



On June 19, 2012, the Board issued a decision in the case remanding the case to the Judge for further proceedings. The remand order was based on the Board's determination that, although the record contained sufficient detail to sustain the Judge's conclusion that the government had established security concerns regarding Applicant under Guideline E, there was insufficient record evidence about Applicant's specific conduct to allow her to properly evaluate the Guideline E mitigating conditions in relation to that conduct. Guideline E of the SOR alleged that Applicant was a defendant in a civil lawsuit that ensued after he left the employ of one company for another. The lawsuit involved allegations of violations of non-disclosure employment agreements, breach of fiduciary duty, violation of the state computer crimes act, violation of the state conspiracy act, common law conspiracy, violation of the state uniform trade secrets act, and conversion.

The Board also noted that the relative paucity of evidence about Applicant's specific conduct was a consequence of the Judge's application of the collateral estoppel doctrine. The Board then ruled that application of the doctrine in this case was problematic in that it prevented Applicant from fully explaining his conduct and presenting a case in mitigation. The Board's remand order contained instructions that both parties should be afforded the opportunity to present any additional evidence regarding the civil trial and Applicant's underlying conduct for the Judge's consideration.

Pursuant to the remand order a subsequent hearing took place and the parties submitted additional evidence. The record was significantly expanded, largely through the admission of pleadings, transcript testimony, and other documents related to the civil trial. On December 17, 2012, after the hearing, Judge Anthony denied Applicant's request for a security clearance. Applicant has again appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (1) whether the Judge erred in finding that Applicant had expressed no remorse about his conduct; (2) whether the Judge made erroneous findings regarding Applicant's actions with a 100 gigabyte (GB) computer hard drive; (3) whether the Judge erred in not applying Guideline E mitigating conditions in Applicant's favor; and (4) whether the Judge erred in her whole-person analysis. For the reasons that follow, the Board affirms the Judge's decision.

## **Facts**

A statement of the Judge's findings in the case was included in the Board's June 19, 2012 decision. The following recitation of the Judge's findings in her remand decision includes many of those same findings, but also includes many additional findings.

The Judge's pertinent findings in her remand decision are as follows: Applicant is a senior program manager for a Government contractor. He enlisted in the military, earned a commission, and retired as an officer. He held security clearances during his military service.

After retirement, he worked for a small technology company, for which he signed an employment agreement, which contained a non-disclosure admonition. This company was purchased by Company A, a Defense contractor. Applicant worked for Company A from 2000 until 2009. He did not sign a non-disclosure agreement after coming to work for Company A. The employment agreement that Applicant had signed earlier stated that it did not terminate as a result of voluntary or involuntary dissolution of the company, or by any merger or consolidation wherein the company was not the surviving or the resulting corporation. Applicant stated that he did not believe the non-disclosure agreement applied to him when he was an employee of Company A. However, the jury in his civil trial found that the non-disclosure agreement provisions did apply to Applicant during his tenure at Company A.

In January 2008, a former colleague of Applicant left Company A and began a Government services division at Company B. In 2009, Applicant and another colleague left Company A and set to work for Company B. Upon leaving Company A, Applicant turned in all equipment provided him by the company. He took with him a 20 GB hard drive, which he had used at Company A during the nine years of his employment. This hard drive was Applicant's own, the one provided by the company contained insufficient memory. He stated that there were personal matters on the computer, as well as some power point presentations on the hard drive.

Although Applicant claimed he left Company A on good terms, within two weeks of starting his new job, Applicant, three other colleagues, and Company B were named as defendants in a lawsuit. The civil complaint alleged various kinds of economic harm to Company A. The case was tried before a jury, lasting 11 days. Applicant testified, both on direct examination and on cross-examination, for 65 minutes. His position remained that he had done nothing wrong.

At the trial, Applicant admitted that in the first half of 2009, he and a friend at Company B discussed gathering together a group of like-minded individuals to do government contracting work that would include projects similar to those carried out by Company A. The friend at Company B asked Applicant to identify individuals who would make good employees at Company B. Applicant informed his deputy at Company A that he was accepting a position at Company B.

Company A was planning to re-compete for a contract it held with the military. Applicant assisted his friend at Company B in identifying Company A employees who might be recruited by Company B in submitting a competitive offer on the contract. The Company B official sent an e-mail proposing a meeting date for several Company A employees to meet with him to discuss the re-compete contract. E-mails identified at trial by Applicant as either written by him or received by him demonstrated Applicant's active involvement in this activity.

Also at trial, a computer forensic expert testified that her analysis of Applicant's Company A computer revealed that approximately three days before Applicant resigned from Company A to go to work at Company B, a 100 GB hard drive had been attached to his computer and five folders created. One of the folders was labeled "Company B." Remote image analysis of the files on the 100 GB hard drive and the files on Applicant's Company A computer revealed that several hundred files were copied from the company computer to the 100 GB hard drive. The computer analysis also

showed that once copied to the 100 GB hard drive, the files were deleted from Applicant's computer and then also deleted from the computer's recycle bin. Applicant acknowledged that he copied files from his Company A computer to the 100 GB hard drive.

At his remand hearing, Applicant stated that he had copied Company A material onto the 100 GB hard drive to leave for the individual (his former deputy) he believed would succeed him at Company A. The list of items Applicant returned to Company A when he left contains no mention of a 100 GB drive. The former deputy stated that he already had all the information he needed in order to assume duties as Applicant's successor, and he had no need for any Company A information that might have been placed on the 100 GB drive. The former deputy also stated that he never received the 100 GB hard drive. Applicant was unable to account for the whereabouts of the 100 GB hard drive.

At the trial, it was alleged and established that the materials copied to the 100 GB drive included Company A's proprietary information and trade secrets. It was also alleged and established that Applicant and the current and former employees of Company A and its predecessor company who went to work for Company B formed a group who planned to use information taken from Company A in order to compete for a lucrative government contract previously held by Company A.

The civil trial jury found Applicant liable for breach of fiduciary duty, breach of the non-disclosure agreement, violation of the State Computer Crimes Act, violation of the State Business Conspiracy Act, civil conspiracy, misappropriation of trade secrets, and for conversion.

After considering motions by both sides, the judge entered an order of final judgment. This order directed (1) Applicant and co-defendants to pay over \$12,000,000 for violations of the State Business Conspiracy Act;<sup>2</sup> (2) Applicant to pay \$350,000 in punitive damages; and (3) Applicant and co-defendants to pay over \$1,400,000 in attorney fees.

Applicant and co-defendants filed an appeal to the a higher state court. The appeal lists five assignments of error, all relating to the amount of damages and to evidentiary matters at the trial pertaining to damages. Liability was not raised on appeal. The State Supreme Court ruled in these matters in June 2012. It held that Company A's evidence was insufficient to support an award of lost goodwill damages. It upheld the trial court's awards of trebled and punitive damages in favor of Company A.

At his remand hearing, Applicant acknowledged that he had been found liable by the jury in his trial, but stated that he didn't do any conversion and that he didn't do anything. He stated that he didn't move documents to Company B, and that the computer drive he took with him was his own personal drive. He indicated that everything he did at Company A was to further the job, and his

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<sup>2</sup>The court entered judgment against Applicant and his colleagues based on all of the claims found against them. However, the court concluded that the damages were duplicative. Accordingly, she fixed the damages based on the State Business Conspiracy Act claim. Final Order, included in Government Exhibit (GE) 2, Answers to Interrogatories.

moving of documents to the 100 GB hard drive was to help the program office at Company A. He stated that he didn't conspire with anybody and he didn't poach people.

In the Analysis, the Judge concluded that Applicant's conduct raised security concerns as the civil trial jury found against Applicant on the following claims: breach of fiduciary duty; breach of contract; violation of a state computer crimes act; violation, in concert with other defendants, of a state business conspiracy act; civil conspiracy, in concert with other defendants; misappropriation of trade secrets; and conversion. She concluded that Applicant's personal conduct, which involved failure to follow rules and regulations for safeguarding his employer's trusted information, was not minor, so remote in time, so infrequent, or occurred under such unique circumstances that it was unlikely to recur and therefore did not cast doubt on his reliability, trustworthiness, or good judgment. Therefore, mitigating condition ¶ 17(c)<sup>3</sup> does not apply. The Judge concluded that Applicant failed to demonstrate that he understood the gravity of the conduct for which the jury found him responsible. He repeatedly insisted he had done nothing wrong, and he failed to demonstrate that he understood what had caused his unreliable conduct. He was unable to ensure that such behavior was unlikely to recur. Therefore, mitigating condition ¶ 17(d)<sup>4</sup> does not apply. The Judge noted that Applicant joined with others to misappropriate his employer's proprietary and trade secret information. He participated in activities to encourage other employees of Company A to accept employment with Company B. Applicant's reason for copying hundreds of files containing proprietary and trade secret information from his Company A computer to a 100 GB hard drive was not credible. The Judge finally concluded that Applicant failed to mitigate the security concerns arising under the personal conduct adjudicative guideline.

## **Discussion**

Applicant challenges the Judge's finding that he insisted that he had done nothing wrong. Applicant asserts that he clearly accepted responsibility for the very unique situation that occurred to the extent that he could. Applicant states that he has been clear that he understood the significance of the underlying civil litigation, and that he would have handled the issues differently in the future. Applicant states that in a civil action of the type he was involved in, it would be impossible to be able to admit and express remorse for the exact misconduct found by the jury because the specific misconduct was not defined by the jury. Applicant has not demonstrated error on the part of the Judge. Neither the record nor the jury's findings are as vague as Applicant's appeal argument suggests. The expanded evidentiary record developed on remand included evidence of Applicant's specific conduct. Contrary to Applicant's assertions, it also contained jury findings that, when considered along with record evidence developed at trial, are specific as to what actionable conduct Applicant engaged in. These facts, with Applicant's testimony at the remand

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<sup>3</sup>[T]he offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.[.]”

<sup>4</sup>[T]he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]”

hearing, provide a reasonable basis for the Judge's conclusion that Applicant continues to assert his lack of culpability for the conduct that was the subject of the jury verdict against him. The Judge cites to specific parts of Applicant's testimony during the remand hearing wherein he denied doing some of the things that provided the basis for the jury's rulings.<sup>5</sup> Applicant's disagreement with the Judge's weighing of the evidence, or his 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).

Applicant argues that the Judge made erroneous factual findings regarding Applicant's involvement with the 100 GB hard drive. He noted that the Judge found that he attached a 100 GB hard drive to his company computer and copied hundreds of company files to that external drive, and that the Judge did not accept Applicant's explanation for what he did with the 100 GB hard drive, nor did she accept Applicant's theory that he had no nefarious purpose in downloading the documents.<sup>6</sup> After a review of the record evidence, the Board concludes that the Judge's finding is reasonably supported by that evidence. Applicant's appeal arguments on this point essentially set forth his version of the record evidence, which is not sufficient to demonstrate error. The Judge's findings regarding the 100 GB hard drive are based in part on an assessment of Applicant's credibility. An appealing party has a heavy burden to demonstrate that a Judge's credibility determination is unsustainable in light of all the contrary record evidence. *See, e.g.*, ISCR Case No. 00-0417 at 3 (App. Bd. May 1, 2001). The Board concludes that the Judge's assessment of the credibility of Applicant's explanations regarding the 100 GB hard drive is sustainable.

Applicant asserts that the Judge erred in not applying mitigating condition ¶17(c) in Applicant's favor. He states that the circumstances of this case all involve a single civil action and that the issues raised happened only once, were extremely rare, and were highly unlikely to ever occur again. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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). In her decision the Judge specifically concluded that the conduct was not minor and was not remote in time. These two elements are included in ¶17(c) as well as any considerations of frequency or uniqueness. The Judge's conclusion that these two elements are absent is sustainable and the record supports her conclusion that Applicant's conduct was not infrequent and did not occur under such unique circumstances as to overcome the government's security concerns. Applicant has not established error.<sup>7</sup>

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<sup>5</sup>Tr. 2 at 137 cited in Remand Decision at 10.

<sup>6</sup>The Judge specifically rejected Applicant's explanation that he left the 100 GB hard drive at Company A when he departed the company so that his successor could use the company information to carry out his duties.

<sup>7</sup>Applicant asserts that ¶17(d) should have applied to the case, but he does not provide any independent argument regarding that mitigating condition, choosing instead to focus his arguments under ¶17(c) and ¶17(f). An appealing party must set forth its claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0429 at 2 (App. Bd. Jul.

Applicant argues that the Judge should have considered mitigating condition ¶17(f)<sup>8</sup> when deciding the case. He states that the allegations in the civil trial came from Company A and its personnel, and as a result of the trial, Company A was found civilly liable with respect to making a false statement. It is true that Company A was found liable for defamation and was ordered to pay Applicant compensatory and punitive damages. The nature of the defamation was the publication by Company A of statements regarding purported DoD investigations of Company B and Company B personnel. The defamation count was but one count in a civil action comprised of dozens of counts. The defamation issue was ancillary to the main thrust of the case and arose out of facts occurring after the actions for which Applicant was found liable. Despite being found liable in a single defamation count, Company A was also the source of the evidence that led to the jury verdict against Applicant and others on multiple counts. The jury verdict was approved by the trial judge and was not challenged on appeal. Under these circumstances, the Board concludes that the Judge was not required, as a matter of law, to apply ¶17(f), or to conclude that a winning plaintiff in a large and complex civil lawsuit was a “questionable source.”

Applicant asserts that lost in the Judge’s whole-person analysis is any balancing of a dedicated public servant’s career over a long period of time, against a one-time civil action. Applicant points to his lifetime of access and protection of highly classified information, and recites the many accolades he received from colleagues and acquaintances, who noted his skill, honesty, and integrity. Applicant’s history of achievement and his favorable reputation was evidence that the Judge was required to consider. Central to the Judge’s analysis under the whole-person concept was the seriousness of Applicant’s misconduct and the fact that, while he denied any wrongdoing, Applicant failed to rebut the allegations against him. The Judge’s whole-person analysis is sustainable on this record.

We examine a Judge’s findings to see if they are supported by substantial record evidence, that is, “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. *See* ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012). 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.

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9, 2001). Therefore the Board will not consider whether ¶17(d) should have been applied in the case.

<sup>8</sup> “[T]he information was unsubstantiated or from a source of questionable reliability[.]”

**Order**

The Judge's remand decision is **AFFIRMED**.

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

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

**Concurring Opinion of Administrative Judge James E. Moody**

In my view, the Judge's original adverse Decision was affirmable. There is nothing in the Remand Decision to change my opinion, insofar as it describes even more extensive misconduct than was apparent from the Judge's original findings of fact. The adverse conclusions in the Remand Decision concerning mitigation are supportable.

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