

KEYWORD: Guideline K; Guideline M; Guideline E

DIGEST: We conclude that the Judge would have denied Applicant a clearance even if he had not made the factual error, thus the error is harmless. Adverse decision affirmed.

CASENO: 12-03402.a1

DATE: 05/04/2016

DATE: May 4, 2016

In Re:)	
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Applicant for Security Clearance)	
)	
)	
)	
)	ISCR Case No. 12-03402

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 3, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information), 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 decision on the written record. On February 26, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola 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’s findings of fact contained errors and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant admitted that, in 2007, he knowingly and improperly transmitted classified information via email on an unclassified computer. He did not report this until mid-January 2011, three days before a polygraph examination. In addition, some time prior to his January 2011 polygraph, Applicant accessed and viewed pornographic material on a work computer. He received a written reprimand for this infraction.

The Judge’s Analysis

The Judge concluded that Applicant had not mitigated the concerns arising from his misconduct. He noted that the email transmission occurred in 2007. However, the Judge stated that Applicant waited over three years to report it, although he had many opportunities to do so. He also concluded that the misuse of Applicant’s work computer was not mitigated. “[W]hen coupled with his mishandling of protected information . . . it is too soon to say that it does not cast doubt” upon Applicant’s reliability, trustworthiness, and good judgment. Decision at 4.

Discussion

Applicant challenges the finding that he had admitted to having knowingly transmitted classified information over an unclassified computer. We examine a Judge’s findings to see if they 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.” Directive ¶ E3.1.32.1. Applicant’s argument has merit. In his SOR response he admitted that he improperly emailed a classified document, but neither the allegation itself nor the admission state that this was a knowing act. Item 7, a JPAS entry, states that Applicant found out about the classified nature of the email only after he had transmitted it. Therefore, the Judge’s finding that Applicant acted with knowledge is not sustainable. However, the Judge’s analysis did not cite to Applicant’s purported knowledge but, rather, to the length of time that Applicant waited before reporting the violation. Furthermore, the totality of the Judge’s analysis put as much or more emphasis on Applicant’s access of pornography. We conclude that the Judge would have denied Applicant a clearance even if he had

not made the factual error in question. Therefore, we conclude that the error is harmless. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015).

Applicant challenges the Judge’s mitigation analysis. Among other things, he cites to the length of time that has elapsed since his security-significant conduct. He argues that this lapse of time without a subsequent offense demonstrates rehabilitation. Questions surrounding the recency of security-significant conduct must be evaluated in light of the evidence as a whole. *See, e.g.*, ISCR Case No. 05-00448 at 3 (App. Bd. Oct. 1, 2007). In this case, the very nature of a Guideline K infraction is a matter entitled to considerable weight. As we have noted before, once it is established that an applicant has committed a security violation, he or she has a “very heavy burden” of persuasion as to mitigation. Such violations “strike at the heart of the industrial security program.” Accordingly, a Judge must give any claims of reform or rehabilitation “strict scrutiny.” ISCR Case No. 11-09219 at 3 (App. Bd. Mar. 31, 2014). In this case, the Judge’s finding that Applicant failed to disclose a security breach for several years, coupled with other findings regarding Applicant’s use of a work computer to access pornography, support his conclusion that Applicant’s conduct continues to cast doubt upon his fitness for a clearance. We conclude that the Judge’s mitigation analysis, viewed as a totality, is sustainable. Applicant has cited to a Hearing Office case that he believes supports his effort to obtain a favorable decision. We give this case due consideration as persuasive authority. However, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

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

Signed: James E. Moody
James E. Moody
Administrative Judge

Member, Appeal Board

Signed: James F. Duffy _____

James F. Duffy
Administrative Judge
Member, Appeal Board