



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: February 13, 2024

<p>In the matter of:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 20-02097</p>
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel
 Andrea Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Christopher Snowden Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 22, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 16, 2023, after the record closed, Defense Office of Hearings and Appeals Judge Richard A. Cefola denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline E, the SOR alleged that Applicant was terminated by a prior employer and that he falsified certain information in his security clearance investigation. Under Guideline I, the SOR alleged that a licensed psychologist determined that Applicant “met criteria for Other specified personality disorder, mixed personality features.” The Judge found that Applicant had mitigated the concerns under Guideline E but failed to mitigate the concern under Guideline I. On appeal, Applicant raised the following issue: whether the Judge’s adverse conclusion under

Guideline I and his whole-person analysis are unsupported by the record evidence and thus arbitrary, capricious, and contrary to law. Consistent with the following, we remand.

Judge's Findings of Fact and Analysis

The Judge's Guideline I factual findings are sparse and are quoted below:

Applicant is 58 years old, unmarried, and has no children. He has a Bachelor of Science degree. He has worked for a defense contractor since October of 2018. Applicant was honorably discharged from the [military] in June of 1989. (TR at page 124 lines 11 ~25, and AppX X.)

Guideline I - Psychological Conditions

1.a. Applicant was evaluated by a duly qualified mental health professional (as stipulated to by Applicant's Counsel) on June 30, 2022, with a brief follow-up interview on June 26, 2022. This psychologist, who testified at length at Applicant's hearing, determined that Applicant met the criteria for Other Specified Personality Disorder, Mixed Personality Features. The psychologist noted that Applicant exhibited a lack of candor regarding his personal history, with a high level of defensiveness, and an exaggerated response to perceived threats throughout his evaluation process. He also noted that he was unable to complete the second interview due to Applicant's defensive, redundant, and non-responsive statements. The psychologist opined that this conduct indicated a deficit in Applicant's judgment that may impair his ability to safeguard classified information. [Decision at 2 (internal citations omitted).]

The Judge's substantive analysis of the disqualifying evidence was limited to the following:

The guideline at AG ¶ 28 contains five conditions that could raise a security concern and may be disqualifying. One condition was established:

(a) opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness.

Applicant has been so evaluated by a duly qualified mental health professional. [Decision at 5.]

The Judge's substantive analysis of the Guideline I Mitigating Conditions is quoted below, in its entirety:

None of these apply. At his hearing, Applicant's unfavorable mental health evaluation was reaffirmed. Therefore, Psychological Conditions is found against Applicant. [Decision at 6.]

The Judge's conclusory whole-person analysis simply stated:

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For this reason, I conclude Applicant failed to mitigate the security concerns arising from his Psychological Conditions. [Decision at 7.]

Discussion

A judge is required to "examine the relevant data and articulate 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b). The Appeal Board may reverse a judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, 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. 97-0184 at 5, n.3 (App. Bd. Jun. 16, 1998). This decision fails in at least two regards.

Failure to Examine Relevant Evidence and to Consider Important Aspects of the Case

Applicant argues that the Judge "failed to consider [Applicant's] favorable employment history (including references, evaluations, awards, recognitions, etc.), failed to resolve contradictions in the DoD Psychologist's opinion, and failed to analyze all the evidence." Appeal Brief at 3. This argument has some merit.

Guideline I Disqualifying Condition AG ¶ 28(b) provides disqualification through an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness. In this instance, the Government's witness, Dr. S., was of the opinion that Applicant's "other specified personality disorder, mixed personality features" diagnosis resulted in such an impairment. Government Exhibit 4; Tr. at 39-42. Applicant presented no expert witness testimony or any mental health evaluations to rebut the personality disorder diagnosis or Dr. S.'s opinion based thereon. Therefore, although the Judge did not specifically discuss the facts relative to the Guidelines, when read in the context of the specific diagnosis and testimony of Dr. S., the conclusion that there was substantial evidence under AG ¶ 28(b) is uncontroverted and supported by the facts. The analysis, however, does not end there. A judge also must consider facts that may mitigate this concern. The Judge failed to do so in this case.

Applicant argues that Dr. S. should not have concluded that Applicant's mental health condition adversely impacts his judgment because he has exercised good workplace judgment in the past, which *potentially* raises Mitigating Condition AG ¶ 29(e). At hearing, Dr. S. was examined on this contention and addressed the relationship between Applicant's past conduct and his diagnosis. Although this was an integral part of Applicant's mitigation presentation, the Judge did not discuss this important aspect of the case in his decision, which is problematic.

There is a rebuttable presumption that a judge considered all the record evidence unless the judge specifically states otherwise. *See* ISCR Case No. 94-0057, 1994 WL 728443 at *3 (App. Bd. Sep. 21, 1994). That said, a decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case. *See* ISCR Case No. 02-19479, 2004 WL 2152723 at *4 (App. Bd. Jun. 22, 2004). Although a judge is not required to discuss each and every piece of record evidence, his failure to discuss important aspects of a case is error. *See, e.g.,* ISCR Case No. 03-07874, 2005 WL 3814738 at *3 (App. Bd. Jul. 7, 2005). A judge's findings of fact must be based on the record evidence as a whole, including any evidence that runs contrary to those findings. Furthermore, if a judge does not discuss or even mention a significant aspect of the case that reasonably could be expected to be explicitly taken into account in the decision, then a serious question arises as to whether the judge forgot that aspect, ignored it, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case, or engaged in an arbitrary and capricious analysis. *See* ISCR Case No. 02-02195, 2004 WL 1434390 at *3 (App. Bd. Apr. 9, 2004). In this case, the Judge's failure to discuss or even mention Applicant's mitigating evidence leaves his analysis incomplete and constitutes error.

Conclusion

In light of the error identified, above, the best resolution of this case is to remand it to the Judge to correct the error and for further processing consistent with the Directive. Upon remand, a judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, a judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130.

Order

The decision is **REMANDED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board