KEYWORD: Guideline E

DIGEST: The Judge erred in failing to address this evidence that undercuts his mitigation analysis. A security clearance decision must be based not just on the favorable evidence but on consideration of the evidence as a whole. Favorable Decision is Reversed.

CASE NO: 19-01911.a1

DATE: 11/04/2020

DATE: November 4, 2020

In Re:	)	
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Applicant for Security Clearance	)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Adrienne Driskill, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 31, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 23, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuider 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 issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law because it failed to consider important aspects of the case and was unsupported by a reasonable reading of the record evidence as whole. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant has held a security clearance since 2010. The sole SOR allegation asserted that, from December 2016 to June 2019, Applicant was a member of a motorcycle club (Club A) through which he associated with persons involved in criminal activity. Applicant's state (State A) defined Club A as a criminal street gang. The Federal Government identified Club A as the official support club of another motorcycle club (Club B), which State A defined as an "outlaw motorcycle gang" (OMG). In responding to the SOR, Applicant admitted this allegation with an explanation.

Applicant and four or five friends formed Club A, which was a local chapter of an existing motorcycle club. He affiliated with it because he enjoyed riding motorcycles and fraternizing with individuals with the same interests. At the time he joined Club A, he was not aware that law enforcement authorities considered it an OMG. No evidence was submitted to establish that Applicant or any member of his local chapter of Club A engaged in any criminal activity.

In June 2018, local law enforcement authorities informed Applicant's Facility Security Officer (FSO) that Applicant was member of Club A. During an interview with the FSO, Applicant acknowledged being a member of Club A but denied engaging in any criminal activity. The FSO advised Applicant to disassociate with Club A because his continued membership could adversely effect his security clearance eligibility.

In May 2019, Applicant underwent a security clearance background interview. As a result of that interview, Applicant had a better understanding of the Government's concerns arising from his membership in Club A. He advised the investigator that he needed to resign from Club A.

In June 2019, Applicant emailed the FSO advising that he had disassociated himself from Club A. In early July 2019, Applicant's clearance was suspended, and he was placed on a leave of absence. The FSO requested that Applicant be allowed to return to work performing duties not requiring a clearance. The base commander approved that request. Shortly thereafter, the SOR was issued.

At the hearing, Department Counsel called a witness from a Federal agency who was an expert on OMGs. The expert witness "provided extensive testimony about Clubs A and B and motorcycle clubs in general. [He] did not have any knowledge of criminal activity of Club A in the state where Applicant lived nor did he have any knowledge of Applicant personally being involved in any criminal activity." [Decision at 4.]

Applicant submitted character letters from coworkers, friends, and family members. They attested to his dependability and good character. They also asserted that Applicant was not a security risk.

The Judge's Analysis

Security concerns in this case arise under Adjudicative Guideline (AG) ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ;" and AG ¶ 16(g), "association with persons involved in criminal activity."

"Applicant testified credibly that he was not aware that Club A was regarded as an OMG or one engaged in criminal activity. However, he was also on notice as of June 2018 that his ongoing membership in Club A was a security concern, yet, at least for the time being, his membership continued." Decision at 7. While there is evidence that Clubs A and B participated in criminal activity in other states, there is no evidence that Applicant or any members of his local chapter engaged in such activity. It is noteworthy that, after Applicant was placed on a leave of absence, the base commander approved a request for him to return to work performing duties not requiring a security clearance. Applicant's character evidence also deserves considerable weight. In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. 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

national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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, e.g.,* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel contends the Judge erred in failing to address adequately the key issue in this case, *i.e.*, whether Applicant's association with individuals involved in criminal activity raised concerns about his judgment, reliability, and trustworthiness. This contention is persuasive. She argues the Judge's decision primarily focused on the lack of evidence of Applicant engaging in criminal activity but only perfunctorily addressed his association with members of Clubs A and B.

In her arguments, Department Counsel asserts the Judge failed to consider important evidence. We agree and note the following evidence drawn from the record:

> 1. Club A is a nationwide club. When he initially became a member of Club A, Applicant was aware of Club A's association with Club B. He noted one of the founding members of Club A reached out to a member of Club B and, through that association, Club A was established. Tr. at 70 and 89-90 and Government Exhibit (GE) 3 at 7
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> 2. The expert witness testified that local chapters of Club A did not have "any type of mother chapter" but instead report to the local chapter of Club B. Tr. at 47-48.
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> 3. Upon being asked when he first realized Club B was considered an OMG, Applicant responded, "I knew that [Club B was] considered that." However, he indicated that he was not aware that Club A's affiliation with Club B would result in Club A being treated as an OMG. Of specific interest was his remark, "I did not know that [Club A was] considered that because [Club A is] not a one-percenter club, so I was not aware that [Club A] would basically be treated as [Club B].[1] Tr. at 75 and GE 3 at 8.
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> 4. While a member of Club A, Applicant participated in club activities at least once a week. This included visiting out-of-town and out-of-state chapters. He stated,

[1] "The American Motorcycle Association spokesman stated that 99 percent of the motorcycle public was comprised of honest, law-abiding citizens, and that only one percent constituted troublemakers. OMGs took pride in the reference and adopted 1% as its symbol . . . ." GE 9 at 22.

"And the best way to get to know them is just to . . . see 'em -- do a visit, hang out -- and then there's been time where I've rode a thousand miles and then turned around the next day and rode a thousand miles back." Tr. at 72-73 and GE 3 at 7.

5. When asked whether he was ever aware of other members of Club A participating in criminal activity, Applicant testified, "I was not, and that is one thing where -- I guess the best way to say it is if it's known that you are not someone who wants or is involved in any way or desire to make criminal activity, you don't get asked to commit criminal activity." Tr. at 73.

6. In addressing why he became a member of Club A, Applicant indicated he was not lured into the club by criminal activity but stated, "I do know and understand the history of motorcycle clubs and some of the bad things that have happened." Tr. at 69.

7. Applicant associated with members of Club B about once a month on average. Tr. at 74.

8. When asked whether he was aware of any criminal activity perpetrated by Club B members, Applicant testified, "My only knowledge, to be honest, is things that you see on , you know, documentaries -- Gangland, stuff like that -- but actual personal knowledge that I have been aware of that isn't public information, none." Tr. at 74-75.

9. Applicant did not disclose his association with Club A to his FSO until she confronted him about it. Tr. at 77 and GE 2 at 2.

10. The expert witness testified that OMGs are sophisticated, hierarchical, military-style organizations that engaged in a wide variety of serious criminal activities. Tr. at 25-26 and GE 6-9.

11. The expert witness stated Clubs A and B were "in cahoots together" and Club A's "primary role is to do whatever they're told." In describing chapters of Club A, he stated, "they're definitely not a social club" and "adhere to whatever rules are brought down by [Club B] on them." In general, he noted that members of Club A engage in criminal activity for or with members of Club B. Tr. at 39-40, 47-49.

12. The expert witness stated a support club is a "feeder system" for recruiting members into the dominant club. Support clubs usually wear the same color scheme as the dominant club and wear tabs and patches showing support of the dominant club. Tr. at 37-40.

> 13. Applicant testified that he did not aspire to become a member of Club B "because [he] knew of the potential issues that it could have with [his] job." Tr. at 92-93.
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> 14. While no longer is a member of Club A, Applicant testified that he still occasionally associates with members of Club A. He noted that it was hard not to run into them in their town. They have mutual friends and sometimes they met at a kid's birthday party. Tr. at 85-86.

The Judge erred in failing to address this evidence that undercuts his mitigation analysis. A security clearance decision must be based not just on the favorable evidence but on consideration of the evidence as a whole. *See, e.g.*, ISCR Case No. 94-1109 at 4 (App. Bd. Jan. 31, 1996).

The above listed evidence establishes that Applicant was aware when he became a member of Club A that it was affiliated with Club B; that he knew Club B was an OMG; that he understood the history of motorcycle clubs; that he had a generalized knowledge of Club B's criminal activities; that he knew of "some of the bad things that have happened[;]" that he participated weekly in Club A activities and associated monthly with Club B members; and that he visited other chapters of these clubs, including in other states. Applicant knew that becoming a member of Club B could potentially cause him to lose his job, yet he continued to associate routinely with members of that club. Additionally, as Department Counsel highlights, Applicant's statement "if it's known that you are not someone who wants or is involved in any way or desire to make criminal activity, you don't get asked to commit criminal activity" shows he was aware that these clubs were involved in criminal activity because otherwise he would not have had the knowledge needed to make such a statement. This latter statement also undermines the Judge's conclusion that Applicant testified credibly he was not aware of Club A was engaged in criminal activity. In short, Applicant's association with members of Clubs A and B raised security concerns about his judgment, reliability, and trustworthiness that the Judge did not adequately address.

For about 17 months, Applicant associated with individuals involved in criminal activity without notifying his FSO. Even after his FSO confronted him, placed him on notice that his membership in Club A created potential security concerns, and advised him to disassociate with that club in June 2018, Applicant continued his membership in that club for another year. It was only after his background interview in May 2019, when he purportedly realized his continued membership placed his security clearance and job in jeopardy, that he disassociated himself from the club in June 2019. As the Appeal Board has previously stated, the timing of an applicant's corrective action is a relevant factor to consider in evaluating its mitigative value. An applicant who takes action to resolve security concerns only after having been placed on notice that his or her clearance is in jeopardy may lack the judgment and willingness to follow rules and regulations when his or her personal interests are not threatened. *See, e.g.*, ISCR Case No. 17-01256 at 5 (App. Bd. Aug. 3, 2018). At the time the record close, Applicant had only disassociated himself from Club A for approximately seven months and still continued to have some contact with its members.

Based on our review of the record, we conclude that the Judge's decision is arbitrary and capricious because it fails to consider important aspects of the case and runs contrary to the weight of the record evidence. The Judge's decision is not sustainable. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

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

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board