

DATE: June 24, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 98-0395

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Michael H. Leonard, Esq., Department Counsel

**FOR APPLICANT**

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Personal Representative

Administrative Judge John R. Erck issued a decision, dated January 11, 1999, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Applicant did not deliberately delete particular e-mail messages; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 17, 1998 to Applicant. The SOR was based on Criterion M (Information Technology) and Criterion D (Sexual Behavior).

A hearing was held on October 19-20, 1998. At the hearing, Department Counsel indicated that it would not be offering evidence in support of the SOR allegation under Criterion D (due to unavailability of a key witness), and that its case against Applicant would be based solely on Criterion M.

The Administrative Judge subsequently issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

**Appeal Issues**

1. Whether the Administrative Judge erred by finding that Applicant did not deliberately delete particular e-mail messages. There is no dispute that a female government employee sent Applicant, a defense contractor employee, an e-

mail message that accused Applicant of sexual harassment.<sup>(1)</sup> There is no dispute that Applicant, acting in his capacity as the local area network (LAN) administrator, obtained access to the female employee's computer in order to perform a software upgrade. However, there is a dispute as to what Applicant did after he gained access to the female employee's computer. The Administrative Judge found: (a) Applicant moved the accusatory e-mail message (which the female employee had sent to Applicant) and a nearly identical version of it from one folder to a folder Applicant created for that purpose; (b) Applicant moved the e-mail messages because he was embarrassed by them and he was concerned they might be seen by other colleagues who were helping him with the software upgrade; (c) Applicant intended to move the messages back to their original location after the software upgrade was completed; (d) due to subsequent events, Applicant was not able to access the female employee's computer to return the e-mail messages to their original location and the messages were lost and could not be restored; and (e) Applicant did not deliberately delete the e-mail messages.

Department Counsel contends the Administrative Judge erred by finding Applicant did not deliberately delete the e-mail messages. In support of this contention, Department Counsel argues: (a) the Administrative Judge improperly relied on his favorable assessment of Applicant's credibility; (b) the record evidence contradicts Applicant's denial that he intended to delete the e-mail messages; and (c) the weight of the record evidence supports a finding that Applicant deliberately deleted the e-mail messages. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge erred.

There is no merit to Department Counsel's argument that the Administrative Judge improperly relied on his favorable assessment of Applicant's credibility. Department Counsel is conflating an insufficiency of the evidence argument with an argument that the Judge impermissibly used a credibility determination in lieu of record evidence. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 4; ISCR Case No. 98-0592 (May 4, 1999) at p. 4; ISCR Case No. 98-0419 (April 30, 1999) at p. 3. A review of the decision in this case persuades the Board that the Judge did not commit the error Department Counsel contends he did.

The Administrative Judge has the primary responsibility for weighing the record evidence and making findings of fact. The presence of conflicting record evidence does not diminish the Judge's fact-finding responsibility. Indeed, the Judge often must weigh conflicting evidence and decide which evidence is more credible or persuasive in light of the record as a whole. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 6. Of course, the presence of conflicting evidence does not relieve the Judge of the obligation to carefully consider the record evidence as a whole and weigh it in a reasonable manner. *See Directive, Additional Procedural Guidance, Item 32.a.* ("The Appeal Board shall . . . determine whether or not: a. The Administrative Judge's findings of fact 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.*")(emphasis added).

There is conflicting record evidence on the issue of whether Applicant deliberately deleted the e-mail messages. The Administrative Judge made findings that reflect a reasonable, plausible interpretation of the record evidence. Department Counsel's appeal brief sets forth arguments in favor of an alternate interpretation of the record evidence that is reasonable and plausible. Department Counsel's ability to argue for such an alternate interpretation of the record evidence does not demonstrate the Judge's challenged findings are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0685 (May 20, 1999) at p. 3. The Board need not agree with the Judge's findings on this point to conclude they are sustainable.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, and contrary to law. In support of this contention, Department Counsel argues: (a) the Administrative Judge erred by finding Applicant did not deliberately delete the accusatory e-mail messages sent to him by a female federal employee; and (b) the Judge misinterpreted Criterion M.

The Board has already addressed the first argument. Since the Board has concluded that argument fails to demonstrate the Administrative Judge erred, it does not support Department Counsel's contention that the Judge's decision is arbitrary, capricious, and contrary to law.

Department Counsel's second contention consists of several, interrelated arguments: (i) the Administrative Judge's interpretation of Criterion M is detrimental to the industrial security program; (ii) the Judge's interpretation of Criterion M is inconsistent with the purpose of the Directive to protect classified information; (iii) the Basis section of Criterion

M is explanatory, not mandatory in nature; (iv) the Judge erred by focusing narrowly on language under Criterion M pertaining to rules, procedures, guidelines, or regulations; (v) the Judge's interpretation of Criterion M would render useless Misuse of Information Technology Disqualifying Conditions 1 and 2; and (vi) the Judge's interpretation of Criterion M would improperly require Department Counsel to prove Applicant violated some specific rule, procedure, guideline, or regulation without any direct proof that Applicant was authorized to do what he did.

The Board rejects Department Counsel's arguments about Criterion M for several reasons. First, Department Counsel seeks to have the Board construe the language of Criterion M in a piecemeal manner. The entire language of a Criterion, not merely the wording of Disqualifying Conditions or Mitigating Conditions, is relevant to interpreting and construing a Criterion. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 4 (Board construing Criterion B in light of its language, including language in Basis section of Criterion B); ISCR Case No. 97-0783 (August 7, 1998) at p. 2 (referring to preambulatory language of Criterion F in construing a Criterion F Disqualifying Condition). Second, Department Counsel's argument does not reflect a plausible reading of Misuse of Information Technology Systems Disqualifying Condition 1 ("Illegal or unauthorized entry into any information technology system") and Disqualifying Condition 2 ("Illegal or unauthorized modification, destruction, manipulation, or denial of access to information residing on an information technology system"). The phrase "[i]llegal or unauthorized" has no discernable meaning independent of some showing that the conduct in question violated some applicable rule, procedure, guideline, or regulation.<sup>(2)</sup> Third, under the Directive, Department Counsel has the burden of proving controverted allegations. Directive, Additional Procedural Guidance, Item 14. In this case, Department Counsel had the burden of proving that Applicant's conduct was unauthorized. In DOHA cases, only after Department Counsel makes a preliminary showing that Applicant's conduct was unauthorized, does the burden shift to Applicant to present evidence to rebut that preliminary showing. *See* Directive, Additional Procedural Guidance, Item 15. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 5. Department Counsel's proposed construction of Criterion M would impermissibly shift the burden to Applicant to disprove a controverted allegation. Fourth, nothing in Department Counsel's arguments demonstrate the Judge's interpretation of Criterion M would result in detrimental consequences to the industrial security program or undermine the protection of classified information.

In this case, Applicant's conduct did not constitute an obvious, self-evident misuse or unauthorized use of a computer. The Board need not agree with the Administrative Judge's findings to conclude it was not arbitrary, capricious, or contrary to law for the Judge to conclude Department Counsel "failed to prove [Applicant's] actions were either illegal or beyond the authority of his position." However, Department Counsel's argument has merit to the extent the Judge went on to state further that the government had "to prove Applicant did not have authority to move any e-mail at anytime for any reason." Unauthorized actions under Criterion M can cover a range of situations from acting without any authority at all to acting in excess of authority. Accordingly, if Department Counsel had proven Applicant was not authorized to delete the particular e-mail messages involved in this case, it would have been irrelevant if Applicant had authority to delete other e-mail messages.

Although the Board has decided that the Administrative Judge did not err by concluding Department Counsel "failed to prove [Applicant's] actions were either illegal or beyond the authority of his position," the Board does not address the Judge's findings and conclusions about Applicant's "implied authority." The Board's ruling concerning the construction of Criterion M makes it unnecessary for the Board to address the merits of Department Counsel's arguments in relation to the Judge's findings and conclusions about Applicant's "implied authority."

## **Conclusion**

Department Counsel has failed to meet its burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's January 11, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding under Criterion D in favor of Applicant. That favorable formal finding is not at issue on appeal.

2. The Directive should be construed broadly in order to effectuate the purposes of the industrial security program, including the protection of classified information. *See, e.g.*, ISCR Case No. 97-0783 (August 7, 1998) at p. 4. Accordingly, the words "rules, procedures, guidelines, or regulations" in Criterion M should be read broadly to include statutes, Executive Orders, regulations, directives, regulations, rules, procedures, guidelines, manuals, position descriptions, official memoranda, or any other appropriate source that sets forth, directly or indirectly, the scope of authority of persons with respect to information technology systems.