KEYWORD: Guideline M; Guideline K; Guideline E

DIGEST: The Findings challenged by Applicant are either permissible characterizations or harmless error. There is a strong presumption against granting a clearance. Once the government presents evidence raising security concerns the applicant has the burden to establish mitigation. Adverse decision affirmed.

CASENO: 03-21688.a1

DATE: 07/02/2007

DATE: July 2, 2007

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Dennis J. Sysko, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 27, 2005, DOHA issued a statement of reasons advising Applicant of the

basis for that decision–security concerns raised under Guideline M (Misuse of Information Technology Systems), Guideline K (Security Violations), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2006, after the hearing, Administrative Judge Christopher Graham denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge erred by considering evidence not in the record; whether the Judge erred by misinterpreting and improperly and erroneously considering evidence in the record; whether the Judge erred by improperly excluding psychological testimony; whether the Judge's findings of fact were not supported by substantial evidence;[1] and whether the Judge's adverse clearance decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.[2]

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant joined the U.S. Air Force in 1978, taking early retirement in 1997. On three separate occasions, twice in the 1980s and once in 1990, Applicant copied software belonging to the U.S. Air Force or to civilian universities for use on his personal computer. He did so in connection with the discharge of his official duties. Additionally, in the mid 1990s, he used a government computer to browse the internet after working hours. This computer was not classified and was set aside especially for such personal use and members checking their home e-mail accounts, etc. In 1996, he scanned a photograph of himself onto this computer and forwarded it to his home. He then forwarded this picture to an internet agency specializing in assisting customers in meeting women from Eastern Bloc countries. Upon submitting his retirement application, Applicant used this government computer to seek post-military employment.

Applicant set up a private post office box in order to receive correspondence from the Eastern Bloc women he contacted through the internet service. He received letters from 10 women. The Judge found that Applicant never discussed classified information with them. In 1997, when his private post office box closed, letters were forwarded to his work address, where they were discovered by a secretary and presented to Applicant. Applicant claimed that someone must have been joking with him. He took the letters to the Air Force Office of Special Investigations (OSI) and filed a complaint. He subsequently made a second false report, presenting the OSI with a second set of letters. This was shortly before Applicant retired. Applicant did not tell his wife of his activities with the internet dating service until 2006.

In 2003, Applicant had two security violations while working for his civilian employer. He had submitted reports to customers using an unclassified e-mail system. The reports contained

[1]Applicant incorporated the first three assignments of error into his challenge to the Judge's findings.

[2]The Judge's favorable decisions under Guidelines M and K are not at issue on appeal.

"subtle violations" that were not caught by Applicant's employer or by the program manager. Applicant received a letter of reprimand and was given additional training as well as additional staff.

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.

The findings which Applicant challenges are either permissible characterizations by the Judge or harmless error, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Judge's material findings do not reflect a reasonable or plausible interpretation of the record evidence. We note Applicant's challenge to the Judge's handling of testimony by a psychologist concerning the results of testing performed on Applicant. The Judge had permitted the psychologist to testify over Department Counsel objection. In his decision, the Judge summarized this testimony: "[The psychologist stated that] Applicant's conduct [in filing the false complaints with the OSI] can be explained away because his ethnic background is such that the fear of embarrassment and humiliation are some of the worst things that can happen to Applicant." The Judge went on to state, "I reject the psychologist's testimony as irrelevant and pure speculation." Decision at 9. Applicant interprets this statement as meaning that the Judge extended the testimony no consideration at all. After reading the record, we conclude that the Judge did, in fact, consider the testimony but that he found it not to be persuasive. Considering the record as a whole, the Judge's challenged findings of security concern are sustainable.

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. 581, 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.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert den* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion

in light of the record evidence as a whole." *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

We have examined the Judge's findings in light of the record as a whole. We conclude that he articulated a rational connection between those findings and his ultimate decision. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). While the Judge focused most of his attention on Applicant's two false reports to the OSI and the fact that Applicant neglected for nine years to inform his wife of his activities with the internet dating service, the Judge's formal findings under Guideline E encompassed the whole of Applicant's conduct as reflected in his findings of fact.[3] Under the circumstances, we conclude that his adverse decision is neither arbitrary, capricious, nor contrary to law.

Order

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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

[3]Many of these same facts were also alleged under Guidelines M and K, which the Judge resolved favorably to Applicant. We find no inconsistency in the Judge having done so. While Applicant may have met his burden of persuasion as to alleged misuse of technology or to security violations, the Judge could still reasonably believe that the totality of Applicant's conduct reflected negatively upon his judgement and reliability. *See* Directive ¶ D2.A5.1.1.