

DATE: February 15, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27870

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Chester H. Morgan II, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 24, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline M (Misuse 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 May 9, 2005, after the hearing, Administrative Judge Robert Robinson Gales 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 raised the following issues on appeal: (1) whether the Administrative Judge's application of Guideline E Mitigating Condition 5 is supported by the record evidence; and (2) whether the Administrative Judge's whole person analysis is sustainable in light of the record evidence.

Applicant was fired from his former employer for entering the computer system calendar and e-mail accounts of the company's chief financial officer (CFO) in arch 2000. While recognizing that this conduct was indicative of poor judgment and irresponsibility, and was therefore potentially disqualifying under Guideline E⁽¹⁾, the Administrative Judge cited numerous factors that he concluded mitigated the government's case against Applicant. These were: (a) the fact that the CFO's computer system and e-mail accounts were readily available on the public drive of the company's computer system; (b) no password or other user identification was necessary to gain access to the accounts, and the accounts were essentially open to public view, notwithstanding the company's desire to limit access; (c) no company information technology policies or procedures or training programs put Applicant on notice that he should not have had access to the CFO's calendar and e-mail accounts; (d) in the absence of any illegal "hacking" by Applicant, his attempts to view information on what was the public drive do not constitute dishonesty or a rule violation; (e) Applicant accessed the CFO's accounts primarily to review stock options data because there was a question in his mind as to whether the company was being fair to him in the awarding of performance-based stock options; and (f) even if a pattern of dishonesty and rule violations had occurred in 2000, the conduct has been mitigated because of the circumstances of the conduct, the fact that it was uncharacteristic behavior for Applicant, who was humiliated by his actions and apologized for them, the conduct occurred approximately five years ago, the conduct is unlikely to recur, and Applicant has demonstrated rehabilitation and has an excellent reputation among his colleagues.

The Board concludes the Administrative Judge's findings and conclusions are supported by the record evidence. Department Counsel's ability to

argue for an alternative interpretation of the record evidence on appeal does not demonstrate error on the part of the Judge. Department Counsel's specific arguments about the Judge's application of Guideline E Mitigating Condition 5 fall short of establishing error. Thus, for these reasons, the Administrative Judge did not err in granting Applicant a clearance.

Order

The decision of the Administrative Judge granting Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I have no substantive difference from my colleagues on this case.

The Board is operating under a new Operating Instruction (OI-17), which I interpret as having no impact on the substance of Appeal Board decisions. The Board decision here uses the short format authorized in OI-17. The Board decision is somewhat more expansive than my reading of the short format laid out in the attachment to OI-17.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings and conclusions under Guideline M are not challenged by Department Counsel on appeal.