unlikely that security concerns would arise from an applicant's failure to follow ethics advice that was patently erroneous. Such is not the case here, and the Judge's findings about 18 U.S.C. § 207 were germane to the issues that were before him.

not logically mitigated by Applicant's claims that he did not know how the documents got there in the first place or by evidence that others had access to his computer or by anything else in the record.

We find this argument persuasive. Security violations "strike at the heart of the industrial security program." Once it is shown that an applicant has committed such violations, he or she has a "very heavy burden" in demonstrating mitigation. A Judge must give any claims of reform or rehabilitation "strict scrutiny." ISCR Case No. 14-04441 at 4 (App. Bd. Apr. 8, 2016). The Judge did not evaluate Applicant's conduct in light of this standard or cite to the standard in any way. Moreover, under the facts of this case, we are persuaded by Department Counsel's argument that Applicant's claims of ignorance do not mitigate concerns arising from his conduct.[6] The Judge's analysis of Guidelines K and M is not sustainable. However, even if the Judge had not made these errors he would have decided the case in the same way. Therefore, we conclude that there is no reason to remand the case for further processing.

Order

The Decision is **AFFIRMED**.

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

Signed: James E. Moody
James E. Moody
Administrative Judge

[6]The record demonstrates that Applicant's laptop computer improperly contained classified information. DOJ officials confronted Applicant about this at a proffer meeting. An investigator who was present at this meeting testified that Applicant told DOJ officials that "at times he would type up a classified briefing on his unclassified laptop and then at a later date would add the classified markings to it." Tr. at 162-163. This official summarized Applicant's statements during the proffer in a document that was admitted as AE MM. Regarding the improper storage of classified information, the summary stated: "[Applicant] stated that at times he would build briefings on his unclassified government laptop and then go in after the fact and apply classification markings . . . Therefore, it could be possible that the now classified briefing was not removed from his laptop after his trip/briefing." An Applicant witness, who was also present at the proffer meeting, testified that AE MM was "generally accurate in terms of its description of both the questions that were asked of [Applicant] and the answers that he gave during that proffer session." Tr. at 616. Accordingly, the record contains substantial evidence that at least some classified information came to be on Applicant's unclassified laptop due to Applicant's own actions. Despite evidence that various IT personnel, rather than Applicant, transferred files from one computer to another, the record does not support a finding that Applicant did not know how classified information came to be present on his unclassified computer in the first place or that someone else put it there.

Member, Appeal Board

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