

KEYWORD: Guideline M; Guideline E

DIGEST: Although this was a decision on the written record, without an opportunity for the Judge to consider Applicant as a live witness, her evaluation and weighing of the record evidence necessarily entailed a determination as to the credibility of Applicant’s case for mitigation. The record supports this credibility determination by the Judge. It also supports her analysis of the mitigating conditions. Favorable decision affirmed.

CASE NO: 10-07794.a1

DATE: 10/04/2011

DATE: October 4, 2011

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Tovah A. Minster, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 13, 2011, 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 elected to have the case decided on the written record. On June 29, 2011, after considering the record, Administrative Judge Nichole L. Noel granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge erroneously substituted a favorable credibility determination for record evidence when applying mitigating factors to the case. For the following reasons, the Board affirms the Judge's favorable decision.

The Judge made the following pertinent findings of fact: Applicant is 32 years old and he has worked with his current company since 2008. His former employer had a very strict workplace internet policy which blocked employees from accessing their personal e-mail accounts, as well as popular internet and social networking sites. Frustrated by this policy, Applicant admits that starting in 2004 he improperly used his employer's software and computer system to create a secure "tunnel" to his home computer in order to circumvent the company's firewall and to allow him to access prohibited sites. Applicant admits he bragged about his actions on his MySpace page. Applicant also disclosed that he had illegally downloaded thousands of copyrighted songs and one to two dozen movies from the internet onto his personal computer. Applicant was confronted by the human resources director of his company in July 2007 regarding these matters. Applicant admitted his wrongdoing and was suspended for five days. At the end of the suspension period, Applicant was informed that he was being terminated, and he was allowed to resign. After his initial confrontation by his employer, Applicant removed the MySpace postings.

In the aftermath of his resignation, Applicant admits that he did not understand why, if no harm was done to the company's network, his actions caused such a problem. Applicant cites his divorce as an aggravating factor. Going through a divorce depressed him and caused him to experience low self-esteem which ultimately caused him to behave immaturity. At the time, he thought his MySpace posts made him look "cool" and the postings provided a boost to his ego. Now, Applicant recognizes that the behavior was wrong, immature, and dangerous. He understands that he placed himself and his former employer in a potentially compromising and vulnerable position. Since then, he has taken a more serious approach to security. He also sees a therapist regularly to deal with issues stemming from his divorce. In the four years since he resigned from his former employer, he has not misused information technology systems. He has not committed any security violations. Since 2008, Applicant has not illegally downloaded copyrighted materials.

The Judge reached the following conclusions: Applicant's last known misuse of an information technology system occurred four years ago. He engaged in this behavior while going through a difficult divorce. Since then, he has seen the error of his ways. Applicant's statements show he understands the security risk created by his behavior and that he will not engage in similar behavior in the future. He has stated a commitment to security practices and respects the integrity of the information systems to which he now has access. He self-reported his conduct on his security clearance applications. He reported his resignation in lieu of termination. He has been candid about his actions. He takes responsibility for his actions. He has repeatedly expressed remorse for his behavior. These themes are consistent in all his responses to his former employer and government inquiries. Applicant is able to specifically identify several potential risks caused by his actions, which shows that he understands the nature and seriousness of his conduct. He is in therapy to deal with the issues of low self-esteem caused by his divorce. Applicant appreciates the security concern raised by illegally downloading copyrighted material. There is no indication that he distributed any of the material he illegally obtained. Viewed in its totality, these factors contribute to the favorable evaluation of Applicant's written statements. While Applicant's past actions were serious, he has shown a more mature and responsible attitude indicating that he will not commit such actions in the

future and his past actions do not reflect negatively on his current reliability, trustworthiness, or good judgment.

Department Counsel asserts that the Judge improperly substituted a favorable credibility determination for record evidence in concluding that Mitigating Condition ¶ 41(a)<sup>1</sup> and Mitigating Condition ¶ 17(c)<sup>2</sup> applied to this case. Department Counsel argues that the Judge wrongfully determined that Applicant's various written comments consistently support conclusions that Applicant has taken responsibility for his actions, has expressed remorse for his behavior, and has shown a more mature and responsible attitude. Department Counsel contends that these conclusions do not have an adequate basis in the record, and are therefore unreasonable. Department Counsel's arguments do not establish error on the part of the Judge.

The bulk of the evidence in this case consists of written statements made by the Applicant at various stages of the adjudicative process. Those statements are evidence that the Judge was obliged to consider. The Judge was then faced with the choice of accepting or rejecting the factual representations contained within the statements. The Judge also had to determine the weight that she would assign to the evidence. As part of the process of assessing the accuracy of various statements made by Applicant, the Judge was making a determination as to credibility, as she would have to do when evaluating the statement of any witness in any case, whether the statement was offered orally or in writing.<sup>3</sup> This does not equate, however, to an improper substitution of a credibility determination for record evidence.

Department Counsel correctly notes that an administrative judge cannot rely on a credibility determination as a substitute for record evidence. *See, e.g.*, ISCR Case No. 97-0727 at 3 (App. Bd. Aug. 3, 1998). However, in this case, as suggested in the preceding paragraph, an assessment of the credibility of Applicant's written statements was unavoidable, and her mere assessment of such evidence should not suggest that the Judge is using her authority to render an improper credibility determination. A reading of the Judge's decision indicates that, in addition to any reliance on credibility alone, the Judge relied on objective evidence in applying the mitigating conditions in question. *See, e.g.*, ISCR Case No. 98-0247 at 3-4 (App. Bd. Jan. 20, 1999). There were the significant factors of Applicant's age and the passage of a considerable length of time since the occurrence of the misconduct in the SOR. There was the factor of no recurrences of the conduct during the period since the infractions—a period where Applicant had access to information

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<sup>1</sup>[S]o 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[.]

<sup>2</sup>[T]he 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 judgment[.]

<sup>3</sup>Hence, the Judge's statement on page 5 of her Decision that "I cannot make a credibility determination of Applicant because I have not had the chance to observe him in person" is not entirely accurate. With the absence of Applicant from the hearing context because this was a FORM case, she could not assess the credibility of Applicant as a live witness while offering testimony. She was still tasked, however, with the decision to accept or reject the representations made by Applicant in his various statements, and that decision was necessarily based on an assessment of the basic believability (credibility) of the statements.

technology systems. There was the factor of Applicant's candid and detailed discussion of his actions at every step of the adjudicative process, and his admissions of his misconduct immediately when confronted by his employer. There was the factor of Applicant's domestic problems, their effect on his behavior at the time of the misconduct, and his decision to see a therapist to address the problems. The Judge also noted that she was influenced by thematic consistency of Applicant's responses to agency interrogatories, his answer to the SOR, and his FORM response. None of this evidence was contradicted by other objective evidence in the record, or by findings of fact made by the Judge. This evidence provided a reasonable basis for the Judge's more subjective conclusions, including her conclusions that Applicant was remorseful, that he accepted responsibility for his actions, and that he is reliable. This evidence also provided a reasonable basis for the Judge's favorable application of the mitigating conditions cited in her Decision.<sup>4</sup> A judge's credibility determination may be set aside or reversed if: (a) it is unreasonable, contradicts other findings, or is based on an inadequate reason; (b) it is patently without basis in the record; or (c) it is inherently improbable or discredited by undisputed fact. *See* ISCR Case No. 01-12350 at 4 (App. Bd. Jul. 23, 2003). Even after taking into consideration the lesser amount of deference owed to credibility determinations based on a written, non-hearing record, the Board concludes that none of these infirmities exist in this case.<sup>5</sup>

In a related argument, Department Counsel asserts that Applicant's statements did not provide an adequate basis for the Judge's conclusion that the misconduct alleged in the SOR was mitigated. Department Counsel states that a favorable credibility determination cannot be made in the absence of the opportunity to examine the Applicant in person through cross-examination or in the absence of any corroborating evidence to support Applicant's assertions regarding his current state. To the extent that Department Counsel is arguing that an applicant's statement, standing alone, without benefit of cross-examination or corroborating evidence, is inherently unworthy of belief, entitled to no weight, and cannot provide the basis for mitigation as a matter of law, the Board rejects it. The efficacy of such a statement as a basis for mitigation will depend on numerous factors unique to the individual case. After a review of the evidence in this case, the Board concludes that, in this instance, the Judge's application of the identified mitigating conditions is adequately supported by the record.

Department Counsel questions Applicant's sincerity and asserts that the Judge overstates the record evidence regarding Applicant's expressions of remorse. Those assertions do not establish error on the part of the Judge. This portion of Department Counsel's brief essentially argues for an alternative view of the record evidence. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary,

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<sup>4</sup>For a clear example of a Judge's substitution of a credibility determination for record evidence, see ISCR Case No. 02-12789 (May 13, 2005).

<sup>5</sup>ISCR Case No. 01-12350 provides another example of an improper substitution of a credibility determination for record evidence. That case is a FORM case. In that case, the Judge made a favorable credibility determination to resolve issues regarding an applicant's disclosure of marijuana use on a security form and a stated intent to not use illegal drugs in the future. ISCR Case No. 01-12350 is easily distinguishable from the case before the Board currently because the credibility determination in that case was flatly contradicted by record evidence and some of the Judge's own findings.

capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Department Counsel also contends that the Judge's discussion of the whole-person factors required a separate, articulated analysis, and that the Judge's consideration of the whole-person factors was cursory and conclusory. Judge's decisions are not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 01-01642 at 4 (App. Bd. Jun. 14, 2002). While an expanded discussion of the whole-person factors may have been helpful in this case, after a review of the record and the Judge's decision, the Board is not convinced that the available evidence required the Judge to engage in a whole-person analysis that was materially different from her analysis of the case under Guidelines M and E. Department Counsel has not demonstrated harmful error on this point.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 ultimate favorable security clearance decision is sustainable.

### **Order**

The decision of the Judge granting Applicant a security clearance 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: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board