

KEYWORD: Guideline K; Guideline M; Guideline E

DIGEST: The Judge’s material findings are supported by substantial evidence. We give deference to a Judge’s credibility determinations. Security violations strike at the heart of the industrial security program. Applicant’s denial of wrongdoing undercut his efforts to show rehabilitation.

CASE NO: 14-05396.a1

DATE: 01/10/2017

DATE: January 10, 2017

In Re:)	
)	
-----)	ISCR Case No. 14-05396
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Arran S. Treadway, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 6, 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 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 hearing. On August 31, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross 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 holds bachelor's and master's degrees and works for a Defense contractor. He is seeking to retain a security clearance that he holds in connection with his employment.

The Judge made extensive findings about Applicant's security-significant conduct, which was alleged under each of the three guidelines cited in the SOR. In essence, Applicant committed three security violations. In 2012, he knowingly attempted to introduce computer discs containing classified information onto a hard drive that was not accredited for that material. In January 2013, Applicant possessed classified information without authorization and without signing appropriate receipts. The information in question pertained to a contract that had ended, and use of documents associated with that contract was limited. Finally, in April 2013, Applicant put a CD pertaining to this contract into an unapproved classified information system and printed classified information without authorization.

Applicant did not agree that he had violated any security protocols, claiming that his use of the classified information in question was with appropriate authorization. However, Applicant's employer gave him a letter of reprimand (LOR) for "clear violation of the company's Corporate Security Standard Practice and Procedures." Decision at 6. The LOR stated, in pertinent part:

The aggressive and persistent nature of your actions in your attempts to gain possession of classified materials in which you were told by corporate security that you could not possess on more than one occasion raises suspicion about your intent in regard to proper handling of classified materials. *Id.*

The LOR offered Applicant the choice of accepting one day of leave without pay as an alternative to being fired. Applicant accepted this offer. Applicant signed an acknowledgment that he had received the LOR and was provided with an opportunity to discuss it. Applicant contended that he signed the LOR through coercion. However, the Judge noted that Applicant's signature only meant that he had received a copy of the LOR and had an opportunity to discuss it.

Applicant is highly respected in his field of expertise. His character references stated that he is knowledgeable about security requirements and is able to follow rules and regulations. One person, who has worked with Applicant for over ten years, expressed "utmost confidence" that Applicant handles classified information in accordance with regulatory guidance. Applicant served as a reservist in the military, retiring in the grade of O-4. He received numerous awards and commendations during his military career.

The Judge's Analysis

The Judge acknowledged Applicant's professional competence and his contributions to the Defense industry. He noted Applicant's having held a clearance for many years and his understanding of security issues. He stated that Applicant had worked on the contract referenced above and "obviously felt a sense of ownership and entitlement about the material he had created over the years concerning this contract." *Id.* at 11. The Judge stated that Applicant felt that the security requirements placed upon him in reference to this contract were unnecessary, but that he knew, or should have known, what the requirements were.

The Judge concluded that Applicant violated security protocols and that he did so knowingly and with an intent to circumvent the strictures that his company placed on documents pertinent to the contract. Although recognizing that others might have borne some responsibility as well, he stated that it was Applicant's duty to follow security rules, regardless of the conduct of others.

The Judge stated that Applicant continues to deny having done anything wrong. However, there is no support for Applicant's claims that he had authorization for his use of the contract materials. The Judge observed that security rules are not voluntary. Given Applicant's refusal to acknowledge wrongdoing, none of the mitigating conditions are entitled to favorable application. In the whole-person analysis, the Judge concluded that there is insufficient evidence of rehabilitation or other behavioral changes. The Judge stated flatly that, based on the record that was before him, he could not conclude "that Applicant would be likely to properly obey security rules and regulations in the future if faced with the same or similar circumstances." *Id.* at 13. As a consequence, the Judge entered adverse findings under each of the guidelines.

Discussion

Applicant contends that the Judge's findings did not address significant evidence that was essential to a fair evaluation of his case. Among other things, he cites to his having held a clearance for many years without incident or concern, his educational attainments, and the passage of over three years since the last infraction. He also contends that the Judge erred by finding that he had violated security rules. 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. *See* ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

Concerning whether Applicant had committed security infractions, the record contains a copy of an incident report prepared by officials at Applicant's place of employment. Government Exhibit (GE) 4, Security Incidents Final Report, dated May 1, 2013. This report describes Applicant's conduct in detail and lists the names of persons interviewed, concluding that Applicant deliberately disregarded established security requirements. At the hearing, Applicant could not provide a reason for the persons cited in the report to have fabricated evidence against him. *See* Tr. at 64-66. The record also contains a copy of the LOR that the Judge described in his findings. GE 5, Memo, dated May 6, 2013. This document also describes Applicant's conduct, though not in so

great detail as GE 4. It characterized Applicant's infractions as "a clear violation" of the company's security practices and procedures. These two exhibits, when read in conjunction with the record evidence as a whole, constitute substantial evidence that Applicant performed acts that constituted deliberate violations of rules designed to protect classified information.

Applicant states that he acknowledged receipt of the LOR through duress. He describes GE 5 as a "coerced confession" and argues that it is of no evidentiary value. Appeal Brief at 8. However, GE 5 is not a confession but a disciplinary action. Applicant's signature did not certify that he agreed with the content of the LOR, only that he had received it and had been given an opportunity to discuss it, as the Judge found. Applicant's contention that he was pressured to sign this receipt acknowledgment, even if true, does not undermine the Judge's reliance upon GE 5 as a credible presentation of Applicant's conduct and of the intent that underlay it. We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. We find no reason to disturb the Judge's findings that Applicant's conduct violated security rules.

Concerning Applicant's other arguments, a Judge is not expected to make findings about every piece of evidence in the record, which would be a practical impossibility. *See, e.g.*, ISCR Case No. 14-05795 at 2 (App. Bd. Apr. 26, 2016). As stated above, he explicitly addressed Applicant's long experience in holding a security clearance, and he gave consideration to other favorable evidence, such as Applicant's educational and professional attainments, his good reputation, and his knowledge of security rules. The findings, viewed as a whole, captured facts sufficient to support a reasoned analysis of the concerns raised in the SOR. The Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

The balance of Applicant's brief constitutes a disagreement with the Judge's weighing of the evidence, 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. 14-06686 at 2 (App. Bd. Apr. 27, 2016). Security violations "strike at the heart of the industrial security program." 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, as the Judge noted, Applicant's presentation consisted in overwhelming measure of denials that he had done anything wrong. Given the substantial evidence to the contrary, however, the Judge did not err in concluding that Applicant had not met his burden of persuasion.

Applicant notes that his most recent infraction is over three years old. He argues that his conduct "cannot be repeated due to behavioral and environmental changes which preclude the conditions of 2012-2013 from being repeated." Appeal Brief at 2. However, Applicant's persistent denial of wrongdoing supports the Judge's conclusion that he has not demonstrated rehabilitation. *See, e.g.*, ISCR Case No. 08-03620 at 3-4 (App. Bd. May 6, 2009), a Guideline J case in which the applicant's denial of criminal intent undercut his effort to show rehabilitation.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. An applicant who deliberately engages in security violations demonstrates a disregard for, or indifference to, national security interests and undermines the integrity and effectiveness of the industrial security program. *See, e.g.*, ISCR Case No. 07-08119 at 3 (App. Bd. Jul. 8, 2010). 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