KEYWORD: Guideline E

DIGEST: In answer to interrogatories, Applicant swore to the accuracy of a previous statement subject to attached comments. His counsel stipulated to admission of the exhibit. The Judge's decision to give the exhibit no weight was unreasonable. The Judge's failure to apply two disqualifying conditions and his whole person analysis are not sustainable given record evidence of: shoplifting, UCMJ punishment, a false statement to an investigator, and Applicant's resignation from a job following allegations of misconduct. Favorable decision reversed.

CASENO: 09-06218.a1

DATE: 09/06/2011

DATE: September 6, 2011

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT
John N. Griffith, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 17, 2010, DOHA 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 May 13, 2011, after the hearing, Administrative Judge Robert Robinson Gales 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 some of his findings of fact and whether the Judge failed to consider the totality of Applicant's conduct in performing his analyses of the SOR allegations. Consistent with the following, we reverse the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant is an account manager in business development for a Defense contractor. He served in the U.S. Navy from 1980 until his retirement in 2001. Applicant is married with two children.

In March 1995, Applicant received a Top Secret security clearance. At some point thereafter he was granted access to Sensitive Compartmented Information (SCI).

In March 2000, Applicant, a commander (0-5), shoplifted items from a Base Exchange. He was apprehended by members of the security forces squadron after a review of a video surveillance tape. He received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice.[1] The specifications were two offenses of larceny and two of conduct unbecoming an officer. Applicant attributed his actions to the effects of prescribed pain medication. His punishment consisted of a punitive letter of reprimand and forfeiture of one-half of his pay per month for two months.

Applicant's security clearance was suspended in April 2000, and his access to SCI was suspended in May 2000. On January 12, 2001, the command recommended Applicant's security clearance be revoked. On May 29, 2001, security authorities for the Navy issued a Letter of Intent (LOI) to revoke Applicant's clearance and his access to SCI.

Because Applicant lost his clearance eligibility, the Navy processed him for retirement based on his failure to maintain professional standards. His retirement was effective in July 2001. His DD Form 214, Discharge Certificate, lists "unacceptable conduct" as the reason for separation.

[1]10 U.S.C. § 815.

Applicant contends that he never saw the May 29, 2001, LOI because he was on terminal leave at the time it was issued.[2]

While on terminal leave, Applicant went to work for a Government contractor. He resigned in March 2008 in lieu of termination for inflating expense reports. On his 2009 security clearance application (SCA), he stated that he had

> [l]eft job by mutual agreement following allegations of misconduct. There were allegations of a violation of a corporate policy. While there was a significant amount of blame to go around and heavy tension related to office politics, in the end, I was the one ultimately responsible. Rather than spend the time fighting the allegations only to return to the same office politics . . . I elected to retire. Decision at 5-6.

Applicant's former employer conducted an investigation into Applicant's 2007 travel expenses ($26,017) and 2008 travel expenses ($13,867). A Report of Adverse Information prepared by the facility security officer stated "Applicant was terminated from employment with the Corporation, but it looks as though it was allowed to go through as a 'resignation.' Very simply, [Applicant] was terminated due to inflating expense reports." Decision at 6. Former colleagues of Applicant characterized his supervisors as manipulative, devious, and concerned about their own power; opined that his problems were due to a difference of opinion between Applicant and an off-site superior; and opined that Applicant was a victim of office politics.

In July 2000, Applicant was interviewed by an investigator. "An incomplete extract of the unsworn and unsigned document which appears to be a report of investigation (ROI) states that Applicant "denied any involvement with Law Enforcement or any Criminal Activities since June 82[.]"[3]

In March 2009, when completing his SF 86, he responded "no" to a question which asked if he had ever had a clearance of access authorization denied, suspended, or revoked. The SOR alleges that he deliberately failed to disclose that his access to SCI was suspended in April 2000. Applicant denies that he intended to falsify or to omit material information. He states that he was only aware that his SCI access was not being renewed.[4]

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[2]Applicant testified that he began his terminal leave in January 2001, nearly six months prior to his retirement date. Tr. at 78. He testified that DoD policy permitted accrual of such an amount of leave by persons on extended deployments, etc. "Q: And so for six years you didn't take any leave? A: For–actually it was longer than that. The answer is yes and no." Tr. at 78-79. Applicant's testimony on this matter is not consistent with his own Exhibit N, an extract from DoD Instruction 1327.06, which permits members in hostile fire zones, imminent danger areas, and "certain deployable ships" to accrue leave in excess of normal limits. However, the Instruction, which is dated June 16, 2009, limits the total accrual to 120 days, less than that to which Applicant testified that he had been entitled.

[3]The Judge cites to Government Exhibit (GE) 7, Answers to Interrogatories. See discussion below.

[4]Department Counsel has not challenged this finding on appeal.

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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). The Appeal Board may reverse the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, 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). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006)

Department Counsel challenges the Judge's finding that Applicant did not deliberately provide false information during the security clearance process. He also contends that the Judge

erred in not applying two Guideline E disqualifying conditions (DC), 16(c)[5] and 16(d).[6] Department Counsel argues that the Judge's failure to raise these disqualifying conditions resulted in an analysis that did not consider Applicant's security-significant conduct as a whole. In making this argument, Department Counsel contends that the Judge's whole-person analysis was in error.

Concerning the Judge's conclusion that Applicant did not attempt deliberately to mislead the Government, we note that proof of a false statement, standing alone, does not prove an applicant's state of mind. When, as here, an applicant denies an intent to mislead or deceive, the Government must present substantial evidence that the false statement or the omission was deliberate. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See* ISCR Case No. 08-05637 at 2 (Sep. 9, 2010).

In this case, the Judge concluded that the record did not contain sufficient evidence to explain who conducted the 2000 interview and that the actual substance of Applicant's answers could not be ascertained beyond mere speculation. He stated that the document in question appeared to violate the provisions of Directive ¶ E3.1.20, which forbids admission into DOHA proceedings of a DoD ROI that is not authenticated. He also concluded that the document did not meet the requirements of ¶ E3.1.22, which delineates circumstances when certain adverse statements can be admitted without affording a right of cross-examination. He stated that he could not give the document substantial weight. Decision at 11-12.

Applicant's answers to DOHA interrogatories, GE 7, contain an excerpt from a summary of the subject interview conducted with Applicant on July 12, 2000. This excerpt includes Applicant's denial of involvement with law enforcement personnel. While this document does appear to be part of a DoD ROI, Applicant swore to its accuracy, subject to comments which he had attached. Applicant's certification bears his notarized signature. Therefore, the interview statement in question has been incorporated into a statement by Applicant, evidence that is admissible in DOHA proceedings.[7] Applicant's counsel stipulated to the admission of this exhibit. In light of the Judge's

[5]Directive, Enclosure 2 ¶ 16(c) : "credible 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[.]"

[6]Directive, Enclosure 2 ¶ 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 person may not properly safe guard protected information This includes but is not limited to . . . (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources[.] "

[7]The Federal Rules of Evidence serve as a guide in DOHA proceedings. Directive ¶ E3.1.19. *See* Fed. Rule Evid. 801(d)(2) for the proposition that a statement by a party, or a statement of which a party has manifested an adoption, is excluded from the definition of hearsay when offered by a party opponent. *See also* ISCR Case No. 08-

erroneous characterization of this evidence, his conclusion that he could not extend substantial weight to it was unreasonable.

Although Applicant stated in his comments that he did not remember the interview, he did not deny that it occurred, nor did he deny actually making the challenged statement. His comments, admittedly somewhat rambling, state that the interview occurred a long time ago, that at the time of the interview his nonjudicial punishment action was ongoing and that "nothing was on record," and that he did not intend to deceive. In GE 6, another set of interrogatories, Applicant also implied some confusion as to the meaning of the term "law enforcement" as it applied to Base Exchange personnel.[8] Given the Judge's findings and record evidence that Applicant was a college educated commander in the U.S. Navy who was undergoing UCMJ action for theft at the time of the interview in question, it is unreasonable to conclude that his denial of criminal activity was honestly mistaken. The record as a whole demonstrates that the Government presented substantial evidence of a deliberately false statement. The record does not support the Judge's conclusion to the contrary.

Regarding Department Counsel's issue regarding DC 16(c) and 16(d), we note record evidence of (1) Applicant's having shoplifted from a Base Exchange, with the result that he was punished under the UCMJ and retired for "unacceptable conduct;" (2) Applicant's access to SCI having been suspended following this shoplifting incident; (3) Applicant's false statement to an investigator concerning this matter; and (4) Applicant's having resigned from a job following allegations of misconduct. On this last point, Applicant did not deny that his expense accounts were inaccurate; rather he only denied that he had intended to defraud his employer.[9] We find Department Counsel's argument persuasive that the evidence in the case establishes Guideline E security concerns under DC 16(c) and 16(d). Taken together the evidence supports a conclusion that Applicant lacks the requisite judgment, trustworthiness, reliability, and willingness to comply with

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01075 at 4 (App. Bd. Jul. 26, 2011). This case addressed the admissibility of a summary of an applicant's security clearance interview. "It is true that [the summary] does not contain the actual questions posed or Applicant's verbatim answers; however, it was signed by Applicant, who swore to its truthfulness, with certain factual corrections on unrelated matters. As such, [the summary] became the equivalent of an admission by Applicant, and the Judge erred in not evaluating it as such."

[8]*See* GE 6 at Answer 5: Applicant related a conversation in which Navy lawyers discussed "what constituted Law Enforcement and was base exchange security considered Law Enforcement, etc."

[9]*See* Tr. at 55-57.: "Q: Now, for the expense reports–and did you inflate expense reports? A: No. The answer is yes and no. Never intentionally . . . I would have a business dinner with a customer and I would categorize that under 'Business meeting.' And my immediate superior didn't like that . . . and he thought that should be over under 'Personal meals.'" *Compare* with GE 4, documentation from Applicant's former employer regarding his resignation. This exhibit includes an e-mail transmission from an official of the company containing the following: "I followed up with appropriate Corporate staff functions to outline the actions we took in the wake of [Applicant's] departure from [Employer]. Corporate Ethics, Human Resources (HR), and Corporate Business Development (CBD) worked with Corporate Legal, Corporate Security, and Corporate Finance in the disposition of [Applicant's] case . . . 1. Did we fix the problem? We have taken active steps to place in an unallowable accounting category all of [Applicant's] 2008 travel and related expenses of $13,867. In addition we have taken active steps to place an equivalent amount of the [named city] field office's expenses in an allowable accounting category to offset $26,017 of [Applicant's] 2007 travel expenses that correspond to the time period covered by the investigation[.]"

rules and regulations. Given the record that was before him, the Judge's failure to apply these disqualifying conditions was error.

For similar reasons, we find Department Counsel's challenge to the Judge's whole-person analysis to be persuasive. Applicant's most recent incident, the 2008 job loss due to his inflated expense account, viewed in light of his prior shoplifting and false statement, undermines the Judge's conclusion that Applicant has mitigated the Guideline E security concerns arising in his case.[10] The record supports Department Counsel's statement in his appeal brief that the evidence "compels an unfavorable whole-person conclusion because Applicant has repeatedly exhibited poor judgment, all in the context of his actions while in the workplace or during the security clearance process." The Judge's decision fails to consider relevant factors and offers an explanation for the decision that runs contrary to the weight of the record evidence. *See* ISCR Case No. 03-22861 at 2-3, *supra*. Accordingly, we conclude that the appropriate course of action is to reverse.

Order

The Judge's favorable security clearance decision is REVERSED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

[10]The Judge's analysis did not address the inherent probability of Applicant's contention that his shoplifting and his misstatements on his expense accounts were both simple mistakes. Nor did the Judge's analysis of mitigation address the inconsistency between Applicant's testimony (that he thought he was only to go back seven years in answering his 2009 SCA question as to whether he had ever had a clearance suspended or revoked, Tr. at 90) and his other testimony and evidence (that he did not know that his SCI access had been suspended).

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