

KEYWORD: Guideline E; Guideline K; Guideline M

DIGEST: An applicant's security related conduct can be alleged under more than one guideline and, in an appropriate case, be given independent weight by an administrative judge under different guidelines. Adverse decision affirmed.

CASENO: 17-01870.a1

DATE: 10/02/2018

DATE: October 2, 2018

In Re:

Applicant for Security Clearance

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) ISCR Case No. 17-01870
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 21, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Use of Information Technology), Guideline K (Handling Protected Information), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 15, 2018, after the hearing, 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 issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant, who is 43 years old, has been working for his current employer since 2015 and has intermittently held a security clearance since about 2004. From about 2011 to 2014, he illegally downloaded songs and movies to his personal computer. He admits that conduct and describes it as “foolish.” Decision at 2. In 2008, he violated security guidelines by knowingly taking home classified documents. A year later, he admitted the improper handling of classified information when confronted with a polygraph examination.

Applicant’s illegal downloading of material occurred more than three years ago. His improper handling of classified information occurred over nine years ago. Due to the passage of time, the Guideline M and K allegations were found in favor of Applicant. Under Guideline E, however, his security violation coupled with the illegal downloading of material constitutes a pattern of dishonesty and rule violations that is not mitigated.

Discussion

In the SOR, the Guideline M and K allegations were cross-alleged as the sole Guideline E allegation. On appeal, Applicant contends that the Judge reached contradictory conclusions by finding for him on the Guideline M and K allegations and against him under Guideline E. This argument lacks merit. An applicant’s security related conduct can be alleged under more than one guideline and, in an appropriate case, be given independent weight by an administrative judge under different guidelines. *See, e.g.*, ISCR Case No. 04-09251 at 3 (App. Bd. Mar. 27, 2007). In this case, there was a rational basis for the Judge to conclude that the conduct alleged under Guidelines M and K, when viewed together, established a pattern of misconduct under Guideline E. We note Disqualifying Condition 16(c) encapsulates this concept by stating security concerns can arise when

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply

with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.¹

Applicant asserts that it is not effectively possible to rebut the presumption that a Judge considered all the evidence. He also insinuates that applicants cannot win before the Appeal Board. Recently, we issued several decisions where applicants have effectively rebutted the presumption and won either remands or reversals at the Board. *See, e.g.*, ISCR Case No. 15-06990 (App. Bd. Jan. 11, 2018); ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 12-10335 (App. Bd. Jul. 21, 2017); ISCR Case No. 15-07242 (App. Bd. Feb. 9, 2017); ISCR Case No. 14-06592 (App. Bd. Apr. 20, 2016); and ISCR Case No. 14-05150 (App. Bd. Apr. 20, 2016).

Applicant's remaining arguments amount to a disagreement with the Judge's weighing of the evidence. He argues, for example, that he regrets the alleged misconduct, has ceased engaging in that behavior, and more than three years have passed without recurrence. He also contends the alleged misconduct was unrelated, not sequenced, and does not constitute a pattern of rule violations. However, a party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

The Judge examined the relevant evidence 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."

¹ Directive, Encl. 2, App. A ¶ 16(c).

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael 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