

KEYWORD: Guideline K; Guideline E

DIGEST: An applicant in a position of supervision can be held accountable for security violations resulting from a failure to supervise subordinates properly. The Judge's decision lists multiple security violations during Applicant's supervisory tenure. Favorable decision reversed.

CASENO: 06-21537.a1

DATE: 02/21/2008

DATE: February 21, 2008

In Re:))	
-----))	ISCR Case No. 06-21537
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

John F. Mardula, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 11, 2006, 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 September 28, 2007, after the hearing, Administrative Judge Jacqueline T. Williams granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department counsel raises the following issues on appeal: whether the judge made certain findings of fact that are erroneous because they fail to reflect a reasonable interpretation of the record evidence as a whole; and whether it was arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's conduct under Guideline K was mitigated¹ and that Applicant's conduct under Guideline E did not raise security concerns.

Whether the Record Supports the Judge's Factual Findings

Facts:

The Judge made the following relevant findings of fact:

In December 2000, while a security manager for a defense contractor, Applicant failed to secure a safe which contained classified information. No classified information was compromised. Applicant reported the violation to her supervisor and made suggestions for improving security for the safe.

In 2004, Applicant was Facility Security Officer (FSO) and supervised three staff members. Over a period of several years, one of those three employees committed multiple security violations with regard to a particular account the employee managed. Applicant was also alternate custodian of that account. Applicant received her training on the account from the employee. Applicant relied on the employee's experience and did not verify the employee's work. Applicant was not aware that the employee had received several notices regarding the delinquent status of the account. The resulting investigation revealed that Applicant's performance in handling the account reflected a pattern of gross negligence and disregard of security requirements. As supervisor, Applicant was held responsible for the security violations of her employee and was suspended by her employer for one week without pay. No classified information was compromised.

Applicant is no longer a supervisor. She received ratings of "outstanding" from her employer in 2006. She submitted four character reference letters, and three coworkers testified on her behalf.

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*

¹Under Guideline K, Department Counsel appeals the Judge's conclusions regarding SOR ¶ 1.a.(2), but not 1.a. (1).

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.

As stated above, Department Counsel has challenged certain of the Judge's factual findings. The Board will address these findings in its analysis below.

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 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 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 interest of the national security.'" *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Department Counsel contends that the Judge erred in finding that Applicant's conduct under Guideline K was mitigated. Department Counsel states that the Judge found mitigation for the following reasons: "(a) the custodian was responsible for the account, (b) Applicant was not aware of the custodian's negligent handling of the account, (c) Applicant had not been notified by the custodian that inquiries had been made about the status of the account, (d) the problem with the [particular] account happened once and did not recur, (e) Applicant had been improperly trained to handle the [particular] account, and (f) Applicant responded favorably and now demonstrates a positive attitude toward the discharge of security responsibilities. . ." Department Counsel's contentions have merit.

With regard to point (a), Applicant characterized her responsibility for the particular classified account as minimal. The custodian had primary responsibility for the account. However, Applicant had responsibility for the account as the custodian's supervisor, the FSO, and as alternate custodian. As alternate custodian, Applicant had a duty to keep aware of the day-to-day activity of the account in order to assume the duties of the account custodian, when necessary, without undue interruption of operations.² There is considerable record evidence regarding the duties of a supervisor and an alternate custodian,³ and Applicant herself admitted that her supervision was very lax. Transcript at 112-113.

With regard to points (b) and (c), the Judge could reasonably find that Applicant was not aware of the account custodian's negligent handling of the account and that Applicant had not been notified by the custodian that inquiries had been made as to the status of the account. However, those facts do not mitigate the security concerns of Applicant's actions. The Board has held that an applicant in a position of supervision can be held accountable for security violations resulting from

²See Transcript at 157-165, referring to specific account manual, Manual 90-1, ¶ 17.b.(1).

³Transcript at 49-50, 55, 57, 85, and 141.

a failure to properly supervise subordinates. *See, e.g.*, DISCR Case No. 89-0781 at 7 (App. Bd. Feb. 23, 1993). Applicant commented that she was to “spot check” the custodian’s work. Transcript at 134. As noted above, Applicant admitted that her supervision was very lax.

With regard to point (d), Applicant supervised the custodian of the account under discussion here from mid-2001 to late 2004. Transcript at 129, 146. The Judge’s decision lists multiple security violations which occurred in that account during that period. Decision at 3. The record does not support the conclusion that the negligent handling of the account happened once and did not recur. The violations were continuous and recurred until Applicant had moved to another position in the company and a new primary custodian had been appointed.

With regard to point (e), Applicant stated that she did not receive training for the specific account at issue. She had received security training, including refresher courses. When Applicant became responsible for that specific type of sensitive account, she should have asked for training specific to that type of account. Applicant did not do so and did not try to familiarize herself with the relevant directives. Transcript at 132-133, 141. This failure is related to her lax supervision and is not a cause for mitigation.

As to point (f), while there is some support in the record for the Judge’s conclusion on this point, there is much evidence to the contrary. The Judge accepted many of Applicant’s characterizations of the events at issue. Some of those characterizations are contained in the points under discussion here. Applicant has attempted to minimize and rationalize her failures by placing the blame on the account custodian or on her employer. In her answer to the SOR, Applicant stated that she “thoroughly disagreed with the disciplinary action and the wording of the adverse report, but in an effort to move past this incident, I accepted the responsibility and disciplinary action.” Response to SOR at 3. When questioned about her response to the report, Applicant stated that it was “not only false and misleading, but libelous and bordered on the lines of defamation of character.” Response to SOR at 3 and Transcript at 152-153. The record evidence indicates neither a favorable response to the incidents in question nor a positive attitude toward security duties.

Overall, the Administrative Judge failed to plausibly interpret the record evidence as a whole. Applicant admitted to very lax supervision. As an alternate account custodian and FSO, Applicant’s duties were not “minimal” and required her to obtain knowledge about the account rather than merely rely on what others reported to her. The security discrepancies in that account involved something more than the one-time mishandling of protected information—Applicant continuously failed to accomplish her duties with respect to the account from 2001 until late 2004. Applicant’s mishandling of her duties contributed to the security violations noted by the Administrative Judge on page 3 of the Decision and lead to her suspension by her employer. Applicant had significant experience as an FSO and when she acquired alternate custodian duties with respect to the account, she should have realized that she needed training specific to that account. She failed to request it, and this contributed to her inadequate training. While there is record evidence that Applicant is now more reliable, there is also evidence that Applicant has not demonstrated a positive attitude by downplaying her responsibility in the account’s security errors. Once it is established that an applicant has committed a security violation, she has “a very heavy burden of demonstrating that she should be entrusted with classified information.” Such violations “strike at the heart of the industrial security program,” and the “Administrative Judge must give any claims of reform and rehabilitation strict scrutiny.” *See, e.g.*, ISCR Case No. 00-0030 at 9 (App. Bd. Sep. 20, 2001). Considering the

burden on Applicant and the record evidence as a whole, it is not reasonable to conclude that Applicant mitigated security concerns under Guideline K.

Department Counsel correctly notes another error which involves both the Judge's factual findings and her conclusions. The Judge stated in her factual findings that there was no compromise of security as a result of Applicant's actions. Decision at 3. However, the Judge later concluded that security was compromised by Applicant's actions. Decision at 6. There is testimony in the record that an agency determination of the existence of a security compromise is controlling. Transcript at 34-35. In this case, the agency determined that a compromise occurred. *See* Government Exhibit 4.

Department Counsel also argues that the Judge erred by concluding that Applicant's conduct did not raise security concerns under Guideline E. Department Counsel's argument has merit. The Judge quoted language from ¶¶ 16.(c) and 16.(d) of the Revised Adjudicative Guidelines of the Directive to support her conclusion.⁴ Because Applicant's actions under Guideline K were sufficient to support a "basis" for disqualification under Guideline K, the Judge concluded that there were no security concerns under Guideline E in Applicant's case. However, the Directive does not provide that if conduct raises a disqualifying condition under a specific guideline, then that conduct is precluded from consideration under any other guideline. As Department Counsel points out, the introduction to ¶ 16 states that the "[c]onditions that could raise a security concern. . . include" the seven listed subparagraphs, but are not limited to those seven conditions. Moreover, the plain meaning of ¶ 16.(c) anticipates that the adjudicating official will reach a favorable determination, after considering disqualifying and mitigating conditions, under another single guideline, but then, under this paragraph, consider the same conduct applying a whole-person analysis, which could result in an unfavorable determination. The Board has held that an applicant's behavior may have security significance under more than one Guideline. *See, e.g.,* ISCR Case No. 03-05072 at 6 (App. Bd. Jul. 14, 2005). While the revision of the Adjudicative Guidelines may modify the interpretation of some Board precedents or preclude their application, the revision of Guideline E noted above does not change the general principle stated in the above Board decision that behavior can have security significance under more than one Guideline. The language of the revised Adjudicative Guidelines is consistent with this principle. The Judge's conclusion not to consider the conduct under Guideline E in this case is erroneous.

The record evidence in this case does not support the Judge's favorable conclusions. The errors discussed above render the Judge's decisions arbitrary, capricious, or contrary to law. The decision is not sustainable.

⁴¶ 16.(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;"

¶ 16.(d): "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. . .;"

Order

The Judge's favorable security decision is REVERSED.

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: Jams E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board