

KEYWORD: Guideline K

DIGEST: Applicant committed numerous security violations over a nine year span. Adverse decision affirmed.

CASENO: 05-01305.a1

DATE: 10/17/2007

DATE: October 17, 2007

In Re: _____  Applicant for Security Clearance	) ) ) ) ) ) ) ) )	ISCR Case No. 05-01305
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Department Counsel

**FOR APPLICANT**

Nicolas A. Gordon, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 26, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline K (Security Violations) of Department

of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 7, 2007, after the hearing, Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Department Counsel 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 in concluding that Applicant had not met his burden of persuasion as to the application of relevant mitigating conditions and whether the Judge's adverse security clearance decision is arbitrary, capricious, and contrary to law. Finding no error, we affirm.

The Judge found that Applicant, a senior systems administrator for a defense contractor, committed numerous security violations from 1997 through 2006. These include five instances of failing to secure DoD-approved security containers designed for the storage of classified material; two instances of failure to secure a classified computer hard disk drive, and one instance of failing to secure a box containing material marked TOP SECRET. This last incident occurred nearly a year after the date of the SOR in Applicant's case.<sup>1</sup> Additionally, one of the improperly secured hard disk drives was never recovered.<sup>2</sup>

In analyzing the case, the Judge noted that two mitigating conditions were possibly applicable—that Applicant's infractions were inadvertent<sup>3</sup> and that he showed a positive attitude toward his security responsibilities.<sup>4</sup> However, the Judge also took into consideration the fact that Applicant's security violations span almost the whole of his employment with the federal contractor, the first incident occurring only two months into his tenure. She also noted that the latest violation occurred after nine years of job experience and that various corrective steps taken by Applicant's employer had been unsuccessful. Balancing the mitigating factors with the security concerns, the Judge concluded that Applicant had not met his burden of persuasion that it is clearly consistent with the interests of national security for him to have a clearance. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988); Directive ¶ E3.1.15. ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance.")

Applicant argues on appeal that the Judge erred in not applying two other mitigating conditions—that the security incidents were isolated or infrequent and that they resulted from improper or inadequate training.<sup>5</sup> The Board does not find this argument persuasive. Given the

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<sup>1</sup>An allegation reflecting this incident was added to the SOR through a Motion to Amend, dated January 29 2007. The Judge granted the motion on the following day. Decision at 2.

<sup>2</sup>See testimony of the Defense Security Service specialist: "As a result of them not being able to find it, we concluded that the item was in fact lost and that's what we are reporting. . . our position was . . . unless you can produce the hard drive and verify that there is in fact nothing on it, the fact that it was associated with a classified system means that there is the potential that classified material was in fact on it . . ." Tr. at 70-71.

<sup>3</sup>Directive ¶ E2.A11.1.3.1.

<sup>4</sup>Directive ¶ E2.A11.1.3.4.

<sup>5</sup>Directive ¶¶ E2.A11.1.3.2, E2.A11.1.3.3.

inherent seriousness of security violations, committing eight over a nine year period is a reasonable basis for concluding that they are not infrequent. *See* ISCR Case No. 03-26888 at 2 (App. Bd. Oct. 5, 2006) (“Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant’s suitability for access to classified information.”) (internal citations omitted); ISCR Case No. 01-24358 at 4 (App. Bd. Apr. 13, 2004) (Judge concluded that Applicant’s failure to safeguard six classified documents over a ten year period was isolated or infrequent. Board reversed the Judge, holding the Judge’s conclusion to be arbitrary and capricious.) Furthermore, the Board finds no basis to disturb the Judge’s conclusion that Applicant’s security violations were not caused by improper or inadequate training.<sup>6</sup>

Examining the Judge’s decision in light of her findings and the record as a whole, the Board concludes that she articulates “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)). We hold that her adverse security clearance decision is neither arbitrary, capricious, nor contrary to law.

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<sup>6</sup>Applicant testified that upon starting his employment he was briefed on security procedures. Tr. at 136. Government Exhibit 3 consists of security training material prepared by Applicant’s employer, which covers potential infractions such as those committed by Applicant. Additionally, various Government exhibits address the specific security violations in Applicant’s case and advise that remedial action included his being “re-indoctrinated” in security procedures. *See, e.g.*, Government Exhibit 21 at 2.

**Order**

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jean 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