KEYWORD: Guideline K; Guideline C; Guideline E

DIGEST: Applicant could not reasonably have believed that he had authority to remove classified documents (which were not relevant to his employer's immediate needs) from another government agency outside official channels. Favorable decision reversed.

CASENO: 12-10404.a1

DATE: 03/13/2015

DATE: March 13, 2015

In Re:	)	
	)	
------	)	ISCR Case No. 12-10404
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Mark D. McMann, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 10, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline K (Handling Protected Information), Guideline

C (Foreign Preference), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 8, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred by requiring the Government to establish a specific security violation; whether the Judge erred in concluding that Applicant held a security clearance at the time he obtained custody of classified documents; and whether the Judge's whole-person analysis is erroneous. The Judge's favorable findings under Guidelines C and E are not at issue in this appeal. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant worked for another Government agency (AGA), retiring in early 2010. At the time of his retirement, he held a Top Secret clearance. He did not receive an exit briefing. AGA had unique procedures for handling classified information. For example, Applicant did not have to secure courier authorization for document transport. After his retirement, Applicant began working for a Defense contractor (Employer). He worked there for six months, after which he starting working for his current employer.

About a month after his retirement, in order to further the accomplishment of his duties with Employer, Applicant arranged for a former colleague at AGA to obtain some classified documents that Applicant had worked on while in AGA employ. Applicant's supervisor at Employer gave him verbal authorization to do this and to store the information in the company secure safe. On March 30, 2012, "Applicant obtained eight properly sealed classified documents and transferred them to the acting Facility Security Officer (FSO) at his place of employment using all the proper protocols." Decision at 4.

Later, the FSO conducted an inventory and, after consulting the Joint Personnel Adjudication System (JPAS), concluded that Applicant did not possess an active DoD security clearance. The FSO reported this incident to the Defense Security Service which, in turn, advised AGA. That agency purportedly undertook an investigation. While the investigation was still ongoing, Employer concluded that Applicant's conduct violated company and Government security policies and procedures. Although Applicant was briefed on the correct handling and storing of classified information, Applicant did not receive a warning, as alleged in the SOR.

Because it was not able to verify Applicant's clearance, Employer moved him to unclassified direct contract work. Applicant subsequently notified Employer that he was resigning to accept another job, but Employer characterized this as a termination, because Applicant's clearance had not been resolved.

Applicant had undergone a clearance update in 2009 and was under the impression that his clearance was active following retirement, provided that it was picked up by another sponsor. Another AGA employee stated the opinion that a clearance remains active for two years from date of separation. After the security incident, Applicant was interviewed by an AGA employee. At Applicant's request, this official debriefed Applicant. Neither the videotape of the interview nor the debriefing forms were offered as evidence.

The CEO of Applicant's current employer had prior experience working for AGA. He stated that when someone with a clearance from AGA leaves the agency for employment as a Defense contractor, the normal procedure is for AGA to transfer the clearance to the Defense Security Clearance Office (DISCO) upon request. The CEO provided his opinion that DISCO or someone at Employer failed to exercise due diligence in ascertaining whether Applicant had a clearance. He stated that he found nothing in JPAS , so he called a "security officer contact" at AGA, who told him that Applicant had "retired clean," meaning that he had a clearance at the time he had retired. Decision at 6. The CEO was not able to find anything in writing, so Applicant submitted a security clearance application as if he did not already possess a clearance. The Judge found that there is no evidence that Applicant's clearance was ever entered into the appropriate record system by AGA or that DISCO ever asked AGA to furnish information about any clearance by Applicant.

The Judge's Analysis

As stated above, the Judge cleared Applicant under Guidelines C and E. Regarding Guideline K, he stated that the Government's case was based upon two factors. The first of these was the belief that Applicant did not have an active clearance at the time in question. The Judge cited to evidence that the CEO of Applicant's current employer had contacted a security officer at AGA and was told that Applicant retired "clean." The second was the assumption that Applicant had violated "general unspecified security rules in carrying out" the transfer of documents. The Judge noted evidence that Employer had found Applicant to have been in violation of its security rules. However, the Judge stated that no investigative report had been offered into evidence, either from Employer or from AGA. The Judge concluded there was a paucity of evidence sufficient to raise security concerns. However, he also concluded that, even if such concerns were raised, Applicant's good security record other than the incident was sufficient to mitigate the concerns.

Discussion

The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). In deciding whether the Judge's rulings or conclusions are erroneous, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision

that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge erred, insofar as he had required the Government to produce evidence of a specific regulatory violation as a basis for concluding that Applicant's circumstances raised concerns under Guideline K. He contends that Guideline K "is not limited to a specific security violation" and that a Judge must look to the totality of an applicant's conduct rather than engage in "a technical debate over the nuances of whether there has been a violation of a specific security rule." Appeal Brief at 7-8.

We find this argument persuasive. We have previously noted that Guideline K contemplates more than the violation of specific rules.

> Security significant conduct may be ascertained through the application of common sense with reference to the broad, overall goal of protecting [classified] information . . . Guideline K should be interpreted broadly to further the government's interest in protecting classified . . . information. The Board will not interpret provisions of the Directive in a manner that would undermine the effectiveness of the industrial security program in protecting the national security. ISCR Case No. 11-05079 at 6 (App. Bd. Jun. 6, 2012). *See also* ISCR Case No. 11-12623 at 6 (App. Bd. Feb. 2, 2015).

To apply an overly restrictive interpretation of any of the Guidelines would result in clearance decisions being made on the basis of legal technicalities that have more purchase in other types of litigation, such as criminal trials, rather than on the basis of national security. *See, e.g.*, ISCR Case No. 03-21262 at 2 (App. Bd. Jul. 10, 2007) (DOHA applicants "are not entitled to the procedural protections afforded to criminal defendants.")

In the instant case, irrespective of whether the SOR actually cited to a particular regulatory prohibition against Applicant's conduct,[1] we are persuaded by Department Counsel's argument that no reasonable person in Applicant's position could actually have believed that he had lawful authority to remove classified documents from AGA. Department Counsel cites to record evidence that Applicant had approached a named AGA employee and asked him if he would supply Applicant with the classified documents. The employee agreed, and the two met at lunch, during which the

[1]Department Counsel cites to Executive Order 13526, *Classified National Security Information*, which contains prohibitions that appear to apply to Applicant's conduct: § 4.1(a) requires that a person have a need to know classified information before being granted access; § 4.1(c) provides that an "official or employee leaving agency service may not remove classified information from the agency's control[;]" and § 4.1(d), which states that "[c]lassified information may not be removed from official premises without proper authorization." Department Counsel's appeal argument does not rely on this EO, addressing it only in a footnote. However, we conclude that the EO undermines the implication of the Judge's analysis to the effect that there are no explicit rules against Applicant's behavior.

employee gave them to Applicant.[2] Moreover, we note evidence in the form of a letter from Employer to Applicant that the documents in question were not relevant to the company's business.[3] Under the circumstances, the record does not support a conclusion that Applicant, with over 20 years' experience holding a clearance with AGA, reasonably believed that he had authority to proceed as he had done. Accordingly, the lack of reference to a particular security rule does not preclude a finding that Applicant's conduct raised concerns under Guideline K.

We note the Judge's conclusion that the absence of investigative reports resulted in a paucity of evidence of security concern.[4] However, the evidence that the Government produced included the letter from Employer referenced in Footnote 3, *supra*, Applicant's statements in his Security Clearance Application (SCA) to the effect that he had not possessed a clearance at the time of his security significant conduct,[5] and the answers he provided during the security clearance interview.[6] Read in light of Applicant's hearing testimony, these documents constitute substantial evidence of the concern raised by the SOR allegation. *See, e.g.*, ISCR Case No. 11-03500 at 3 (App. Bd. Feb. 28, 2012).

In any event, Applicant admitted the allegation at issue here (albeit with an explanation), which stated that he had "solicited and/or obtained classified documents from an employee of [AGA], outside of official channels and without first determining [his] clearance eligibility for access to that material[.]" SOR ¶ 1(a). The Government is required to present evidence only in

---

[2]"I said this is training material that I would like to take with me . . . would you be able to give it to me at a later date when I knew I would be able to go into [Employer's] office. He said sure. So we made arrangements to meet on a particular day for lunch." Tr. at 44. Later, on cross examination, Applicant continued about this matter, testifying that he asked the employee if they could meet at a later date for hand-off of the documents. "Q: And he did so later? A: Yes, and he also, my understanding is, of course, came under a lot of scrutiny and [was] investigated. I do not know the outcome. But unfortunately for him it was also something that could have, may have jeopardized his clearance." Tr. at 61.

[3]"On April 8, 2010, it was reported to the Director of Security at [Employer] that you brought 8 classified documents and one working document to the [Employer] facility for storage on March 30, 2010 . . . Upon completion of the inventory and during verification of your clearance it was determined that the documents were not related to any current [Employer] contract and that you did not possess a DoD clearance." Letter from Employer to Applicant, dated April 12, 2010, included in Government Exhibit (GE) 3, Interrogatories.

[4]To be fair, the Judge may well have been influenced by Department Counsel's argument at the close of the hearing, which appeared to convey the opinion that Applicant should have a clearance. Arguments by the parties are advisory only, and a Judge must evaluate the case based on the evidence presented.

[5]GE 1, SCA, dated March 12, 2012, at p. 15: "I did not understand that my [AGA] clearance had been terminated upon my retirement; therefore I was not in possession of an active security clearance when I picked up the documents from my former co-worker . . . My employer . . . provided me with a written warning."

[6]*See, e.g.*, Interview Summary at p. 2, contained in GE 3: "While working for [Employer] in training, [Applicant] brought classified documents that he received from . . . a fellow [AGA employee] that he had worked with into a secure facility at [Employer] in order to utilize them in a training program . . . When [Employer] FSO returned from leave a few days later . . . she was reviewing the documents and the subject. When she looked the subject up in JPAS, it did not appear to her that he had an active clearance."

regard to allegations that have been controverted. Applicant's admission relieved the Government of its burden of production, and the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 14-02447 at 5 (App. Bd. Feb. 26, 2015). Therefore, the record as a whole, containing both Applicant's SOR admission and the evidence that the Government produced, was sufficient to raise a concern that Applicant had engaged in "inappropriate efforts to obtain or view classified or other protected information outside [his] need to know."[7]

As we have stated many times before, security violations strike at the heart of the industrial security program. An applicant who has committed such violations has "a very heavy burden" of persuasion, and the Judge must examine the applicant's case for mitigation with "strict scrutiny." ISCR Case No. 07-08119 at 3-4 (App. Bd. Jul. 8, 2010). In the case before us, Applicant's security-significant conduct is sufficient to raise doubts in a reasonable mind as to whether he is entitled to a clearance. We conclude that, under the facts of this case, Applicant's lack of subsequent violations is not sufficient to remove those doubts. Therefore, they must be resolved in favor of national security. The Judge's decision fails to articulate a satisfactory explanation for its conclusions, fails to consider important aspects of the case, and offers an explanation for the decision that runs contrary to the weight of the record evidence In light of this holding, we do not need to address the other issues raised by Department Counsel, save the one discussed in Footnote 7.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett

[7]Directive, Enclosure 2 ¶ 34(d). Department Counsel's Appeal Brief asserts that, after the Judge issued his decision, DOHA received new evidence from AGA that could form the basis of additional allegations. Department Counsel requests that we remand the case for a new hearing, in anticipation of which DOHA will amend the SOR to include allegations based on this evidence. In the first place, this aspect of Department Counsel's brief consists of new evidence not contained in the record, which we cannot consider. Directive ¶ E3.1.29. Moreover, in the past we have remanded cases to resolve questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 11-15005 at 2 (App. Bd. Jan. 24, 2014). However, we have declined to remand cases for the purpose of taking in new evidence. *See, e.g.*, ISCR Case No. 14-00976 at 3 (App. Bd. Feb. 5, 2015). In a case where new derogatory evidence comes to light regarding an individual with a clearance, DOHA can issue a new SOR to address the newly discovered evidence.

Administrative Judge
Member, Appeal Board

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