

KEYWORD: Guideline K

DIGEST: The Judge’s analysis does not adequately explain why Applicant’s security violations do not cast lingering doubt on her judgment and reliability. The Judge’s mitigation and whole-person analysis fail to consider important aspects of the case. The best resolution of this appeal is to remand the case to the Judge for a new decision that corrects these errors. Affirmative decision remanded,

CASENO: 11-09219.a1

DATE: 03/31/2014

DATE: March 31, 2014

In Re:)	
)	
-----)	ISCR Case No. 11-09219
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jeffrey Nagel, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 7, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant

requested a hearing. On December 23, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The Judge's Findings of Fact

Applicant served in the U.S. military from 1984 until 1987. She held a security clearance while on active duty. In 2001, she began working for an employer in a job requiring a clearance. She had no security violations during this period of employment.

In 2004, she began working for another employer, again in a position requiring a clearance. From April 2008 until July 2010, Applicant had five security violations. The first two, both in 2008, involved her failure properly to secure her workplace upon leaving. The earlier of these two offenses resulted in a verbal warning, the later in a verbal and a written warning.

The third incident occurred in 2009. Applicant put a file on a CD and inserted the CD into an unclassified network. She discovered that the file was classified, so she disconnected the network, shut down the computer, and notified the appropriate security authorities. She received a written memorandum of concern as a result of this infraction.

In March 2010, Applicant failed to secure a classified tape, though it was eventually found. As a result of this incident, Applicant received security training.

Finally, in July 2010, Applicant uploaded classified data into an unclassified network. She stated at the hearing that she and another person put a document on the network and later others discovered that the document should have been classified. She said, "[J]ust because you don't know doesn't mean its okay." Decision at 3.

Since beginning work for her current employer in 2010, Applicant has had no further security incidents. Her supervisor finds her to be trustworthy.

The Judge's Analysis

The Judge found that Applicant's circumstances raised three Guideline K disqualifying conditions: 34(c),¹ 34(g),² and 34(h).³ Explaining his conclusion that Applicant had mitigated the concerns arising from her security incidents, the Judge applied Guideline K mitigating condition (MC) 35(a).⁴ His pertinent analysis consisted of the following:

Applicant's actions were, for the most part, due to negligence, and they occurred more than three years ago. She has now been a most reliable and trustworthy employee for her current employer, as attested by her supervisor. Decision at 5.

In the whole-person analysis, the Judge listed the factors set forth in Directive, Enclosure 2 ¶ 2(a). He then stated that, having considered all of the evidence, he was left without questions or doubts as to Applicant's worthiness for a clearance.

Discussion

The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether, *inter alia*, it does not consider relevant factors or it fails to consider an important aspect of the case. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's analysis is "sparse" and "fails to consider the cumulative significance of the record evidence of Applicant's pattern of security violations." Appeal Brief at 9. He contends that the weight of the record evidence does not support a favorable application of any of the mitigating conditions and that the Judge employed a "piecemeal" analysis.

We find portions of Department Counsel's argument to be persuasive. Once it is established that an applicant has committed security violations, he or she has a "very heavy burden" to surmount in mitigating the concerns arising therefrom, insofar as security violations "strike at the heart of the Industrial Security Program." ISCR Case No. 10-07070 at 8-9 (App. Bd. Apr. 19, 2012); *see also* ISCR Case No. 10-04911 at 5 (App. Bd. Dec. 19, 2011).

¹Directive, Enclosure 2 ¶ 34(c): "loading . . . storing, transmitting, or otherwise handling classified . . . information on any unapproved equipment . . ."

²Directive, Enclosure 2 ¶ 34(g): "any failure to comply with rules for the protection of classified or other sensitive information[.]"

³Directive, Enclosure 2 ¶ 34(h): "negligence or lax security habits that persist despite counseling by management[.]"

⁴Directive, Enclosure 2 ¶ 35(a): "so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]"

In this case, the Judge’s analysis failed to address significant record evidence, such as the number of infractions committed by Applicant and that these infractions occurred despite prior training. For example, the incident report for the first offense outlines company policies regarding the protection of classified information. This report contains a signed statement by Applicant acknowledging this policy and her responsibilities to uphold them. Final Report of Investigation, dated April 23, 2008, included in Government Exhibit (GE) 4. A later Report of Investigation contains a recitation of Applicant’s security training, demonstrating that it was ongoing and of a nature to have placed her on notice of the need for vigilance in protecting classified information.⁵ Moreover, the record demonstrates that Applicant’s subsequent offenses occurred against a background of repeated verbal and written corrective action. The extent to which Applicant had been placed on notice of the security requirements of her job, and to which she received adverse action regarding her infractions, are relevant in evaluating the seriousness of her conduct. This evidence is crucial to an adequate mitigation analysis, bearing as it does on the foreseeability of future misconduct that strikes at the heart of the security clearance process.⁶ The Judge’s analysis makes no reference to this evidence, nor does it examine the evidence as a whole in light of Applicant’s “heavy burden” of persuasion.

In other cases decided under the Directive, applicants were denied a clearance based on conduct that presents a likelihood that they may fail to protect classified information in the future. In the case before us, however, Applicant has actually failed to protect classified information multiple times, on one occasion leaving a room unsecured from 1:43 pm to 7:40 am the following day. GE 4. The Judge’s analysis does not adequately explain why these violations do not cast lingering doubt on her judgment and reliability. Moreover, the Judge does not explain in what sense Applicant’s negligence is mitigating, in light of his application of disqualifying condition 34(h). The Judge’s mitigation and whole-person analyses fail to articulate a satisfactory explanation for his ultimate conclusion and fail to consider important aspects of the case. Given the totality of the record evidence, the decision as it stands is not sustainable.

We conclude that the best resolution of this appeal is to remand the case to the Judge for a new decision that corrects the errors raised above.

⁵GE 7, Report of Investigation, dated April 19, 2010: “[Applicant] was initially granted access to classified materials as [an employee] in 2004, following that initial indoctrination briefing [Applicant] has completed annual security clearance refresher training. In addition to the standard security clearance briefing [Applicant] has also complete[d] security briefings for access to classified safes/container, closed areas, and classified information systems.”

⁶Applicant’s explanations for her conduct—dropping her phone, forgetting her keys, failing to double check her work—describe characteristics that appear to be habitual in nature rather than the products of stresses or circumstances that were short-lived and/or demonstrably consigned to the past. GE 4 at 4; GE 5 at 8; GE 6 at 6.

Order

The Decision is **REMANDED**.

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

Dissenting Opinion of Administrative Judge James E. Moody

I agree with my colleague's discussion of the errors contained in the Judge's decision. However, I conclude that the record will not support a favorable result, in light of the heightened scrutiny appropriate to security violation cases. I would reverse the Judge's decision.

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board