

DATE: November 24, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17839

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esq., Department Counsel

FOR APPLICANT

Robert S. Gardner, Esq.

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The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 26, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On April 6, 2006, after the hearing, Administrative Judge Carol G. Ricciardello denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge applied the correct Adjudicative Guidelines and whether record evidence supports the Administrative Judge's findings and conclusions.

(1) Applicant argues that the Administrative Judge committed harmful error by basing her decision on the Directive's Enclosure 2 Adjudicative Guidelines rather than the Revised Adjudicative Guidelines. The revised Adjudicative Guidelines were circulated to agencies involved in security clearance determinations after December 29, 2005. They were implemented by the Department of Defense in a memo dated August 30, 2006, for SORs issued on or after September 1, 2006. The SOR in Applicant's case was issued on May 26, 2004. The Judge correctly based her decision on the Adjudicative Guidelines in effect at that time.

Applicant is essentially challenging the implementation of the Revised Adjudicative Guidelines by the Under Secretary of Defense. The Board's jurisdiction and authority are limited to reviewing security clearance decisions by Hearing Office Administrative Judges. *See* Directive ¶¶ E3.1.28-E3.1.35. Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the Under Secretary of Defense. *See, e.g.*, ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001). Therefore, the Board does not have the jurisdiction or authority to address this part of Applicant's appeal argument.

(2) Applicant also maintains that the Administrative Judge's findings and conclusions are not supported by record evidence. We will treat that argument as raising the issue of whether the Judge's decision is arbitrary, capricious, and contrary to law. The Board finds no merit in Applicant's argument.

The Administrative Judge made the following relevant findings of fact and conclusions: On his last day of work, Applicant downloaded unclassified information from his government-furnished computer onto diskettes. He believed he was permitted to do so, and no evidence was provided to show that his action was prohibited. When told to stop by his supervisor, Applicant persisted in trying to maintain copies of the information for some future purpose. The Judge also found that Applicant forwarded proprietary/intellectual information to a foreign national without verifying that the foreign national was authorized to view the material. Applicant's supervisor told him that the information he was forwarding was proprietary/intellectual, but Applicant disagreed and continued to share it.

Applicant argues that the Administrative Judge erred by reaching adverse conclusions about Applicant's actions since there were no rules against his downloading of unclassified information and since no evidence was provided that the information Applicant was forwarding was proprietary/intellectual or that the individual he shared it with was not qualified to receive it. The Judge agreed that there were no rules to prohibit Applicant's action. However, the Judge found adverse security significance in Applicant's decisions to disregard his supervisor's instructions regarding the nature of the information on his computer and the proper handling of it, choosing instead to follow his own opinions on the matter. The record evidence supports the Judge's findings and conclusions.

In this case, the Administrative Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge articulated a rational basis for not applying any mitigating conditions in this case, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline E is sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Member David M. White

I agree with the majority that the Administrative Judge's decision to deny Applicant a security clearance should be affirmed. I write separately because this appeal raises issues that warrant a more thorough discussion and analysis under the Directive and DOHA Operating Instruction No. 17. The majority declined to join this opinion, instead electing to produce the preceding "short format" opinion. That format is authorized (but not required) by the Operating Instruction for use when the Board affirms a decision in a case that does not establish new precedent, apply settled precedent in a novel manner or resolve a novel issue of law. Because this appeal raises the novel legal issue of when the revised Adjudicative Guidelines will be used in clearance decisions, and further raises substantial challenges to key foundations

of the decision below, a "long format" decision is both mandated under the Operating Instruction and is sound appellate jurisprudence. The Board is obliged by Directive ¶ E3.1.32 to address the material issues raised on appeal by the parties to determine whether harmful error occurred. That section specifically includes whether the Administrative Judge adhered to the required procedures within the Board's scope of review. Both an accurate recital and an articulated analysis of the issues raised are necessary to provide a final clearance decision that is not arbitrary and capricious under the Board's own standards (discussed below) for such decisions, and to provide useful precedent for litigants and Administrative Judges in future cases.

Applicant raised four⁽¹⁾ material issues on appeal: (1) whether the record evidence supports the Administrative Judge's factual findings; (2) whether the then-current or the revised Adjudicative Guidelines for determining eligibility for access to classified information control this decision; (3) whether some of the Judge's conclusions were arbitrary, capricious or contrary to law; and (4) whether the Judge erred in her ultimate decision denying Applicant's security clearance.

The Judge made the following pertinent findings of fact and conclusions:

Applicant is a 48-year-old engineer who, during more than twenty years of working for various defense contractors, was employed by Company A from 1995 until he voluntarily left that job in February 1999. He did not enjoy working for Company A and did not get along well with either of his two immediate supervisors. He resigned in 1999 for reasons of his health, his daughter's health, job dissatisfaction and because his wife's income was sufficient for the family's needs.

On his last day at work, Applicant downloaded unclassified information from his government-furnished computer onto diskettes. He believed he was permitted to do so. Another Company A employee, who was the deputy project/team leader for whom Applicant worked, told him it was time for him to leave the building. Applicant wanted to finish downloading information because it might help the government later, but was told by the deputy that he could not do so, that it was Company A's information and was not to be given to the government. Applicant testified that he then finished packing up his belongings and, when he got a chance, backed up more files. He further testified that he was not sure what he intended to do with the diskettes, and that he selected files that might be useful for himself or someone else later, including both professional matters and items pertaining to his children.

The Judge specifically found that no evidence was provided that any government or Company A rules or regulations governed or prohibited downloading the information in question for backup storage or personal retrieval.

Applicant admitted in a sworn statement that he forwarded Company A's proprietary/intellectual information to other companies or government officials, specifically the United Kingdom. Applicant said the information was not significant proprietary/intellectual information that would hurt Company A. He further admitted sharing various information with a foreign national scientist assigned to work at the same defense facility. Applicant's supervisor said the information provided to the foreign national scientist was believed to be Company A's proprietary/intellectual information, but Applicant disagreed with his supervisor about whether this information was proprietary/intellectual information.⁽²⁾ Applicant had not verified that the foreign national scientist was authorized to view the material provided. Applicant's testimony at the hearing contradicted his prior sworn statement in some respects.

Applicant's evidence demonstrated high work quality, expertise and that he is considered an asset to the government, with both good knowledge and a history of properly controlling classified information. His character witnesses had no concern about his being a security risk.

The Judge accurately quoted and cited portions of Applicant's testimony which she characterized as "confusing, convoluted and conflicting." She said he "attempt[ed] to rationalize his earlier sworn admissions,"⁽³⁾ and found his testimony at the hearing not credible.

I. Whether the record supports the Judge's factual findings

Applicant asserts that the Administrative Judge's findings of fact are not supported by substantial evidence, arguing the absence of record evidence that: (1) the information Applicant sent to any unauthorized recipient was proprietary

information; (2) the recipients of any such information were not authorized to receive the information; and (3) downloading information on Applicant's government furnished computer to diskettes was not a violation of rules or regulations of Applicant's employer or the government.

Review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial evidence - "such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative [Judge's] finding from being supported by substantial evidence."⁽⁴⁾ In evaluating the findings of fact, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

There was evidence that the information Applicant sent was proprietary information, and the recipients of such information were not authorized to receive it, which was contradicted by Applicant's testimony. Applicant admitted in his pre-hearing, sworn statement to a Special Agent of the Defense Security Service that he forwarded information to other companies, the U.S. government and foreign nationals,⁽⁵⁾ that his supervisors considered to be proprietary/intellectual information, and that he knew was so considered. He did so because he disagreed with his supervisors' determinations that the information should not be shared.⁽⁶⁾ Applicant further asserts that the Judge's finding that he continued to download information from his government computer after being told to stop has no evidentiary basis in the record. The Judge specifically quoted Applicant's response to his own counsel's question in support of that finding.⁽⁷⁾ Additionally, an adverse information report concerning Applicant from Company A's Security Manager, indicated that he may have provided government information to a foreign citizen "inappropriately." (Government Exhibit 2).

With respect to Statement of Reasons (SOR) ¶ 1.b,⁽⁸⁾ the Judge's findings of fact are supported by substantial evidence. The Judge recognized that Applicant disagreed with his superiors at Company A about whether the information he admittedly shared was proprietary in nature and about who was authorized to receive it. There was, however, no dispute that Applicant shared government intellectual property with U.S. and foreign national colleagues who were in a professional association unrelated to the project or agency for whom he was working. Whether any or all of it was technically proprietary to his employer is not critical to the concern that he knowingly distributed information his supervisors thought he should not distribute to these people.⁽⁹⁾

Applicant is correct that no evidence was presented that his actions downloading information from his government computer was prohibited or otherwise violated a rule or regulation of Company A or the government. SOR ¶ 1.a does not allege that he violated any particular rule or regulation,⁽¹⁰⁾ and the Judge specifically stated in her findings of fact that there was no evidence that he did violate any rules.⁽¹¹⁾

In sum, the Judge's factual findings are supported by substantial evidence, or absence thereof, in the record.

II. Whether the Judge erred by applying the Directive's Enclosure 2 Guidelines rather than the revised Adjudicative Guidelines

Applicant asserts that the Judge committed harmful error when she denied his motion that she decide the case under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005). The President's approval of revised adjudicative guidelines was forwarded in a Memorandum from the Assistant to the President for National Security Affairs to the Director, Information Security Oversight Office on December 29, 2005. This Memorandum asked the Director to, "[p]lease circulate the revised guidelines to all affected agencies for immediate implementation."⁽¹²⁾ Applicant asserts that this memorandum made the revised guidelines effective immediately, and that the Judge's decision not to use them to decide his case was harmful error. As noted above, the SOR was issued to Applicant in May 2004. The hearing was held February 7, 2006 and the Judge's decision was issued in May 2006.

When legal issues are raised on appeal, we review them *de novo*. Determining when new or revised Directive provisions become effective for use in deciding a particular case is such a legal issue. This is the first case raising this issue for

resolution by the Board.

The Department of Defense (DoD) had not implemented the revised Adjudicative Guidelines as of the time of the hearing or decision in this case. The revised guidelines were implemented within DoD by an Under Secretary of Defense Memorandum dated August 30, 2006. This Memorandum makes the revised Guidelines applicable to all adjudications and other determinations in which an SOR is issued after September 1, 2006, and requires that all SORs issued prior to September 1, 2006 be adjudicated under the previous Guidelines. Applicant's May 19, 2006 appeal challenged neither the wisdom nor the lawfulness of this memorandum, which was not published until 104 days later.

The Judge correctly applied the then-current version of the Adjudicative Guidelines in deciding Applicant's case. First, the DoD implementation now explicitly directs that cases for which an SOR was issued before September 1, 2006, be adjudicated using those guidelines. Second, this procedure conformed to the historical and logical implementation method in which the date an SOR is issued, not some later stage of the adjudicative proceeding, fixes the guidelines under which the adjudication will continue.⁽¹³⁾ The interpretation Applicant proposes would have required starting over with a new SOR in each pending case, to ensure an applicant received fair notice. The Memorandum implementing the effective dates for use of the revised Adjudicative Guidelines within DoD is now binding on DOHA and will determine which Guidelines apply to each adjudication during the transition.

Moreover, the revised Guideline E potentially mitigating condition cited in Applicant's brief as one that would have benefitted him requires not only that one or more of the listed circumstances make the offense unlikely to recur, but also that the conduct does not cast doubt on the individual's reliability, trustworthiness, or good judgment.⁽¹⁴⁾ Since the Judge specifically found that Applicant's conduct did cast doubt on his judgment, reliability and trustworthiness, this mitigating condition would not apply even had she used the new guidelines. Both sets of guidelines require that the final determination embody analysis of the issues raised within the "whole person concept." This requires more than a simple checklist approach to disqualifying and mitigating conditions, and the Judge weighed the circumstances specified in the revised Guideline E mitigating condition cited by applicant in her "whole person" analysis but found them unpersuasive. The Judge's ruling concerning which guidelines to apply in deciding the case was correct, but even if she had erred it would have been harmless.

III. Whether the Administrative Judge's conclusions are erroneous.

The Appeal Board may reverse or remand the Judge's decision to grant, deny, continue or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A long line of our cases, based on Supreme Court precedent, define the "arbitrary and capricious" standard as one that requires an Administrative Judge to examine the relevant evidence and articulate a satisfactory explanation for her conclusions, including a "rational connection between the facts found and the choice made."⁽¹⁵⁾ A decision is arbitrary and capricious when it, "does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion."⁽¹⁶⁾ Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge who conducted the hearing and rendered the decision being appealed. We may not set aside a Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency."⁽¹⁷⁾

A. Whether the Judge's finding of a security concern under Guideline E (Personal Conduct) was arbitrary, capricious or contrary to law.

Taken together, the Judge articulated a rational and substantiated basis for her determination that the evidence of record and facts found in connection with SOR ¶¶ 1.a. and 1.b. established a security concern under Directive ¶ E2.A5.1.2.1. This determination was based on all the material evidence before her. It followed her factually supported explanation that Applicant substituted his own judgment on safeguarding potentially sensitive information for that of his superiors when he had no authority to do so, and her further observation that Applicant still refused to see the error of his ways and tried to justify his actions during his testimony at the hearing. The Judge's conclusions are therefore not arbitrary and capricious. Applicant made no assertion that her rulings and conclusions were otherwise contrary to law.

B. Whether the Judge erred in finding that Applicant is especially vulnerable to not protecting classified information or there is a heightened security concern because Applicant may substitute his judgment on proper handling of classified information for determinations appropriately made by others.

The Judge concluded her analysis applying Guideline E Disqualifying Condition 1 by stating:

He showed a clear lack of candor in his testimony and repeatedly contradicted himself in his sworn statement and testimony. It is clear Applicant is a subject matter expert in his field, but it does not relieve him of complying with the appropriate determinations and requirements directed by his supervisors. His conduct is the type that makes him especially vulnerable because he may choose to chart his own course in the future with regard to classified information and not comply with determinations that have been appropriately made by others.

Decision at 8.

Applicant characterizes his actions as a legitimate and open disagreement with a supervisor over the extent to which information should be considered proprietary. He claims, based solely upon one statement during his testimony at the hearing, ⁽¹⁸⁾ that he brought that disagreement to some higher authority within Company A who agreed with him that his supervisor was wrong. The Judge evidently did not give much weight to this aspect of Applicant's testimony.

The Board is required to give deference to a Judge's credibility determinations. The party challenging the Judge's "credibility determinations has a heavy burden of persuasion on appeal." ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). And a Judge may use her credibility determination to make findings of fact in the face of conflicting record evidence. However, a Judge cannot rely on her credibility determination to the exclusion of documentary or other objective record evidence that is relevant and pertinent to the Judge's findings of fact. *See* ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). Applicant has not alleged that the Judge failed to consider any documentary or other objective evidence that higher authority within Company A agreed with Applicant, or produced such evidence.

Here the Judge's determination that Applicant lacked credibility is supported by the record. Indeed, if some higher authority had authorized Applicant's actions with respect to the information at issue in this case, Applicant likely would have said so when first questioned by the DSS Special Agent, and certainly would have provided this information during his presentation at the hearing. Instead, this testimony first surfaced in response to a question by the Judge after counsel had finished questioning Applicant. His claimed receipt of higher level approval is made even more doubtful by the subsequent filing of an adverse information report about his actions by the Security Manager at Company A, ⁽¹⁹⁾ and documentation on his Separation Notice that he was only contingently eligible for rehire due to repeated counseling on using poor judgement in sending inappropriate e-mails to government officials external to the [facility] and [project] contract. ⁽²⁰⁾ The Judge's conclusions are rational and supported by the record.

The Judge's conclusion that his conduct demonstrates that he is especially vulnerable to disregard authorized determinations of others about classified material with which he may disagree is supported by both her analysis and the record as a whole. Applicant's assertions that the Judge's conclusions were arbitrary, capricious, or contrary to law is without merit.

IV. Whether the Judge erroneously denied Applicant's security clearance.

Based on the multiple allegations of error addressed previously, Applicant argues that the Judge's ultimate determination was arbitrary, capricious, or contrary to law. I find no merit in any of his assertions of error. The Judge acted properly with respect to each issue raised on appeal. She made supportable findings of fact which she then thoroughly analyzed within the context of the proper governing adjudicative guidelines and came to a series of rational conclusions supporting her ultimate decision that Applicant should be denied a security clearance. These conclusions were not arbitrary, capricious or contrary to law, and her decision is properly affirmed.

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief (pp. 1-2) lists five issues, two of which allege insufficient evidence to support findings under the two separate SOR subparagraphs. These two are combined here as issue (1) for the sake of clarity, but each is discussed in evaluating the Judge's findings of fact below.

2. Decision, at 4, *citing* Government Exhibit (GE) 5, at 1 and 2.

3. Decision at 7.

4. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21(1966).

5. Although he only identifies one foreign national in his sworn written statement (GE5), during his testimony at the hearing Applicant identified two foreign nationals to whom he provided information. Transcript at 69-70, 90-93. The second individual had no connection to the contract or team on which Applicant was working or to Company A.

6. Transcript at 80-81.

7. Decision at 3 (citing Transcript at 54-55). The question and answer quoted in the decision were:

Q. Were you instructed to stop downloading the information?

A. Well, I had essentially finished at that time. It was like at the very dead-end of the day. And I knew what time of day it was, and everybody was leaving. I kind of finished what I was doing, which was trying to pack up my stuff. And when I got a chance, I would, you know, back up anything, you know, after I looked on the files to say, "Well, you know, this might be useful for, you know, me or someone else later."

Although not quoted by the Judge in her decision, the very next question from Applicant's counsel and the beginning of his rather rambling answer add context to the foregoing answer, and further supports her interpretation:

Q. Now, did you try to leave with that data? Did you try to leave the facility with that data?

A. No. I mean, I was just sitting there and just backing it up. And, you know, ...

8. SOR ¶ 1.b. reads, "You forwarded proprietary and government information to unauthorized recipients, while employed at [Company A, location] from approximately March 1995 to February 12, 1999."

9. Having concluded that there is substantial evidence to support the Judge's findings of fact in regard to SOR 1.b., Applicant's allegation that the Judge's conclusion against him under Guideline E is arbitrary, capricious, and contrary to law is without merit. Additionally, it is notable that Applicant's conduct is specifically listed as an example of untrustworthy or unreliable behavior under revised Guideline E at ¶ 16(d)(1), which Applicant's appeal asserts should govern this decision.

10. SOR ¶ 1.a. reads:

You attempted to save all information from your government computer on to diskettes at the time of your resignation from [Company A, location] on or about 12 February 1999. [Company A] personnel intervened and stopped you from downloading and removing information after you connected a personal zip drive to government equipment. You were escorted from the area, your military decal was removed from your vehicle, and you were escorted from the base.

11. Applicant also challenged the Judge's conclusion against him that SOR ¶ 1.a. raised a security concern under Guideline E. The Judge found that Applicant attempted to download and remove information from his government

computer and had to be stopped from doing so by Company A personnel. The Judge specifically found this defiance of authority with respect to protecting information was troublesome, showed an unwillingness to comply with his supervisor's directions and a lack of judgment. No rule or regulation violation was alleged in the SOR, none was proven, and none is required to establish a security concern under Guideline E (Personal Conduct). Indeed, had such a violation been at issue, the matter would likely have been raised and addressed under Guideline M (Misuse of Information Technology Systems) of the Directive, rather than Guideline E (Personal Conduct). Based on established facts and supported by her "whole person" analysis, the Judge's conclusion with respect to SOR ¶ 1.a., and application of Guideline E is not arbitrary, capricious or contrary to law.

12. AE A, at 1.

13. DOHA practice during the 1999 guideline revision process followed this approach in which the SOR date controls guideline applicability. *See* ISCR Case No. 99-0438 (A.J. Nov. 30, 1999); ISCR Case No. 99-0295 (A.J. Nov. 16, 1999); ISCR Case No. 99-0062 (A.J. Sep. 15, 1999); ISCR Case No. 99-0196 (A.J. July 30, 1999).

14. Revised Guidelines ¶ 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 case doubt on the individual's reliability, trustworthiness, or good judgment;" (emphasis added).

15. *See* ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)); *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)).

16. ISCR Case No. 03-10004 at 1-2 (App. Bd. Jan. 27, 2006) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)).

17. *Motor Vehicle Mfrs. Ass'n.*, *supra* note 15, at 42.

18. Appeal Brief at 15 (citing Transcript at 105).

19. GE 2 (filed on 5 March 1999).

20. GE 3.