KEYWORD: Guideline K; Guideline E

DIGEST: Applicant, a facility security officer should have been aware that sensitive personal information must be protected. Although the Judge made factual errors they are harmless. Adverse decision affirmed.

CASENO: 06-07515.a1

DATE: 04/24/2008

DATE: April 24, 2008

In Re:	)
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------------	) ISCR Case No. 06-07515
	)
	)
Applicant for Security Clearance	)
	)

APPEAL BOARD DECISION

<u>**APPEARANCES**</u>

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

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 29, 2007, DOHA issued a statement of reasons advising Applicant of the basis

for that decision—security concerns raised under Guideline K (Handling Protected Information) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On December 28, 2007, after the hearing, Administrative Judge Philip S. Howe 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 issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant points out that the Judge's decision contains factual errors and mischaracterizations. Applicant also disagrees with the Judge's interpretation of the evidence.

Whether the Record Supports the Judge's Factual Findings

Facts:

The Judge made the following relevant findings of fact:

Applicant is Vice-President and Facility Security Officer (FSO) at a government contracting firm. Security personnel at the company's headquarters sent Applicant an e-mail message in March 2004 stating that his uncleared assistant could not have access to the Joint Personnel Adjudication System (JPAS), a DoD program containing sensitive personal information. Computer records show that Applicant opened the message. [Applicant has no memory of reading it.] Applicant received a password for access to JPAS. Applicant's firm got access to JPAS in approximately April 2004. Applicant allowed his assistant, who did not have a security clearance, access to JPAS on a regular basis by giving him Applicant's user name and password, and the assistant also helped Applicant to create subsequent passwords. In July 2005, security personnel at headquarters learned that Applicant was allowing his assistant access to JPAS. Applicant was instructed to stop that practice. Applicant immediately instructed his assistant not to access the program on his own, but continued to give him information from JPAS in paper print-out format. In September 2005, Applicant was advised to change his password to further limit the assistant's access. Applicant complied.

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 a conclusion in light of all the contrary evidence in the same 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 finding 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.

Applicant points out several factual errors in the Judge's decision. The Judge stated that Applicant's firm began using JPAS in April 2004 and that Applicant therefore was in violation of

proper security procedures for 18 months. Decision at 3 and 5-7.[1] Applicant states, and Department Counsel acknowledges, that Applicant began using JPAS in August 2004, and Applicant therefore demonstrated that the period of violation was shorter. The Judge also mischaracterized computer use under JPAS, apparently believing that JPAS could only be accessed on one computer, which Applicant moved into his office in July 2005. Decision at 3. Although these are factual errors, they are harmless errors when viewed in the context of the record as a whole.[2] It is not likely that the Judge would have reached a different decision if he had found that Applicant's security violations began four months later or that JPAS was accessible from more than one computer.

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 choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). 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. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Dep't of the Navy v. Egan,* 484 U.S. 518, 528 (1988).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to rebut, explain, extenuate , or mitigate those concerns. *See* Directive ¶ E3.1.15. The Judge considered Applicant's testimony in that regard and reasonably concluded that Applicant had not met his burden of proof. Although Applicant argues that he was unaware until July 2005 of the requirement that his assistant have a security clearance in order to access JPAS, the record supports the conclusion that Applicant received and opened an e-mail message containing that information in March 2004 and was therefore on notice as to the requirement. The Judge pointed to Applicant's years of security experience. While Applicant states that he did not receive training on the JPAS program, he had a responsibility as the FSO for his office to familiarize himself with at least the basic concepts of JPAS. The fact that he was given a user name and password for JPAS access should have caused Applicant, as FSO, to realize that JPAS was more restricted than prior systems. Since access to the information was limited, an experienced FSO should not have shared the information itself with an uncleared employee, at least without confirming that he was allowed to do so. Moreover, as an experienced FSO, Applicant should not have allowed another employee access to his user name and password. Applicant argues that the Judge's decision is overly harsh because he did not compromise classified information. As an FSO, he should have been aware that not only classified information, but also sensitive personal information, must be protected. Directive ¶¶ E2.34(a) and (g).

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[1]Applicant also notes the same error in the Judge's synopsis. The Board has held that error in the synopsis of a decision is generally harmless. *See, e.g.,* ISCR Case No. 02-06338 at 3 (Sep. 7, 2004).

[2]Applicant identifies other errors, such as Applicant's age and years of service in the Air Force. Likewise, these errors are harmless.

The Judge discussed why disqualifying conditions under both Guideline K and Guideline E applied to Applicant's conduct and why the conduct was not mitigated under the Guidelines or a whole-person analysis. The Judge's decision is sustainable based on record evidence. Applicant's ability to argue for a different interpretation of the evidence and his disagreement with the Judge regarding the significance of Applicant's handling of protected information do not indicate error on

the part of the Judge. *See, e.g.,* ISCR Case No. 04-08806 at 4 (App. Bd. May 8, 2007). The Judge's decision is neither arbitrary, capricious, nor contrary to law.

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
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