

KEYWORD: Guideline K; Guideline B; Guideline D

DIGEST: The Directive presumes there is a nexus between proven circumstances under any Guideline and an applicant’s security eligibility. The disqualifying conditions listed under each Guideline are illustrative only, not exhaustive and exclusive. In analyzing cases, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with national security. A duty to report ongoing contact with a foreign national bears a rational relation to the protection of classified information within the meaning of Guideline K. The Directive provides that “any failure to comply with rules for the protection of classified information” could raise a concern about an applicant’s clearance eligibility. Adverse decision affirmed

CASENO: 14-0441.a1

DATE: 04/08/2016

DATE: April 8, 2016

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

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**  
Claire Shapiro, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 15, 2015, 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 B (Foreign Influence), Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 14, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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; whether Applicant’s conduct raised security concerns; 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 has worked for a Defense contractor since 1996 and has held a clearance since early 1998. Applicant’s SOR alleges several infractions, many of which were cross-alleged under the four Guidelines at issue. The Judge found that Applicant had signed a log sheet certifying that the front door to the workplace was secure when, in fact, he had not checked the door. The door was later found not to have been properly secured. Applicant sent a classified email that was not encrypted. Applicant received a written warning for this inadvertent violation. In 2014, he was reprimanded for failing to complete checkout procedures for securing access to a classified storage room.

During 2012, Applicant engaged in an affair with a married woman from Japan. They had sexual relations about six times during the course of the affair. He made attempts to contact her by means of his work email account. The emails were discovered during an investigation of an unrelated problem. Applicant also had sexual contact with three other women, two from Japan and another from the Philippines. He maintained email contact with them on a quarterly basis, although he stated that the messages were of a general nature, such as holiday greetings, etc. Applicant’s employer required that continuing contacts with non-U.S. citizens be reported to the facility security officer (FSO). Applicant was made aware of this requirement but did not inform his FSO of his relations with the woman with whom he had the affair. Neither did he inform his wife about this relationship.

Applicant has received pay raises and bonuses for the high quality of his work. He also received an award for having developed a means for discovering “a spill of classified information.”  
Decision at 5.

Japan is a major U.S. ally who cooperates with the U.S. on a broad range of issues. It has a good human rights record. The Philippines is a top trading partner with the U.S. The country has certain human rights problems, however, such as warrantless arrests, torture and abuse by security forces, violence against women, etc. Terrorist organizations are active in the Philippines, and U.S. citizens are advised to use caution when traveling to certain parts of the country.

### **The Judge's Analysis**

The Judge resolved each of the Guidelines against Applicant. He concluded that Applicant's conduct, viewed as a whole, was recent. He noted that Applicant began to comply with a duty to submit written reports of foreign travel as soon as he became aware of the obligation and that he disclosed his affair with the Japanese woman when he completed his SCA. However, the Judge concluded that Applicant's having sent a classified email unencrypted was not due to inadequate training. He noted that Applicant's contact with the Japanese woman was neither casual nor sufficiently infrequent to mitigate concerns arising from it. He found that this affair was not minor and that Applicant had not terminated it himself. He stated that Applicant had provided no evidence of counseling or other remedial measures, nor had he disclosed this misconduct to his wife.

### **Discussion**

Applicant has challenged the Judge's conclusion that his failure to report the affair raised concerns under Guideline K, in that it did directly involve the handling of protected information. He also challenged the Judge's conclusion that his conduct raised Guideline E concerns. Among other things, he argues that his conduct does not constitute a pattern of rule violations such as would implicate Directive, Enclosure 2 ¶ 16(d)(3).<sup>1</sup>

The Directive presumes there is a nexus between proven circumstances under any of its Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). The disqualifying conditions listed under each Guideline are illustrative only, not exhaustive and exclusive. In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. *See, e.g.*, ISCR Case No. 12-01698 at 4 (App. Bd. Jun. 13, 2014).

A duty to report ongoing contact with a foreign national bears a rational relation to the protection of classified information within the meaning of Guideline K.<sup>2</sup> Indeed, the Directive provides that "*any failure* to comply with rules for the protection of classified information" could raise a concern about an applicant's clearance eligibility. Enclosure 2 ¶ 34(g). (emphasis added)

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<sup>1</sup>This provision addresses information that "supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations . . . this includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations[.]"

<sup>2</sup>Directive, Enclosure 2 ¶ 33: "Deliberate or negligent failure to comply with rules and regulations for protecting classified or either sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, *and is a serious security concern.*" (emphasis added)

Therefore, Applicant's argument that the infraction bore only an indirect relation to national security, even if true, is not enough to rebut the presumption of nexus.

Moreover, Applicant's various infractions are sufficient to impugn his judgment and willingness to comply with rules and regulations, thereby raising a concern under Guideline E about his ability to protect classified information. *See* Directive, Enclosure 2 ¶ 15.<sup>3</sup> Applicant's failures to comply with various security and reporting requirements possess a common feature, a laxity in following procedures designed to protect classified information. Accordingly, they can reasonably be understood as a pattern of rule violations rather than a series of isolated acts, as Applicant argues. Under the facts of this case, the Judge's application of Directive, Enclosure 2 ¶ 16(d)(3) is supportable. Moreover, Applicant's failure to report his affair with a married woman from a foreign country could create a vulnerability to exploitation, duress, etc. within the meaning of Directive, Enclosure 2 ¶ 16(e).<sup>4</sup> In any event, even if Applicant's conduct did not satisfy the explicit criteria of Guideline K or E disqualifying conditions, the Judge could still have concluded that it raised security concerns. *See* ISCR Case No. 12-01698, *supra*. We find no reason to disturb the Judge's treatment of the mitigating conditions.

Applicant challenges the Judge's finding that he had failed to ensure that both doors of his employer's facility were secure. He argues that persons in the building after Applicant left could have been responsible. The Judge's finding on this matter, however, is supported by Applicant's answers during his clearance interview (Summary, Interview Conducted on January 8, 2014, at p. 3, included in Government Exhibit 3, Answers to Interrogatories) and by his testimony beginning at p. 36 of the Transcript. We conclude that the Judge's material findings are based upon "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 cites to various pieces of evidence that he contends are sufficiently mitigating as to warrant a favorable clearance decision. Among other things, he notes his many years of holding a clearance without incident or concern. Regarding his security record, even those with good prior records can encounter circumstances in which their judgment and reliability might be called into question. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015); *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied* 397 U.S. 1039 (1970). Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant's argument consists in large measure of an alternative interpretation of the record, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

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<sup>3</sup>"Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

<sup>4</sup>"[P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress[.]"

In summary, the record contains substantial evidence that Applicant made a false certification regarding the locking of a secure facility; sent a classified email unencrypted; failed to complete checkout procedures for a classified storage area; conducted extramarital affairs with four foreign women; and failed to report his security significant conduct as he knew that he had an obligation to do. These infractions, viewed cumulatively, support the Judge's conclusions under each of the Guidelines covered by the SOR. After evaluating the record evidence as a whole, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. In particular, security violations "strike at the heart of the industrial security program." Once it is established that an applicant has committed security violations, the applicant has "a very heavy burden" in mitigation. 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). "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 Ra'anan

Michael 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