KEYWORD: Guideline m; Guideline e

DIGEST: Ineffective assistance of counsel is not a basis for appeal. DOHA proceedings are civil not criminal. Adverse decision affirmed.

CASENO: 07-06332.a1

DATE: 05/09/2008

DATE: May 9, 2008

In Re:	)	
	)	
----------	)	ISCR Case No. 07-06332
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 27, 2007, 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 February 6, 2008, after the hearing, Administrative Judge Matthew E. Malone 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 Applicant's allegation of ineffective assistance of counsel constitutes error; whether Department Counsel's introduction of certain evidence was in bad faith and therefore a violation of due process; and whether the Judge committed error in his findings and conclusions.

The Judge made the following factual findings: Between March 2005 and May 2006, Applicant was employed by a defense contractor as an information technology technician. In addition to his normal duties, Applicant offered to develop a computer program to help the contractor manage its projects. Applicant's program contained passwords and codes, including source and expiration codes, which the company had not required and which Applicant did not initially share with his employer. At one point, an expiration code triggered automatically and caused a database to stop working. Applicant was subsequently told he would be fired if he did not supply the passwords and codes to his employer, which he had initially refused to do. At another point, Applicant deliberately deleted a folder containing some of the codes, although he was able to reconstruct the codes during the next ten days. Applicant eventually provided some of the information after he was reminded that he had signed a Patent and Trade Secret Agreement which required him to do so. Applicant was let go as part of a reduction in force.

In March 2006, Applicant filed a complaint against his employer alleging discrimination, harassment, and other types of misconduct by his supervisors. After he was let go, Applicant filed a complaint alleging that he lost his job in retaliation for his earlier complaint. Applicant testified that his complaints were still being investigated, but in September 2006 an investigation by the Department of the Army concluded that there was no basis for Applicant's allegations of wrongdoing by his supervisors. Decision at 3. In April 2007, the Army Inspector General concluded that Applicant lost his job due to reduced manpower needs and Applicant's unprofessional conduct. Decision at 4.

In his appeal brief, Applicant repeats the arguments he made at the hearing. His appeal also contains a series of e-mails, including an e-mail exchange in November 2007 between Applicant and the Government Accountability Office (GAO). To the extent the brief contains evidence not presented at the hearing, it proffers new evidence, which the Board may not consider on appeal. *See* Directive ¶ E3.1.29.

Ineffective assistance of counsel is not a basis for appeal. DOHA proceedings are civil, not criminal, in nature, and the ineffective assistance of counsel doctrine does not apply to them. *See, e.g.,* ISCR Case No. 98-0515 at 3 (App. Bd. Mar. 23, 1999); ISCR Case No. 96-0127 at 2 (App. Bd. Jul. 29, 1997). The actions or inactions of Applicant's hearing lawyer do not provide a basis for the Board to conclude that the Judge's decision should be reversed or remanded. *See, e.g.,* ISCR Case No. 01-07629 at 2-3 (App. Bd. Apr. 5, 2002).

While the language in Applicant's appeal brief is not clear, it appears that he is arguing that Department Counsel acted in bad faith in introducing certain evidence pertaining to Applicant's two complaints against his employer and that Applicant was thereby denied due process.[1] There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.,* ISCR Case No. 03-21329 at 1 (App. Bd. Sep. 25, 2006). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that burden, because he has not identified anything in the record that suggests a basis for a reasonable person to conclude that Department Counsel acted improperly. Applicant's two complaints, one to GAO in March 2006 and one to the DoD IG in April 2007, were a source of confusion.[2] It appears that the GAO complaint was investigated at least in part by the Inspector General of the Army (Army IG). Among the government's exhibits, Department Counsel submitted documents stating that the investigation of the first complaint by the Army IG was closed, at least as to the issues listed, and that the investigation by the DoD IG was closed. Department Counsel gave copies of those documents to Applicant before the hearing. Applicant had the opportunity to refute those documents. Applicant also had the opportunity to supplement the record if he felt that Department Counsel's documentary submissions were incomplete or misleading. It appears that Applicant had written evidence from GAO before his hearing that the investigation of his first complaint was still ongoing, but he did not submit it. Furthermore, when Applicant testified that the GAO investigation was still open, he did not indicate that he had documentation for his assertion. Applicant also states that he was assured by two sources that the investigation of the second complaint was still open, but he did not document or submit that information for the hearing. Applicant has not demonstrated denial of due process.

Applicant cites sections from the Judge's decision which he asserts contain errors. Applicant does identify one factual error: the Judge stated that in 2007 Applicant filed a complaint with the Army IG, while Applicant actually filed that complaint with the DoD IG. That error is harmless, since that fact alone would not affect the Judge's ultimate conclusions. Applicant states his disagreement with other portions of the Judge's decision, but those portions involve the Judge's characterization and weighing of the evidence. Applicant's explanations of his actions were relevant and material evidence that the Judge had to consider. However, the Judge was not bound to accept Applicant's explanations at face value. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole. *See, e.g.,* ISCR Case No. 01-20579 at 5 (App. Bd. Apr. 14, 2004). The fact that Applicant does not agree with the Judge's findings and conclusions, or can offer an alternative interpretation of the record evidence, does not establish error on the part of the Judge.

---

[1]". . . the decision was based off of submitted evidence that may or may not have pertained to my Federal Fraud cases and also all evidence submitted by the prosecution was not presented in its full process leading the administrative judge not to believe my testimony when given."

[2]The complaints were not part of the SOR allegations against Applicant. However, Applicant contends that the complaints at least indirectly caused the dispute with his employer which, in his view at least, led to the SOR allegations.

The Board has examined the Judge's decision in light of the record as a whole. The Judge has drawn "a rational connection between the facts found" and his adverse decision. *See 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). The Judge's finding that Applicant wrongfully denied his employer and the U.S. Army access to a necessary computer program and his ultimate conclusion that Applicant was ineligible for a security clearance are sustainable.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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