

KEYWORD: Guideline K; Guideline E

DIGEST: Criminal investigation report was properly admitted as an official record. Even though documents in question were not classified, as alleged in the SOR, they were sensitive and, as such, within the scope of Guideline K. A SOR is required to place an applicant on reasonable notice of the allegations against him. It does not have to satisfy the strict requirements of a criminal indictment. In this case, Applicant’s failure to secure sensitive documents and his failure to report the incident were sufficiently alleged in the SOR so as to place him on notice. Adverse decision affirmed.

CASE NO: 11-05079.a1

DATE: 06/06/2012

DATE: June 6, 2012

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**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 September 12, 2011, DOHA 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2012, after the

hearing, Administrative Judge Elizabeth M. Matchinski 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 issues on appeal: (1) whether the Judge erred in admitting documentary evidence over Applicant's objection; (2) whether the Judge's conclusions under Guideline K are supported by the record evidence; (3) whether the Judge's conclusions under Guideline E are supported by the record evidence; and (4) whether the Judge's conclusions under the whole-person concept are supported by the record evidence. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 35 years old. In June 2004, while on active duty with the U.S. military, he was serving as a counterintelligence/human intelligence specialist in a Middle Eastern country. His duties included conducting vulnerability assessments. Applicant kept separate notebooks for each assignment in which he recorded his observations, usually in shorthand, and he did not conspicuously mark or date them. Notes were not secured, because, according to Applicant, they were unclassified unless combined with information regarding terrorist techniques and procedures. One evening during June 2004, Applicant met a Russian woman in a bar. After consuming seven or eight alcoholic drinks, he invited the woman to his hotel room. While there they engaged in consensual sex. At one point, Applicant went to the bathroom and left the woman alone and unsupervised. The following morning, after the woman had left the room, Applicant discovered he was missing the notebook that he used to take notes regarding his vulnerability assessments. At the time, the notebook contained his sensitive observations relating to threat vulnerabilities of U.S. facilities in the area. He suspected that it had been stolen by the Russian woman. Applicant did not report the incident to any U.S. Government or military authorities.

In 2008, after being discharged from the military, Applicant pursued civilian employment. His new employer sponsored him for SCI access. In January 2009, during a polygraph examination related to his security clearance, Applicant revealed, for the first time, the events involving the loss of his notebook in 2004. Applicant admitted to the polygraph examiner that the information in the notebook was considered classified Secret when compiled in a report, and he had not reported the incident to anyone because he was embarrassed that it happened. Applicant acknowledged that even though he was not certain that his notebook had been stolen by the foreigner, he knew that he had lost sensitive information, and that he should have reported the incident to ensure a timely damage assessment of the material lost. In February 2009, Applicant's TS/SCI access was apparently suspended, and he was terminated from his employment because he was denied access to the defense agency's facilities.

Applicant is known to be a conscientious, knowledgeable professional by those persons who had the opportunity to observe his performance at various times during his career.

The Judge reached the following conclusions: Applicant acknowledged that the classification level of the information in his notebook, when reported in his final vulnerability assessment, was at the level of "Secret." However, it does not necessarily follow that the notes of

his personal observations were classified without reference to other data. As to whether the notes themselves were classified in and of themselves without reference to other data, the evidence is inconclusive at best. Notes were treated like other, non-classified personal information, and left in hotel rooms during downtime. Without proof that the notebook and the notes in it were classified in and of themselves, it had not been established that Applicant violated the Navy Security Program Regulation provisions cited in the SOR.

Likewise, Applicant's failure to report the loss of the notebook, without proof that it contained classified as opposed to sensitive information, does not fall within the reporting requirements of the Navy Security Program Regulation provision cited in the SOR. That being said, Applicant clearly understood that he should have reported the loss of his notebook to minimize the risks of sensitive information being disclosed to unauthorized persons. Applicant was negligent in failing to adequately protect his sensitive notes, and his failure to report the loss of that sensitive information was deliberate. Guideline K security concerns are not restricted to classified information. It does not take counterintelligence training to appreciate the security risk presented by a rendezvous with a Russian woman about whom he knew little, if anything, while he was under the influence of alcohol and in a foreign locale. Applicant admitted that he should have reported the loss to a counterintelligence officer, who would have likely referred the matter to a counterintelligence division. The fact that Applicant did not report the June 2004 loss until a CI polygraph interview in January 2009 is further evidence that he knew that he had violated a command rule or practice, if not a specific regulation, concerning proper control of sensitive information. By virtue of his TS/SCI access, Applicant had an individual responsibility to report to his cognizant security officer any activities or conduct related to the security guidelines, including foreign influence or close associations with foreign nationals, which could conflict with his ability to protect classified information from unauthorized disclosure or counterintelligence threats.

To the extent that AG ¶ 34(g)<sup>1</sup> applies, AG ¶ 35(a)<sup>2</sup> is the only Guideline K mitigating condition possibly pertinent. Applicant handled highly classified material for most of his military career, and there is no evidence of any inappropriate handling of classified or sensitive information apart from the incident at issue. Nonetheless, his failure to report the loss of sensitive information for over four years precludes a conclusion that it happened so long ago or was so infrequent to no longer cast doubt on his reliability, trustworthiness, or good judgment. Reform is not sufficiently demonstrated where he continues to rationalize or justify his failure to report the loss or suspected loss of sensitive information. But even if Guideline K is not firmly established because the government failed to prove a violation of the Navy Information Security Program Regulations, the conduct bears negative implications for his judgment under Guideline E.

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<sup>1</sup>“[A]ny failure to comply with rules for the protection of classified or other sensitive information[.]”

<sup>2</sup>“[S]o much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]”

Under Guideline E, Applicant exercised very poor judgment within AG ¶ 15<sup>3</sup> by leaving sensitive information unattended when a foreign national, about whom he knew little, had uncontrolled access. Suspecting that the foreign national had taken the notebook, Applicant chose not to report the loss because he wanted to avoid personal embarrassment, if not censure, for conduct inconsistent with the sound judgment expected of someone in his position. The government established its case under AG ¶ 16(e).<sup>4</sup> Furthermore, whether he was intoxicated or only “slightly buzzed,” Applicant showed poor judgment in consuming seven or eight alcohol drinks and then becoming involved with a foreign national, who was essentially a stranger to him, while he was on a CI assignment for the U.S. military. When considered with his failure to timely report the loss of the notebook, AG ¶ 16(c)<sup>5</sup> is also pertinent. As for potentially mitigating conditions, AG ¶ 17(a)<sup>6</sup> cannot reasonably be applied, in light of Applicant’s failure to report the loss of the notebook before the January 2009 polygraph. AG ¶17(c)<sup>7</sup> also is not pertinent. Although Applicant has mitigated his vulnerability somewhat, it does not completely eliminate the extremely poor judgment he displayed in June 2004 and compounded by his failure to disclose the loss of the notebook for over four years.

Under the whole-person concept, Applicant was a knowledgeable professional who carried out his duties with dedication, as his character references attest. At the same time, this expertise makes it especially difficult to mitigate the poor judgment he exhibited in June 2004. Alcohol may well have been a significant factor in him letting down his guard with the Russian female, but it was not a factor in his failure to report the loss of the notebook.

As a threshold issue, Applicant argues that the Judge committed error by introducing certain documentary evidence offered by Department Counsel over his objection. Government Exhibit 3 was a Naval Criminal Investigative Service Investigation. Applicant first states that this exhibit was obtained through himself when he willingly supplied it as part of the process for clearance

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<sup>3</sup>“Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”

<sup>4</sup>“[P]ersonal conduct or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing.”

<sup>5</sup>“[C]redible 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.”

<sup>6</sup>“[T]he individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.”

<sup>7</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.”

adjudication. He then states that the government has not shown any evidence of attempting to obtain any evidence from other government agencies when it was clearly within their ability to do so. Applicant then states that the Judge erroneously admitted the document since it was not authenticated. Applicant's arguments do not establish error on the part of the Judge.

Applicant does not articulate how the source of the evidence is a matter of legal significance. Neither does he state with any specificity a theory as to how the fact that the evidence was obtained from him provides a basis for excluding the documents in question. Regarding authentication, Directive ¶ E3.1.20 provides that official records created in the regular course of business, other than those created or compiled in DoD personnel background reports of investigation, may be received and considered by the Administrative Judge without an authenticating witness. The document in question is not a DoD personnel background report of investigation requiring authentication. Moreover, since the vast bulk of the evidence contained in the exhibit derives from Applicant himself, any concerns about a right of cross-examination or confrontation are largely irrelevant. Applicant cites to several perceived administrative irregularities in the polygraph process again without establishing how any irregularities, if established, render the exhibit inadmissible. Without clearly stating that the document in question contains inaccuracies, Applicant complains that the matters he wrote about in the document were coerced and impossible for the government to prove. Applicant provides no details as to how he was coerced or in what respect the document contains false or incorrect information. Regarding the claim of coercion, there is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 07-18065 at 2 (App. Bd. Nov. 18, 2008). Applicant has failed to overcome this presumption. Furthermore, the exclusionary rule does not apply in DOHA proceedings. *See, e.g.*, ISCR Case No. 02-12199 at fn 7 (App. Bd. Aug. 8, 2005). The Judge did not err by admitting Government Exhibit 3.

Applicant argues that the Judge's decision contains a clear error of law in that it found a violation of Guideline K despite also finding that he did not violate any rules or regulations concerning the handling of classified or sensitive information. Applicant states that the Judge's application of Guideline K, which on its face cannot be violated unless there is an express finding that Applicant failed to comply with some rule or regulation, was arbitrary and capricious. He asserts that, in a departure from the plain language of Guideline K, the Judge's decision found a violation of Guideline K based on the fact that the information in his notebook was sensitive (as opposed to classified) and that Guideline K somehow imposes an obligation to protect, or report the loss of, such sensitive information.

Applicant's arguments correctly note that Department Counsel did not establish its case under the SOR as written. After a careful consideration of the evidence, some of which was inconclusive, the Judge concluded that Applicant's entries in his notebook, standing alone, were sensitive in nature but did not rise to the level of classified information. The Judge found that the four specific provisions of the Navy Information Security Program Regulation cited in the SOR pertained only to classified information. The mere fact that Department Counsel did not produce substantial evidence to establish the allegations set forth in the SOR to the letter does not end the inquiry, however. Rather, the question becomes, did Department Counsel produce substantial

evidence of security significant conduct as described under Guideline K, notwithstanding the failure to establish every factual allegation listed thereunder.

Applicant states that Guideline K itself does not prohibit the loss of classified or sensitive information, but rather is triggered only where there has been a violation of a rule or regulation concerning such information. Applicant's assertion that a case against him under Guideline K can only be established by a showing that he violated a specific rule or regulation relies on an interpretation of Guideline K that is too narrow. Facially, the language and stated scope of Guideline K do not lend themselves to the restricted interpretation proffered by Applicant. By its plain language, Guideline K acknowledges the need to protect sensitive as well as classified information, notwithstanding the fact that many more rules and regulations have been promulgated to govern the handling of the latter as opposed to the former. Much conduct that is antithetical to the protection of classified or sensitive information may not be contemplated by specific rules or regulations. It need not be. Security significant conduct may be ascertained through the application of common sense with reference to the broad, overall goal of protecting such information. *See* ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008)(In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security).

Applicant's complaint that the Judge assumed that Guideline K imposes a general prohibition against the loss of sensitive information is misplaced. The Adjudicative Guidelines are not criminal statutes. The Judge's reading of the Guideline recognizes that it is designed, in part, to address culpable conduct that results in the loss of classified or sensitive information irrespective of whether the conduct is covered by specific rules and regulations. Such a reading is fair and reasonable. While Judges do not have unfettered discretion in this area, and the facts and circumstances of each individual case must be evaluated, Guideline K should be interpreted broadly to further the government's interest in protecting classified and sensitive 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. *See* DISCR Case No. 87-2107 at 7 (App. Bd. Oct. 25, 1990).

In this case, the SOR allegation under Guideline K clearly references Applicant's actions in failing to safeguard notes transcribed by him while on official duties. The gravamen of the case against him is clearly his actions in becoming intoxicated, inviting a Russian woman into his hotel room, failing to secure sensitive notes he had in his possession at the time, and failing to report the loss of said notes to the appropriate authorities. While there was no evidence that a specific rule or regulation was violated, it cannot seriously be argued that the conduct engaged in by Applicant lacked security significance. Applicant hid the conduct for several years. Once the government found out about the incident, Applicant lost his access to classified information. When Applicant disclosed the information, he acknowledged that it was wrong of him not to have disclosed it in a timely fashion. These facts are indicative of a general proscription against Applicant's conduct and provide evidence that the conduct was a significant deviation from accepted standards of conduct. The fact that Department Counsel did not establish a violation of the regulatory provisions

enumerated in the SOR is not dispositive of the issue. The Judge did not err by concluding Department Counsel established its case under Guideline K.

Similarly, Applicant argues that the Judge's findings and conclusions under Guideline E were flawed because the SOR premised the security significant conduct under that Guideline on violations of rules and regulations. He argues that if the government had wanted to proceed generally under Guideline E, it should have made this clear in the SOR. To the extent that Applicant is attacking the legal sufficiency of the Judge's findings and conclusions under Guideline E, for the reasons articulated in the preceding paragraphs, Applicant's assertions do not demonstrate error. Also, Applicant concedes in his brief that an adverse finding under Guideline E does not require a finding that some rule or regulation has been violated.

Applicant maintains that because of the specific wording of the SOR, it did not put him on fair notice that he would need to prepare a defense "based on all of the other factors and conduct that can constitute a Guideline E charge." He states that the alleged violation under Guideline E was based on alleged violations of rules and regulations, and he prepared for, defended himself and prevailed on that very issue. He argues that it was arbitrary and capricious and a clear violation of due process for the government to tell him that it would be proceeding under one theory in order to induce him to focus his defense on that theory, and then for the government to come up with an entirely new theory, which he had no notice he needed to defend, as to why Guideline E was violated. Applicant's arguments in this regard lack merit.

While an applicant is entitled to receive an SOR placing him on reasonable notice of the allegations the government is making against him, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 03-20538 at 2 (App. Bd. Jul. 5, 2006). Nor is an SOR, which pleads facts and relevant portions of the Adjudicative Guidelines, required to indicate what arguments Department Counsel might make at a hearing, or to anticipate every theory that a Judge might utilize to decide a case. The facts in this case are not complicated. They involve only the circumstances surrounding a single incident of lost sensitive information and Applicant's failure to report the loss. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegations being made against him. Furthermore, Applicant does not indicate with any precision precisely how he was hindered from preparing a defense to the allegations. A review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case. Given the SOR allegations against Applicant and the manner in which the hearing was conducted, Applicant was on adequate notice as to the issue of security concern.

Applicant asserts that the Judge did not properly apply the Guideline E mitigating factors or the whole-person concept.<sup>8</sup> He argues that all four prongs of AG ¶ 17(c) are satisfied, principally the passage of time since the incident. He also argues that under the whole-person concept, the 2004 incident is properly viewed as an isolated incident in an otherwise illustrious career. Applicant asserts that these matters should have been weighed more heavily in his favor. The Board does not find error. The Judge acknowledged Applicant's history of successfully handling classified and sensitive information throughout his career, but then concluded that his failure to report the loss of the sensitive information for over four years precluded a finding that it happened so long ago or was so infrequent as to no longer cast doubt on his reliability, trustworthiness, or good judgment. 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). The Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guideline E was not mitigated and why Applicant's evidence had not overcome the government's concerns under the whole-person concept.<sup>9</sup>

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 her 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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<sup>8</sup>Applicant's brief references Guideline K mitigating conditions, but the sole citation (and accompanying discussion) is to AG ¶ 17(c), a Guideline E mitigating condition.

<sup>9</sup>Along these lines, Applicant argues that it was improper for the Judge to hold against him his refusal to accept responsibility for his actions because, he claims, he did so in the context of an "adversarial" proceeding where he was entitled to vigorously defend himself against charges he believed were without merit. Nothing prevented Applicant from "defending" himself in any manner he deemed appropriate. It was, however, well within the Judge's purview to characterize any evidence he chose to present, as long as that characterization was supported by substantial evidence. Moreover, there is evidence in the record indicating that Applicant tended to minimize his conduct during interviews taking place prior to the hearing.



**Order**

The decision of the Judge denying Applicant a security clearance 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

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board