

KEYWORD: Guideline M; Guideline K; Guideline E

DIGEST: Although Department Counsel has established error in the Judge’s decision, the Judge’s decision is sustainable. The Board need not agree with the Judge’s to conclude that is rationally based on the Judge’s findings. Favorable decision affirmed.

CASENO: 04-08749.a1

DATE: 07/23/2007

DATE: July 23, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-08749
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 5, 2005, DOHA issued a statement of reasons (SOR) 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 December 11, 2006, after the hearing, Administrative Judge Carol G. Ricciardello granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant has worked for the same defense contractor for 30 years. While working in a space with classified computers, he misused company equipment on numerous occasions by making copies of music CDs and by viewing and editing personal photographs on a classified computer. The viewing and the editing of the personal photographs also constituted security violations under the National Industrial Security Program Operating Manual (NISPOM). Applicant's record is otherwise unblemished. After a period of suspension without pay, Applicant returned to his job and retained his security clearance.

Department Counsel raises the following issues on appeal: whether the Judge's overall analysis of the case is flawed because she failed to address or employ the "very heavy burden" standard when evaluating Applicant's evidence in mitigation; whether the Judge's application of Personal Conduct Mitigating Condition 5 was arbitrary, capricious and contrary to law; whether the Judge's application of Security Violations Mitigating Condition 4 was arbitrary, capricious and contrary to law; whether the Judge's application of Misuse of information Technology Systems Mitigating Condition 5 was arbitrary, capricious and contrary to law; and whether the Judge's whole-person analysis is sustainable. Department Counsel's arguments have mixed merit, but overall they fall short of establishing harmful error on the part of the Judge. Therefore, the Board affirms the Judge's decision.

Department Counsel asserts that whether evaluating security violations under Guideline K, Guideline E or Guideline M, or the whole person factors, the Judge was required to utilize a "very heavy burden" standard when evaluating Applicant's claims of reform and rehabilitation. The Board concludes Department Counsel's argument fails to establish error on the part of the Judge.

There is no presumption of error below. *See, e.g.*, ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001). In her decision, the Judge indicated that she considered the appropriate legal standards. Citing applicable Directive provisions, the Judge properly explained Applicant's burden with respect to extenuation and mitigation, as well as stating the clearly consistent with the national security standard as the basis for granting a security clearance. Decision at 5. While the Judge did not specifically mention the "very heavy burden" that Applicant has to demonstrate in terms of establishing extenuation or mitigation where security violations are involved,¹ there is no language in the decision to suggest that she employed a lesser standard. While a specific enunciation of a "very heavy burden" would have been appropriate, its omission does not constitute error. Decisions of DOHA administrative judges are not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996). Department Counsel's argument appears to be that because Applicant's security violations were multiple and deliberate, the fact that the Judge concluded that they were not ultimately security clearance disqualifying is proof that she did not employ the correct standard. In other words, Department Counsel appears to be arguing that, because the security violations are disqualifying as a matter of law, the Judge must have employed the wrong standard of review. This argument is not persuasive. The record evidence in this case

¹See, e.g., ISCR Case No. 04-04264 at 3-4 (App. Bd. Sept. 8, 2006).

included matters in extenuation and mitigation, and the Judge was not required as a matter of law to conclude the security violations were disqualifying on this record. The Judge's ultimate weighing of the record evidence, and her ultimate conclusions, standing alone, do not provide sufficient proof that the Judge employed the wrong legal standard. Absent more specific indicators in the Judge's decision that provide evidence of the Judge's use of an inappropriate standard, Department Counsel has not met its burden of establishing error.

The Judge applied Personal Conduct Mitigating Condition 5² to the case. As pointed out by Department Counsel, vulnerability to coercion or duress as a result of misuse of technology or security violations was not an issue raised by the government in the SOR. By its plain meaning, Personal Conduct Mitigating Condition 5 addresses the concerns covered by Personal Conduct Disqualifying Condition 4.³ *See, e.g.*, ADP Case No. 30-1130 at 5-6 (App. Bd. January 4, 2001). Personal Conduct Disqualifying Condition 4 was not discussed by or relied upon by the Judge and, given its absence, she did not articulate an adequate basis for the inclusion of Personal Conduct Mitigating Condition 5. In this instance, Department Counsel has met its burden of establishing error.

Department Counsel asserts that the Judge erred by applying Security Violations Mitigating Condition 3⁴ to the case. In support of this argument Department Counsel states that the Judge's conclusion that the "lax" security training by Applicant's employer was a matter in mitigation is unsupported by the record evidence. Department Counsel notes that, at the hearing, Applicant provided evidence that his employer had not strictly enforced the security procedures and NISPOM provisions he had violated for a number of years. Department Counsel goes on to state that the Judge erred by conflating the concept of relaxed enforcement of security rules with the concept of security training, and that relaxed enforcement does not rise to the level of mitigation. The Board does not agree. Even if the concept of lax enforcement of rules is not included within the purview of Security Violations Mitigating Condition 3, the Judge could still evaluate it as a matter in mitigation when doing a "whole person" analysis of the totality of the record evidence. Moreover, on this record, there is substantial record evidence of the fact that, prior to an investigation of Applicant and his subsequent disciplining, Applicant's employer's security training program was perfunctory at best. The evidence supports the Judge's conclusion that this resulted in a situation where, when coupled with lack of rule enforcement, Applicant and his fellow employees were largely unfamiliar with security rules that related to the specific practice of loading and editing personal photographs onto classified computers. Thus, the Judge's conclusion that the employer's inadequate training program was a contributing factor to the violations, and was therefore mitigating, is sustainable.

²"The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

³"Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure."

⁴"Violations were due to improper or inadequate training."

Department Counsel complains that the Judge inappropriately applied Security Violations Mitigating Condition 4.⁵ Department Counsel asserts that the Judge's application of the mitigating condition was based solely on her conclusion that there was no evidence that Applicant violated any of the provisions of the NISPOM and/or his employer's rules since his reinstatement in 2003. The Board concludes that Department Counsel is reading the Judge's decision too narrowly. In her decision, the Judge went beyond the basic finding that Applicant has committed no security violations since 2003 and also found that Applicant had demonstrated a renewed sense of commitment to security rules and regulations and has been diligent in ensuring that he abides by all the rules and procedures since 2003. A review of the record evidence convinces the Board that these findings of the Judge are sustainable. Department Counsel also argues that when applying Security Violations Mitigating Condition 4, the Judge did not take into consideration the frequency, seriousness and deliberateness of Applicant's security violations and Applicant's initial false and evasive responses to inquiries during a March 2003 investigation into possible compromises of classified information. There is a rebuttable presumption that an administrative judge has considered all the record evidence unless he or she states otherwise. Department Counsel does not overcome that presumption here. The record indicates that the Judge did consider the frequency and deliberateness of Applicant's actions and did not mitigate the government's concerns on those bases. The frequency and deliberateness of Applicant's security violations and his evasiveness during the initial phase of the investigation do not make the mitigating factor inapplicable as a matter of law. At most, they go to the weight that the Judge could reasonably assign to the mitigating factor. After reviewing the entire record, which includes substantial evidence of Applicant's improved attitude and conscientious security practices since his suspension, the Board is not persuaded that the Judge applied Security Violations Mitigating Condition 4 in a manner that is arbitrary, capricious or contrary to law.

Department Counsel next argues that the Judge erred by applying Misuse of Information Technology Mitigating Factor 5.⁶ Department Counsel's assertion is persuasive. While there is ample record evidence to support the Judge's conclusion that Applicant demonstrated a positive attitude toward security responsibilities after 2003, there is no record evidence to support a conclusion that Applicant took affirmative, noteworthy steps to correct the misuse of his company's computer equipment either before or immediately after his company found out about it. In this instance, the fact that Applicant engaged in the misuse of computers briefly after he learned that his employer was becoming concerned about it and the fact that Applicant was initially uncooperative during the company's investigation into the matter necessarily preclude the application of Misuse of Technology Mitigating Factor 5, which contemplates prompt, affirmative corrective measures undertaken in good faith.

Department Counsel asserts that the Judge's whole person analysis is unsustainable and undercuts an analysis of the Government's concerns under the specific Guidelines. The Board does not agree.

Department Counsel states that the Judge's whole person analysis consists of a short list of favorable facts which erroneously rely on the same unsupported conclusions that were inadequate

⁵ “[actions that] Demonstrate a positive attitude towards the discharge of security responsibilities.”

⁶ “The misuse was followed by a prompt, good-faith effort to correct the situation.”

under the specific mitigating conditions of Guidelines K, E, and M. Inasmuch as the Board has sustained several of the Judge's conclusions regarding the applicability of specific mitigating conditions, this argument is significantly undercut. Additionally, contrary to Department Counsel's argument that the Judge's whole person analysis consists only of collective consideration of the same individual components that relate to each mitigating condition, the Board concludes that the Judge's whole person analysis is appropriately broader than her analysis of the case under the individual disqualifying and mitigating conditions. The Judge's whole person considerations include: (a) Applicant's successful 30-year history with his employer; (b) the practice of copying CD music tapes (not involving classified systems) and loading personal photographs onto classified computer systems was widespread among members of Applicant's shop; (c) because of his unusual facility with computers, Applicant often copied for others at their request as well as himself; (d) Applicant's activities were conducted in the open during work hours with the full knowledge of the workforce; and (e) importantly, much of Applicant's activity was requested by his immediate supervisor, who gave him at least tacit and constructive approval of the activity, and even encouraged Applicant to do copying for him after it was apparent that the company was looking into the unauthorized practices.

In his reply brief, Applicant insists that the Judge's decision was rationally based on all the evidence presented. The Board need not agree with the Judge's ultimate disposition of the case to conclude that Applicant's assertion is correct. Notwithstanding the Judge's errors identified herein, remand would serve no useful purpose as the decision as a whole is sustainable.

Order

The decision of the Judge granting Applicant a security clearance is **AFFIRMED**.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

This case is disturbing. There is ample record evidence that Applicant was dishonest and deceptive immediately after he was caught. There is one piece of evidence that reports that Applicant remained so for at least *two months* after he was caught. A May 26, 2003 Security Violation —Report of Findings says Applicant "has been uncooperative and deceptive regarding

what equipment and processes he used to copy his personal items.” The same report found that the risk of compromise to classified information from Applicant’s was “HIGH.”

Applicant’s dishonesty and failure to cooperate were not alleged in the SOR. Neither the Administrative Judge nor the Department Counsel moved to amend the SOR to conform with the evidence, although either one could have done so (Directive, ¶E3.1.17). The failure to amend the SOR has produced an anomaly where Applicant is eligible for a favorable decision in light of what was alleged but would have been ineligible if all the pertinent record evidence of his conduct were properly at issue. Such an outcome does not make sense in light of the “clearly consistent with the national interest” standard.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board