

KEYWORD: Guideline M; Guideline D; Guideline E

DIGEST: The unusual and extensive technical problems with the video-teleconference equipment during the hearing were sufficiently disruptive to have deprived Applicant of his right to a hearing as contemplated by the Directive. Adverse decision remanded.

CASENO: 11-09056.a1

DATE: 10/23/2013

DATE: October 23, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-09056
)	
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 March 15, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Use of Information Technology Systems),

Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 16, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raises the following issues on appeal: (1) whether extensive technical problems with the video teleconference equipment experienced during the hearing resulted in a denial of Applicant's right to a hearing under the Directive; (2) whether the Judge based his decision on evidence that was improperly admitted off the record; and (3) whether the Judge's analysis under the whole-person concept was erroneous. For the following reasons, the Board remands the Judge's decision.

The Judge found: Applicant is 42 years old. Between 2006 and 2009, Applicant accessed the wireless networks of others on several occasions. On some occasions he connected to these networks through no affirmative action on his part. By default his computer would pick up the network of others. There were other occasions, during the same time frame, when Applicant actively penetrated other people's wireless networks by using "tools" to discover the passwords for the network. Once penetrated, he would access the network and check his e-mail and browse the internet. He did not have permission to access these networks. He stated that his reason for accessing these networks was out of curiosity. He admitted that what he did could be considered "hacking."

In February 2011, Applicant filled out his security clearance application and was asked whether he had ever "illegally or without proper authorization entered into any information technology system." He answered "no" to this question. When asked why he did not list this information on his application, he stated that he did not recall the incidents when he was completing the application. This response is not credible inasmuch as the specific topic of Applicant's accessing of other peoples' accounts and his using tools to determine their passwords was addressed in an investigation conducted by another government agency (AGA) in 2010. Applicant also admitted his computer activities when answering interrogatories sent to him by the Government and during his hearing testimony.

The Judge concluded: Although Applicant's actions in "hacking" into other people's wireless network occurred from 2006 to 2009, the reason he gave for doing so (i.e., he was curious to see if he could do it) "shows a lack of good judgment and casts doubt on his reliability and good judgment." Applicant's reliance on forgetfulness as an excuse for not answering the question about unauthorized access to computer systems is not credible. His untruthful answer casts doubt on his reliability, trustworthiness, and good judgment. A consideration of the whole record, including his military service, leads to the conclusion that Applicant failed to meet his burden to mitigate the security concerns.

¹The Judge made formal findings in favor of Applicant under Guideline D and the underlying Guideline D allegation that was cross-referenced under Guideline E. Those findings are not at issue on appeal.

Applicant argues that the entire hearing should have been put off because of unusual, extensive technical problems with the video-teleconference (VTC) equipment and transmission. The Board construes this assertion as a claim by Applicant that the recurrent and lengthy technical problems with the VTC transmission denied him a hearing as provided for in the Directive. Applicant's claim has merit.

Applicant's hearing was conducted by VTC, with the Judge, Department Counsel, and the court reporter in one location, and Applicant in another. The principal technical problem experienced at the hearing was the "freezing" of the video image of the Judge and Department Counsel on the video monitor used by Applicant. The transmission of the images of the Judge and Department Counsel froze into a single, still image on Applicant's end approximately five times during the course of the hearing. Although precise time lapses are impossible to determine from the hearing transcript, some of the periods where Applicant experienced a frozen image appear to have been of significant length.

The problem was first encountered by Applicant on page 14 of the transcript and continuing through page 15, lasting roughly the duration of Department Counsel's opening statement. The Judge stopped the proceedings and went off the record until such time as normal video transmission could be restored. Applicant noted a second "freezing" of the image on page 31 of the transcript which took place during Applicant's testimony in his case in chief. The frozen image remained until page 33 of the transcript, where it apparently self-corrected. On page 37 of the transcript the Judge reported that the transmission from the Applicant had frozen, but it had come back.² At the same time, Applicant told the Judge that he had "completely lost" the video and the equipment "was asking" to please wait on the video.³ A technician stationed with Applicant informed the hearing participants that he would have to "dial back in." The Judge went off the record a second time so that this could be accomplished. The Judge went back on the record and Applicant's video image of the proceedings froze again on page 38 of the transcript. At that point the Judge indicated his desire to keep going. Applicant indicated on page 44 that the video image was still frozen. Thereupon, the loss of a normal video transmission confused Applicant during a pause where the Judge was reading a document. Applicant thought he had lost the audio transmission. On page 50, Applicant indicated that he had completely lost the video again. There is no indication from the transcript as to whether a normal image had been restored between pages 44 and 50. From page 50 until the end of the hearing at page 76, there is no indication that normal video transmission had been restored. Applicant made a comment that he had momentarily lost audio transmission on page 55 of the transcript.

The transcript indicates that there were multiple disruptions in the flow of the hearing owing to technical difficulties with the video transmission and, to a lesser degree, the audio transmission.

²The Judge did not indicate the duration of the problem. Also, he did not indicate whether it was the audio or video portion of the transmission that had frozen.

³Applicant does not specify whether this was another instance of the frozen image problem, or whether he lost the video transmission altogether.

At least one of the comments on the record concerning problems with the audio transmission may have been the result of confusion on the part of Applicant brought on by the fact that he was unable to observe the Judge and Department Counsel as they were speaking. Hence, pauses were apparently interpreted by Applicant as a loss in audio transmission. While it appears that the transmission of Applicant's image to the Judge and Department Counsel was not significantly affected by the ongoing technical problems, Applicant was required to respond to questions and to narrate testimony to a frozen image for significant portion of the proceedings. Although it is difficult to determine what effect the problems had on Applicant's ability to present his case, it is clear that the extensive transmission issues were disruptive and that Applicant was confused at times as to what was going on (interpreting pauses as a possible breakdown in audio transmission). The Board concludes that because of the numerous, ongoing problems with the VTC transmission, the fact that they significantly disrupted the progress of the hearing, and the fact that they continued unabated throughout much of the course of the hearing, Applicant was deprived of his right to a hearing as contemplated by the Directive. This conclusion is bolstered by the fact that the transcript does not clearly indicate the duration of the some of the periods where Applicant experienced the frozen image. It is possible that very large portions of the hearing were affected by the video transmission problem.⁴

The Board concludes that the appropriate resolution to what can properly be characterized as unusual and major problems with the VTC transmission during the course of the hearing is to remand the case to the Judge for a new hearing and decision. Given this posture, the Board need not address the other issues raised by Applicant.

⁴Applicant indicated that he had lost normal video transmission on page 50 of the transcript. From that point until the hearing concluded on page 76 of the transcript, there is no indication (a statement from any of the hearing participants) that normal video transmission was restored. On pages 55-56 of the transcript, the Judge told Applicant, "there's silence on this end, just so you know." In reply, Applicant stated, "Yes, sir. I can actually hear papers rustling, so that does help." These references to audio clues strongly indicate that the video frozen image problem continued until at least page 56 of the transcript.

Order

The decision of the Judge is REMANDED.

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