KEYWORD: Guideline K; Guideline M; Guideline E

DIGEST: The challenged statements in the Judge's decision constitute harmless error. The Board has repeatedly declined to adopt a hard and fast definition of recency. Nor is the Board persuaded that Applicant's decision to give his son access to a government computer is mitigated because Applicant did not know what his son intended to do with that access. Adverse decision affirmed.

CASENO: 03-23829.a1

DATE: 04/27/2007

DATE: April 27, 2007

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT
Keith L. Baker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 2, 2005, DOHA issued a statement of reasons advising Applicant of the basis

for that decision–security concerns raised under Guideline K (Security Violations), Guideline M (Misuse 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 decision on the written record. On August 23, 2006, after the considering the record, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's statements that the Government had established its case as to all allegations in the SOR and that Applicant had a history of repeated security violations were based upon substantial record evidence; whether the Judge's analysis of the applicable mitigating conditions was arbitrary, capricious, and contrary to law; and whether the Judge's whole person analysis failed to consider relevant factors.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant received a Secret level security clearance in 1967, which was upgraded to Top Secret in 1985 and to SCI access in 1988. His clearances were suspended during a Naval Criminal Investigative Service (NCIS) investigation beginning in August 2002.

In 1986 or 1987, Applicant failed to follow proper security procedures when he allowed his secretary to hand-carry a classified NATO document to an adjacent building. The secretary was not cleared for NATO access. Applicant explained that he was not aware of the sensitivity of NATO access information. He has had no further incidents involving NATO materials.

Paragraph 1(b) of the SOR, alleged that Applicant knowingly transmitted classified e-mail from approximately April 2002 to approximately August 2002, instructing his team to sanitize the computer rather than notify the security officer of the breach. After considering the record, the Judge concluded that this allegation was not based upon substantial evidence and held in favor of Applicant.

Prior to 2002, Applicant purchased a laptop computer with government funds. Applicant permitted his son to use the computer, stating that he asked his son to set it up. Applicant made contradictory statements as to whether both he and his son used the computer or his son only.

On July 5, 2002, Applicant permitted his son to have unescorted access to a workspace. Although signed in at the gate as an "escort required" visitor, Applicant's son sat alone in an office adjacent to Applicant's. This was in disregard of company policies. Additionally, Applicant permitted his son to have unsupervised access to a government network. Although he stated that his son was to search for software to download onto the computer, the son hacked into the workplace server and downloaded pornography. Applicant claims that this material was "adult" pornography, although the Security Officer's Report (Exhibit 9) states that the NCIS investigation characterized it as child pornography. Applicant's dial-in account with the company has been deactivated and his key-card access limited to normal working hours. The son has been barred from the company site.

Applicant's supervisors and a government program manager attest to Applicant's good character, reliability, trustworthiness, competence, and dedication to national security.

B. Discussion

The Appeal Board's review of the Judge's findings of fact 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.

Although the challenged statements occur in the Conclusions section of the Judge's decision, we will treat them as findings of fact for purposes of this appeal. *See* ISCR Case No. 02-20110 at n.2 (App. Bd. June 3, 2004) ("The Board will treat a finding of fact [as such] regardless of where it appears in the Judge's decision").

The Guideline K security concerns contain two allegations, of which the Judge concluded that only one was supported by substantial evidence, the 1987 incident in which Applicant permitted his secretary to have unauthorized access to a NATO document. The Judge found in favor of Applicant on the other. Nevertheless, she stated in her Conclusions section that the Government had "established its case as to all allegations in the SOR. . ." Decision at 7. This clearly is an error. However, the Board does not read individual sentences in isolation. The Judge analyzed Applicant's case only in light of those matters which she found to have been supported by substantial evidence. There is no reason to believe that she based her decision to any extent on the 2002 security incident concerning which she ruled in Applicant's favor.

Regarding the second challenged statement, that Applicant has a "history of repeated security violations," it is true that, under Guideline K, the Judge found only one incident to have been established. Therefore, to the extent that the word "history" implies more than one event, it does not properly characterize the Judge's findings under that Guideline. However, given the fact that the challenged phrase occurs at the beginning of the Judge's Conclusions section, prior to her specific discussion of Guideline K, we conclude that she intended the phrase to refer to the totality of the security concerns which she found the Government to have established and which form the basis of her adverse clearance decision. We conclude, therefore, that even if these two challenged observations had not been included in the Judge's decision, it is not reasonably likely that the outcome of the case would be different. *See* ISCR Case No. 01-23362 at 2 (App. Bd. June 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 at 5 (App. Bd. Aug. 26, 2002). Accordingly, we conclude that these statements constitute harmless error.

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).

Applicant relies on other cases, both from the Hearing Office and the Appeal Board, to build a claim that his conduct was mitigated because it was not recent. That claim is not persuasive. The Board has repeatedly declined to adopt a hard and fast definition of recency. Neither do we find persuasive Applicant's claim that his son's conduct should be considered mitigated because Applicant did not know what his son intended to do when given access to a government computer system. Indeed, we have examined the Judge's treatment of the possible mitigating conditions in light of the record as a whole. The Judge's findings provide a rational basis for concluding that Applicant had not met his burden of persuasion as to the application of mitigating conditions. Furthermore, we conclude that her 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 her decision. *See* ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). In light of the foregoing, we conclude that the Judge's decision is neither arbitrary, capricious, nor contrary to law.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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