

KEYWORD: Guideline F; Guideline J; Guideline H

DIGEST: The Judge analyzed Applicant's individual drug offenses in isolation rather than considering them in light of the record as a whole. Her mitigation analysis is not sustainable. Favorable decision reversed.

CASENO: 14-03526.a1

DATE: 12/31/2015

DATE: December 31, 2015

In Re:)
)
)
 -----) ISCR Case No. 14-03526
)
)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 14, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for

that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 14, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 issues on appeal: whether the Judge erred in concluding that the Government had not met its burden of production and whether the Judge’s favorable decision under Guidelines J and H was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we reverse.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal. Applicant works for a Defense contractor. He has an associate’s degree and is working on a bachelor’s. Applicant has held a clearance since 2008.

In 2003, Applicant was charged with possession of marijuana, to which he pled guilty. He had been driving with friends when the police pulled him over. The officer detected an odor of marijuana and arrested Applicant. The court imposed a fine on Applicant as well as costs.

The Judge noted that there was “some discussion at the hearing” about an incident in 2004 in which Applicant was in a car with friends. Decision at 3. The car, which was not Applicant’s, was subsequently found to contain drug paraphernalia. Applicant and the others were charged with possession of drug paraphernalia. Upon being found guilty, Applicant paid a fine.

In 2007, Applicant was cited for having an open container of beer. He had been on a porch drinking with a friend, when a policeman told them that they were making too much noise. Again, Applicant was fined for the offense.

In 2013, Applicant was arrested and charged with possession of a controlled substance and with sexual solicitation. He was operating a friend’s car as the designated driver. After dropping his friends off at a restaurant, Applicant drove about looking for a place to park. He stopped at a red light, and a woman who was standing nearby said something to him about money and sex. Applicant was then stopped by the police, who discovered a bag of marijuana in the car. Applicant pled not guilty to the charges. The court entered him into a deferred adjudication program, which required him to perform community service. Applicant completed this service in 2014 and has had no other criminal incidents.

The Judge cited to Applicant’s testimony that his last use of marijuana had been in 2001. She noted, however, that in a security clearance application (SCA) prepared in 2008, he had stated that his last use was in 2004-2005. Applicant signed a statement of intent not to use drugs or to be around those who do. He has never tested positive for illegal drugs and does not associate with his friends who use marijuana.

The Judge's Analysis

In evaluating Applicant's case under Guideline J, the Judge stated that the 2003 marijuana charge occurred a long time ago and is mitigated due to age. She concluded that the open container offense was an isolated incident not likely to recur and that the 2013 incident "is not established by anything in the record." *Id.* at 6. Under Guideline H, the Judge reiterated that the 2013 charge "was not established," though noting that Applicant had performed community service as a consequence of this incident. *Id.* at 7. She concluded that Applicant had demonstrated an intent to refrain from using illegal drugs and cited to her finding that he tested negative resulting from a March 2015 urinalysis.

Discussion

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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 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* ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

Department Counsel notes the statement in the Analysis that the 2013 offense was not established by the record evidence. He argues that it was an error for the Judge to have concluded that the Government had failed to produce evidence of this allegation. We find this argument to be persuasive. As Department Counsel acknowledges, it is not precisely clear that the Judge meant that the Government had failed to produce evidence that raised a security concern. However, to the extent that this was her meaning, we note that this burden of production arises only in regard to allegations that an applicant has denied. Directive ¶ E3.1.14 ("Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted"). *See also* ISCR Case No. 12-10404 at 5 (App. Bd. Mar. 13, 2015). In this case, Applicant admitted the allegation in his response to the SOR. Therefore, the Government bore no burden of producing evidence.¹ Insofar as the Directive presumes a nexus between admitted or

¹Despite this comment by the Judge, the Government did produce some evidence of this incident. Government Exhibit (GE) 2 contains summaries of Applicant's various clearance interviews. In one of them he addressed this allegation. He stated that he had dropped his friends off at a restaurant and, while stopped at a traffic light, a woman approached the passenger side of the car, where the window had been lowered. She asked Applicant what he was "looking for" and how much money he had. Subsequently, Applicant was stopped by an unmarked police car with four or five officers inside. During a search of the car, an officer uncovered a bag of marijuana. As a consequence of this, Applicant was charged with possession of marijuana and with solicitation and was entered into a pretrial diversion program, whereby he was required to perform community service. Summary of Interviews Conducted between March 7, 2014, and March 23, 2014, included in GE 2. Applicant's hearing testimony regarding this event is similar, although he testified that the woman had drawn the attention of his friends, who were calling out to her. Tr. at 28-29, 55-59.

proven conduct under any Guideline and an applicant's eligibility for a clearance, this matter should have been evaluated in light of Applicant's burden of persuasion as to mitigation. The Judge's conclusion that there is no basis in the record for this allegation is not sustainable.

Department Counsel argues that the Judge's mitigation analysis was erroneous, in that she failed to evaluate the evidence in light of the record as a whole. We find this argument to be persuasive. A Judge must examine a case in light of the totality of the record evidence. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015). The Judge does not appear to have done so. For example, she concluded that the 2003 marijuana incident was mitigated through age. Were this the only allegation, her conclusion might be persuasive. However, the significance of this offense should have been analyzed in light of the others that followed. That Applicant was charged and convicted of subsequent misconduct of a similar nature has a direct bearing on the extent to which Applicant had succeeded in mitigating concerns arising from the offense. In a similar way, her conclusion that the open container offense had been mitigated insofar as it arose from what she termed unusual circumstances failed to address the extent to which Applicant's conduct as a whole, though involving marijuana rather than alcohol, suggests an inability or unwillingness to comply with laws and regulations, which is at the heart of Guideline J. *See* Directive, Enclosure 2 ¶ 30.

Department Counsel also argues that the Judge's favorable credibility determination was "a major factor in her Decision because she accepted as credible Applicant's stories about the incidents that led to his multiple arrests." Appeal Brief at 10. We give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. However, this deference has limits. Where the record contains a basis to question an applicant's credibility (such as inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect of the record explicitly, explaining why he or she finds and applicant's version of events to be worthy of belief. *See, e.g.*, ISCR Case No. 10-09035 at 6 (App. Bd. Jun. 10, 2014). Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence.

In this case, we note that the Judge's analysis did not address her own finding that Applicant had made inconsistent statements about the date of his last use of marijuana. More to the point, her analysis failed meaningfully to analyze the credibility of Applicant's claims of factual innocence. Applicant contended that more than once he had been arrested while driving, or riding in, a car that was not his, in which police had found drugs or paraphernalia belonging to whom he did not know, and that, in 2013, while he was awaiting a green light, a prostitute looked in the window of the car of which he was the sole occupant and apparently sought to negotiate for her services without Applicant's active encouragement. His explanation for the open container violation is similarly exculpatory.² These events took place in two different states over a period of ten years. While it is conceivable that a person's behavior might be misinterpreted on a single occasion, if Applicant's

Viewing this as a totality, a reasonable person could conclude that a factual basis for the allegation had been established, even without reference to Applicant's admission.

²"[W]e had . . . purchased some beers, and we were sitting on the front porch of the steps of my apartment, and a cop . . . was driving around in the neighborhood, and . . . he pretty much charged me with open container. [Q]: Now had you even consumed any beer? [A]: No. No, sir. We had just got ready to open the beer . . . *we never got a chance to open them up.*]" Tr. at 26-27 (emphasis added).

presentation is to be believed, it happened more than once to him. As we stated in an earlier decision, the Judge “failed to address the extent to which a reasonable person could find [the applicant’s] presentation to have been merely self-serving. It also failed to address the extent to which repeated arrests and charges might be attributable less to bad fortune than to Applicant’s own conscious and willful behavior.” ISCR Case No. 14-02567 at 6 (App. Bd. Oct. 5, 2015).³

To sum up, the record contains Applicant’s admissions and evidence of a series of arrests and/or convictions for offenses involving possession of drugs or paraphernalia, violation of an open container law, and sexual solicitation. In addition, the record contains evidence of inconsistent statements by Applicant as well as uncorroborated claims of innocence that a reasonable person might find to be merely self-serving. The Judge’s favorable conclusions under Guideline J fail to consider important aspects of the case. The evidence, viewed as a whole, is not sufficient to meet Applicant’s burden of persuasion under the standard set forth in *Egan, supra*. Because of this conclusion we do not need to address the Judge’s findings under Guideline H.

Order

The Decision is **REVERSED**.

Signed: Michael Ra’anan
Michael 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

³In addition, the dispositions of these various cases—convictions, fines, or pretrial diversion—do not support Applicant’s claims of innocence.