

KEYWORD: Guideline M; Guideline E

DIGEST: Applicant, a security officer, used a company-issued laptop computer to access pornographic web sites. Multiple times over a year. Adverse decision affirmed.

CASENO: 08-11135.a1

DATE: 06/14/2010

DATE: June 14, 2010

_____ )	
In Re: )	
)	
----- )	ISCR Case No. 08-11135
)	
)	
Applicant for Security Clearance )	
_____ )	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 17, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under 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 March 11, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr., denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his application of the pertinent mitigating conditions; whether the Judge properly applied the whole-person factors; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is employed by a government contractor performing duties in “business intelligence” and data integration. Decision at 3.

He began working for a previous employer in June 2006. When he began working for the earlier employer, Applicant was presented a handbook outlining company policy on a variety of things. Included among the various policy statements was one that forbade the use of a company-issued computer to access pornographic web sites. Applicant signed an acknowledgment that he understood the policies contained in the handbook.

Applicant received an interim security clearance in May 2007 and a security clearance the following September. That same month, he was named Assistant Facility Security Officer (AFSO) and, in October 2007, Facility Security Officer (FSO) for his previous employer.

Between September/October 2006 until the end of 2007, Applicant used a company-issued laptop computer to access pornographic web sites. He downloaded approximately 12 movie files, which were pornographic in nature. Although he used a company computer, Applicant only viewed the prohibited web sites from his home. The pornographic images were of adults.

Applicant contends that the Judge should have found the security concerns to have been mitigated under both Guideline M and Guideline E. Specifically, he cites to a single mitigating condition under each Guideline, which embody roughly similar criteria.<sup>1</sup> He argues that the Judge should have concluded that the misconduct in question was not recent and that it will not recur.

---

<sup>1</sup>Directive ¶ E2.41(a) mitigates Guideline M security concerns when “so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment[.]” The analogous provision under Guideline E is found at Directive ¶ E2.17(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 cast doubt on the individual’s reliability, trustworthiness, or good judgement[.]”

Additionally, Applicant argues that the misconduct, as alleged under Guideline M, does not rise to the level of seriousness as that described in the Adjudicative Desk Reference (ADR).

On this latter point, it is well settled that Judges must decide cases based on the current Guidelines and not on the ADR. “The [ADR] itself contains language indicating that it may not be cited as authority for denial or suspension of access.” ISCR Case No. 08-01583 at 2 (App. Bd. Dec. 4, 2009). Therefore, Applicant’s reliance on this document is misplaced, and we resolve that aspect of the appeal adversely to him.

In evaluating the mitigating conditions cited by Applicant, the Judge noted that the misconduct in question occurred on multiple occasions over more than a year’s time. Additionally, it occurred with Applicant’s knowledge of company policy regarding internet access. The Board also notes record evidence (including Applicant’s response to the SOR) and the Judge’s findings that Applicant’s misconduct continued until the end of 2007, making plausible an inference that he accessed pornographic web sites on a company computer while holding at least an interim security clearance and while serving as an ASFO and/or FSO.<sup>2</sup> The Judge’s conclusions under the mitigating conditions at issue in this appeal are sustainable.

Applicant contends that the Judge failed to consider, or that he mis-weighed, record evidence which he believes pertinent to a proper whole-person analysis. He cites evidence (1) purporting to demonstrate that Applicant’s previous employer violated part of Applicant’s employment contract; (2) that the employer did not file a report concerning an unrelated security violation by another employee; and (3) that the employer’s handbook does not indicate that internet misuse can lead to termination. We have considered this argument. These matters have, at best, only a tangential relation to the security concerns arising from Applicant’s misconduct.<sup>3</sup> Insofar as they are part of the record, it is presumed the Judge considered them. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). However, Applicant has not demonstrated that they were entitled to more weight than the Judge appears to have given them. All in all, the Judge’s whole-person analysis complies with the requirements of Directive ¶ E2.2. *See* ISCR Case No. 08-02464 at 3 (App. Bd. Jul. 16, 2009); ISCR Case No. 05-03948 at 3-4 (App. Bd. May 21, 2007); ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006).

---

<sup>2</sup>*See* Tr. at 121: “When is the last time you viewed any sort of internet pornography using a work resource? A: Probably November of 2007.” Compare with Judge’s findings that Applicant acquired an interim clearance in May 2007 and became an AFSSO in September of that year.

<sup>3</sup>*See, e.g.*, ISCR Case No. 03-15308 at 4 (App. Bd. Aug. 2, 2005), in which the SOR had alleged that an applicant had downloaded pornography using his employer’s computer resources. The applicant contended that the Judge erred by failing to give sufficient weight to record evidence that he had been terminated from his employment due to a personality conflict with a human resources official. The Board sustained the Judge’s conclusion that this matter was not relevant to the security concerns arising from the applicant’s misuse of his employer’s computer system. *Compare, also*, ISCR Case No. 07-15281 at 5 (App. Bd. Jul. 16, 2009): “There is no prohibition in the Directive against considering security-related conduct merely because a previous employer chose not to pursue it in a particular forum.”

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made.’” *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 adverse decision 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).

### **Order**

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board