

KEYWORD: Guideline K; Guideline M

DIGEST: The Judge’s resolution of evidentiary conflicts and his findings of fact are sustainable. An ability to argue for an alternative interpretation of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 14-00963.a1

DATE: 01/13/2015

DATE: January 13, 2015

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In Re:)	
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-----)	ISCR Case No. 14-00963
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 28, 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), and Guideline M (Use of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 10, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant 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. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 52 years old. From 1982 to 2011 he worked as a drafter for Company A. Throughout the years, he signed nondisclosure agreements and knew he was obligated to protect the company's proprietary information. While working at Company A, Applicant would routinely backup computer data to a Company A external hard drive. Late in 2011, Applicant decided to leave Company A and to begin employment with Company B, a competitor. In the weeks and days before resigning from Company A, Applicant transferred or copied all the projects that he worked on for his own personal reference. A lot of backups occurred on the afternoon of his departure. Applicant also copied data from a Company A computer onto his personal thumb drive, which he then uploaded at Company B for use at Company B. He did not have authority to do this.

Applicant's statements about what happened to the Company A external hard drive after he left Company A are inconsistent. In an OPM interview, Applicant indicated that he used a checklist when departing Company A and turned in all of Company A's property except the external hard drive because it had been packed away in the boxes used for his personal items. He also indicated in the interview that he told the Company A human resources supervisor that he would return the external hard drive when he found it after going through the boxes. According to Applicant's initial hearing testimony the hard drive had been inadvertently placed in one of the boxes or his briefcase. He then testified that he learned he had the external drive when he saw it in his garage on either the night he left Company A or the next day. He testified that he procrastinated in reporting to the head of human resources of Company A that he had found the external hard drive in his garage. In subsequent testimony, Applicant indicated that he realized he had the external drive "within a week or a month" later while he was at Company B. The hard drive was eventually seized by the FBI while it was in Applicant's possession at Company B.

About a month after leaving Company A, Applicant ran into an employee of Company A and, based on their conversation, Applicant assumed an inquiry was being conducted that involved him. Subsequent to the conversation, Applicant reported to the head of human resources at Company A that he had the external hard drive. Two days later, Applicant was contacted by agents from the FBI. The external hard drive was then seized by the FBI while it was in Applicant's possession at Company B.

Applicant stated that he had no bad intentions when copying files and he did not transfer the files to take away any of Company A's property or business. Applicant is not a credible witness.

The Judge reached the following conclusions: Sufficient circumstantial evidence exists to establish that Applicant took the external hard drive from Company A without permission. His actions in backing up "a bunch of stuff" to the external hard drive on the afternoon of the day he was leaving Company A is suspicious. Sufficient circumstantial evidence exists to conclude that Applicant's conversation with the Company A employee is what prompted him to report to the head

of human resources that he had the external hard drive. Applicant's testimony is entitled to little weight given the inconsistencies contained therein and elsewhere. Furthermore, Applicant's testimony regarding the personal thumb drive establishes that he had the intent to take property from Company A without its knowledge or authorization. When the above pieces are put together, the picture becomes clear that Applicant intentionally took the external hard drive from Company A.

Applicant had no authority to take Company A proprietary data or official government information on the external hard drive and store that information at Company B. Applicant knew that he should not have taken sensitive data from Company A to Company B, but he intentionally did so. Applicant's conduct is recent and casts doubt on his reliability, trustworthiness, and good judgment. No evidence of counseling or remedial security training was offered. None of the mitigating conditions under either Guideline K or Guideline M apply. His actions were a breach of trust. The record establishes unmitigated questions and doubts about Applicant's suitability for a security clearance.

Applicant asserts on appeal that he attempted to return the Company A hard drive before anyone told him that the FBI was looking into his activities. The Board construes this as a challenge to the Judge's finding of fact that Applicant took steps to notify Company A about his possession of the hard drive and to arrange its return after learning from a Company A employee that the matter was being investigated. The Judge was required in this case to resolve conflicts in the evidence and to make findings based on circumstantial evidence. After a review of the record and the Judge's decision, the Board concludes that the Judge's evaluation of the evidence and his finding are sustainable.

Applicant states that he made a slight error in judgment, and that he now realizes his error. He argues that Company A turned him in as a result of his role as a whistleblower, and he cites to transgressions that the company was engaged in and was attempting to cover up. He states that he is worthy of his security clearance and is deserving of a second chance. Applicant's assertions do not establish error on the part of the Judge.

The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board

concludes that the Judge examined the relevant data and articulated 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 general standard 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). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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