

KEYWORD: Guideline M; Guideline E

DIGEST: An Applicant's admission to an SOR allegation is a legally sufficient basis to find that that applicant engaged in the conduct covered by the admission. Failure to provide relevant and material information to the government provides a rational basis for an unfavorable security decision. An applicant's security related conduct can alleged under more than one guideline and can be given independent weight under more than one guideline. Adverse decision affirmed.

CASENO: 04-09251.a1

DATE: 03/27/2007

DATE: March 27, 2007

In Re:	)	
	)	
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SSN: -----	)	ISCR Case No. 04-09251
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

Jerry R. Goldstein, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 27, 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) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On July 17, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge’s conclusion that Applicant failed to disclose information to a security clearance investigation interviewer that he was required to disclose is supported by the record evidence; whether the Judge’s conclusion under Guideline E that Applicant was required to disclose the fact that he was under investigation at his workplace for misuse of a computer network was inconsistent with the Judge’s conclusion under Guideline M that the workplace violation was unintentional and insignificant; whether the Judge’s finding against Applicant on an allegation under Guideline E that Applicant had misused a workplace computer network was inconsistent with her earlier favorable finding regarding the same facts as alleged under Guideline M; and whether the Judge’s overall security clearance decision was arbitrary and capricious under the “whole person” concept. The Board affirms the Judge’s decision.

Applicant argues on appeal that there is insufficient evidence to support the Judge’s conclusion that, during an initial interview with a DoD investigator on April 17, 2002, Applicant was required to disclose the fact that he had been under investigation from November 2001 to February 2002 for misuse of his workplace computer network and failed to do so. The Board does not agree. Subparagraph 2.b. of the SOR alleged: “During your initial security interview with an authorized investigator of the Department of Defense, you deliberately failed to disclose the . . . investigation concerning the conduct set forth in paragraph 1., above, due to your fear that this incident would negatively impact your security clearance.” Paragraph 1 of the SOR referenced Applicant’s alleged misuse of his workplace computer system. In his answer to the SOR dated October 11, 2005, Applicant stated the following: “On paragraph 2 and subparagraph (b), **I admit** (emphasis supplied) my failure to fully disclose and deliberately not inform the investigator of the . . . investigation concerning my conduct as set forth in paragraph (1) because of fear that it would affect my current clearance as well as future ones.” Applicant, in essence, made the same admission earlier in a written statement prepared for an investigator on October 31, 2002<sup>1</sup>, and later in his hearing testimony before the Administrative Judge.<sup>2</sup> Department Counsel has the burden of presenting evidence to prove controverted facts. *See* Directive, Additional Procedural Guidance, ¶ E3.1.14. However, Applicant’s admissions concerning the alleged falsification, perpetrated in this case by a willful omission of information required to be disclosed, were unqualified and unequivocal. If an applicant admits an SOR allegation, then such admission provides an administrative judge with a legally sufficient basis to find that the applicant engaged in the conduct covered by the applicant’s admission. *See, e.g.*, ISCR Case No. 02-21087 at 3 (App. Bd. Aug. 19, 2005). Applicant’s argument to the contrary is without merit.

Applicant argues that since the Administrative Judge determined that the conduct for which Applicant was investigated was neither recent nor significant and that it was isolated, unintentional and inadvertent, then his failure to disclose it to the interviewer should not be held against him under

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<sup>1</sup>Government Exhibit 3 at 2.

<sup>2</sup>Hearing Transcript, at. 83, 85, 113, and 117-118.

Guideline E. Applicant is essentially arguing that he should not be held accountable for the omission since the Judge ultimately concluded that the underlying conduct that was the basis of the falsification allegation was not of security significance. Applicant's contention is not persuasive. Failure to provide relevant and material information to the government provides a rational basis for an unfavorable security decision. *See Gayer v. Schlesinger*, 490 F.2d 740, 753-754 (D.C. Cir. 1973); *Clifford v. Shoultz*, 413 F.2d 868 (9<sup>th</sup> Cir. 1969), *cert. denied*, 396 U.S. 962 (1969). Accordingly, the Judge's conclusions under Guideline E regarding Applicant's failure to disclose the investigation into his workplace conduct provide a rational basis, independent of the Judge's favorable conclusions under Guideline M, for her unfavorable security clearance decision.

Also regarding Guideline E, Applicant appears to argue that because the Judge entered a favorable finding regarding his underlying workplace conduct under Guideline M, her adverse finding under Guideline E regarding the same underlying conduct was inconsistent with the first finding and without basis. To the extent Applicant argues that Guideline E does not provide any independent basis for an adverse decision in the case after the Judge ruled in his favor under Guideline M, Applicant's argument lacks merit. An Applicant's security related conduct can be alleged under more than one Guideline and, in an appropriate case, can be given independent weight by an administrative judge under different Guidelines. *See, e.g.*, DISCR Case No. 93-1251 at 4 (July 29, 1994). In this case, there is a rational basis for an SOR allegation involving Applicant's workplace conduct to be included under both Guideline M and Guideline E, and it was therefore legally permissible for the Judge to consider Applicant's conduct under both and to reach differing conclusions under both, so long as the Judge articulated a rational basis for each. The Board notes that the Judge's decision does not articulate a rationale for ultimately finding against Applicant for the underlying workplace conduct under Guideline E. Given the Judge's conclusions under Guideline M that Applicant's workplace conduct (misuse of his employer's computer system) was mitigated because it was not recent, and was insignificant, unintentional, and inadvertent, the Judge's failure to articulate a rationale for why the same conduct was ultimately disqualifying under Guideline E was error. However, the Board concludes that it is unnecessary to remand the case to the Judge for correction of this error, as her adverse conclusions regarding Applicant's willful concealment of information under Guideline E are sustainable and provide an adequate basis for her overall adverse security clearance decision.

Applicant argues that the Judge's conclusions that the case was not mitigated and that he was not entitled to a favorable decision under the "whole person" concept were arbitrary and capricious. Applicant's argument is not persuasive.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in Applicant's favor under SOR ¶¶ 1.a, 3.a, 3b, and 3.c. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions or whole person factors with respect to the allegation under ¶ 2.b. of the SOR, the one alleging his deliberate failure to disclose. The Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's ultimate unfavorable security clearance decision was not arbitrary or capricious.

**Order**

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board