KEYWORD: Guideline K

DIGEST: Given the record that was before him the Judge articulated a rational explanation for his favorable decision. Favorable decision affirmed.

CASENO: 04-05802.a1

DATE: 06/13/2007

DATE: June 13, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 04-05802
SSN: ------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 13, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision–security concerns raised under Guideline K (Security Violations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 22, 2006, after the hearing, Administrative Judge Philip S. Howe granted Applicant's

request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge's conclusion that Applicant had mitigated the Guideline K security concerns was based upon a piecemeal analysis and was arbitrary, capricious, and contrary to law. We affirm the decision of the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant is a computer technician for a defense contractor and has held a security clearance since 1990. His duties include "being custodian of the computer resource lab closed area (CRL), information security officer (ISSO) of a classified computer network in the CRL, and a backup systems administrator for various computer systems his employer owned and operated. He acquired these duties over time as other personnel departed the company and replacements were not hired. Applicant worked in the CRL four to eight hours daily, often up to 10 hours daily when the workload was heavy. He would enter and exist this secured area several times daily in the course of his duties."

"Applicant committed seven security violations between 1997 and 2005 during the course of his official duties for his employer. Each violation was investigated by his employer. Applicant was retrained on security protocols after each violation. Applicant also made procedural changes in his routine to prevent repeats of the individual violation types after each incident. No compromise of classified material occurred as a result of any of Applicant's actions because the violations occurred in a secured and limited access area within the employer's facility, and the facility has 'security in depth' procedures. As of February 2006 his company has reduced his workload by removing and reassigning Applicant's former additional duties as main custodian for the CRL and ISSO. The company's chief security officer is confident that with these changes the possibility of future security violations are substantially eliminated." (Citations omitted)

Applicant's security violations included four incidents of failing to log off a classified computer system; a failure to engage the combination lock on the CRL door and to sign the log sheet upon departure; a failure properly to secure a computer disc classified at the secret level; and a failure to secure a secret tape in the CRL server room. His last incident consisted of a failure to log off the computer system. Applicant's employer placed a sign prominently within the CRL asking, "Did you log off?" Applicant has placed a chain across his cubicle entrance as a reminder, and he triple checks his computers. Furthermore, a guard is now called when the CRL is closed after the last person departs.

The Judge noted that Applicant's security officials "regard him as a conscientious employee who takes his security responsibilities seriously." In his Conclusions section, the Judge stated, "Applicant is a very credible and honest witness whose explanations of the various situations were direct and persuasive."

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not challenged the Judge's findings. Therefore, they are not at issue in this case.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices 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 general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Because the Department Counsel did not challenge the Judge's factual findings, they are binding upon the Board in our analysis of the issue on appeal. *See* ISCR Case No. 04-11369 at 2 (App. Bd. Mar. 16, 2007) ("The Board may consider whether a Judge's factual findings are based upon substantial evidence, presuming that issue is raised. Failing that, we rely on the findings as set forth in the decision"). *See also* ISCR Case No. 03-11765 at 3 (App. Bd. Apr. 11, 2005). The issue before us is not whether we ourselves would have granted Applicant a clearance, since we do not review cases *de novo*. Rather, it is whether, in light of the Judge's unchallenged findings, his decision is sustainable.

We acknowledge that there is much in the Judge's findings that would have supported the opposite decision, primarily the fact that Applicant committed seven security violations, not an inconsiderable number. However, we also take note of the Judge's findings concerning the impact that Applicant's workload had upon his mistakes; the inadvertent nature of the violations; the employer's decision to assign some of Applicant's responsibilities to others; the employer's belief

that these changes will eliminate the possibility of future violations; and steps Applicant has taken to ensure his compliance with security procedures. We also note the Judge's evaluation of Applicant as a believable and honest witness in his own behalf. *See* Directive ¶ E3.1.32.1 ("[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge."); *see also* ISCR Case No. 01-14740 at 9 (App. Bd. Jan. 15, 2003). In light of this, we conclude that, given the record before him, the Judge has articulated a rational explanation for his favorable decision. An appealing party's disagreement with a Judge's decision is not a sufficient basis to establish that he erred. *See, e. g.*, ISCR Case No. 01-05912 (App. Bd. Aug. 29, 2001).[1] The Board concludes that the Judge's favorable security clearance decision is not arbitrary, capricious, or contrary to law, given the totality of facts and circumstances in this case. *See* Directive ¶ E3.1.32.3.

Order

The Judge's decision granting Applicant a clearance is AFFIRMED.

See Dissenting Opinion
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E Moody
Administrative Judge
Member, Appeal Board

DISSENTING OPINION OF JUDGE JEFFREY D. BILLETT

The Administrative Judge's favorable security decision should be reversed. While I do not subscribe to Department Counsel's theory that the Judge engaged in a piecemeal analysis of the case, I do think that the Judge erred when he analyzed the evidence in mitigation outside the context of the considerable amount of evidence that forms the basis for the government's security concerns.

[1]Regarding Department Counsel's argument that the Judge addressed the case in a piecemeal fashion, we conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006).

I agree fully with Department Counsel's larger point that the Judge's conclusion that Applicant's security violations have been mitigated cannot be sustained.

Applicant committed seven security violations at his workplace over an eight year period between 1997 and 2005. Additionally, in 2005 Applicant was responsible for a breach of physical security involving alarms at his workplace that was later determined not to be a security violation under the terms of the NISPOM. After each security violation, Applicant was "re-briefed" and steps were taken to ensure he understood his security responsibilities. However, repeated remedial actions did not prevent the commission of multiple additional violations. During the period that the violations took place, Applicant was the Information Systems Security Officer and the Custodian of the Computer Resource Lab, positions that required him to spend considerable time maintaining security. In February 2006, the same month as the hearing in this case, Applicant was relieved of his duties as the Information Systems Security Officer and Custodian of the Computer Resource Lab.

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. ISCR Case No. 97-0435 at 3-4 (App. Bd. July 14, 1998). Once it is established that Applicant has committed a security violation, he has "a very heavy burden of demonstrating that [he] should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an Administrative Judge must give any claims of reform and rehabilitation strict scrutiny." ISCR Case No. 00-0030 at 7 (App. Bd. Sept. 20, 2001). In many security clearance cases, applicants are denied a clearance for having an indicator of risk that they might commit a security violation in the future (e.g., alcohol abuse, drug use, or delinquent debts). In this case, there is more than the presence of an indicator. The Judge found Applicant repeatedly disregarded in-place security procedures in violation of the NISPOM. The frequency and duration of Applicant's security violations are aggravating factors. ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998.)

Given these standards and the totality of the record evidence in the case, the matters in mitigation cited by the Judge are insufficient to sustain his overall favorable security clearance determination. The Judge makes much of the fact that Applicant's security violations were not deliberate but were due to oversight and were unintentional. However, the Board has held that security violations are a serious matter, whether they are the result of deliberate or negligent conduct. The United States has a compelling interest in protecting classified information from disclosure to unauthorized persons, regardless of whether such disclosure is the result of deliberate or negligent conduct. ISCR Case No. 00-0030 at 6 (App. Bd. Sept. 20, 2001). In a case like this one, where there are numerous violations, the fact the violations were inadvertent or the result of oversight is of limited value in mitigation.

In his "Conclusions" section when discussing matters in mitigation, the Judge also mentions that there was never a compromise of classified information and all of Applicant's violations occurred within a secure area. To consider the lack of compromise a matter in mitigation was clear error. The negative security implications of Applicant's history of security violations are not reduced or diminished by the fact that no compromise of classified information occurred. *See*, *e.g.*, DISCR Case No. 89-1397 at 7 (App. Bd. Sept. 25, 1997)("The absence of any compromise of classified information may be a fortunate circumstance, but it does not diminish the seriousness of Applicant's multiple security violations over a period of years."); DISCR Case No. 88-2773 at 7 (App. Bd. Jan.

30, 1990)("Applicant's pattern of negligent or careless security violations is not rendered any less serious or problematic by the purely fortuitous circumstance that none of them resulted in a compromise of national security").

The Judge found that in February 2006 Applicant's company reduced his workload by removing his previous responsibilities for maintaining security in the hopes of substantially eliminating the possibility of future security violations. The Judge cited this change as a matter in mitigation. However, the change occurred, at most, two or three weeks prior to the hearing in the case. The lack of ability to evaluate whether the change has had the salutary results Applicant's superiors were hoping for significantly undercuts the mitigating effect of this evidence.

The Judge cited as another factor in mitigation the fact that Applicant displays a positive attitude toward his security responsibilities by various remedial actions he instituted himself to prevent security violations, including his "rebriefs" on security. However, as pointed out by Department Counsel, on at least one occasion a remedial measure instituted and undertaken by Applicant failed to prevent a subsequent security violation. Numerous "rebriefs" undergone by Applicant also failed to forestall subsequent violations. Omitting these facts in an analysis of Applicant's display of a positive security attitude reduces the analysis to an assessment of mere good intentions. By ignoring Applicant's unsuccessful attempts at reform and rehabilitation, the Judge has not employed the strict scrutiny required when evaluating claims of reform and rehabilitation in security violation cases. Moreover, by not reviewing evidence of reform and rehabilitation in light of Applicant's subsequent violations after reforms and rehabilitation were instituted, the Judge erred by not considering an important aspect of the case.

The Judge gave considerable weight to the assessment of Applicant's superiors and his security managers regarding Applicant's conscientiousness and high integrity. The Judge also gave weight to the fact that Applicant was a very credible and honest witness "whose explanations of the various situations were direct and persuasive." The willingness of Applicant's superiors to vouch for his trustworthiness and integrity must be considered in light of Applicant's long history of security violations. *See*, *e.g.*, ISCR Case No. 99-0109 at 5 (App. Bd. Mar. 1, 2000). Applicant's personal trustworthiness and credibility has not prevented him from committing many security violations over a period of years. The Judge's failure to address this issue and his failure to evaluate this evidence in the context of the totality of the record evidence is error.

Given the totality of the record evidence, and given the high mitigation burden necessary to overcome seven prior security violations, the Administrative Judge's findings of mitigation and reform and rehabilitation sufficient to overcome the negative implications of Applicant's long history of security violations are not sustainable. Directive, Additional Procedural Guidance, Item 32.a. *See Lauvik v. INS*, 910 F.2d 658, 660 (9th Cir. 1990)("there is some point at which the evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it.")(*cited* in DISCR Case No. 92-0404 at 3 (App. Bd. May 25, 1993)). I would reverse the Judge's favorable security clearance decision.

Signed: Jeffrey D. Billett
Jeffrey D. Billett

Administrative Judge
Member, Appeal Board