KEYWORD: Guideline E; Guideline J

DIGEST: A credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observation of a witness's demeanor. It is not clear from the decision or from the record why the Judge found Applicant's explanation for his false statement credible. Favorable decision remanded.

CASENO: 04-12680.a1

DATE: 05/21/2007

DATE: May 21, 2007

In Re:	)	
	)	
--------	)	ISCR Case No. 04-12680
SSN: -------	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Daniel F. Crowley, Esq., Department Counsel
Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 2005, DOHA issued a statement of reasons advising Applicant of the basis

for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On August 31, 2006, after considering the record, Administrative Judge Shari Dam granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge's findings of fact are based upon substantial evidence; whether the Judge improperly relied upon a credibility determination rather than record evidence; and whether the Judge erred in her application of the Guideline E mitigating conditions.[1] Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: In June 2001, Applicant was arrested and charged with DUI and with negligent operation of a vehicle. At trial he was acquitted of the DUI but convicted of negligent operation. He was fined. Additionally, his driver's license was suspended for 90 days because he had refused to take a Breathalyzer.

One month later, Applicant was arrested and charged with driving under a suspended license. Upon payment of court costs, the charge was dismissed. In May 2002, Applicant completed his security clearance application. Question 24 read: "Your Police Record - Alcohol/Drug Offenses: Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and expungement order under the authority of 21 U.S.C 844 or 18 U.S.C 3607." Applicant answered "no" to this question, despite his having been arrested and charged with DUI.

Question 26 read "Your Police Record - Other Offenses: In the last 7 years have you been arrested for, charged with, or convicted of any offense(s) not listed [elsewhere on the application]? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." Applicant answered "no" to this question, despite having been arrested and charged with driving under a suspended license.

The Judge went on to find, "Applicant did not disclose the two charges because he did not take enough time while completing the SCA to fully understand the scope of the questions, which included an inquiry into all matters, including arrests, regardless of the outcome. After re-reading both questions twice during his interview with the government's investigator, he realized he should have disclosed the information."

[1]The Judge's favorable decision under Guideline J is not at issue in this appeal.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel challenges the findings placed in quotation marks above on the grounds that they are not supported by the record, viewed as a whole. Counsel observes that Questions 24 and 26 are clear in their meaning. Furthermore he cites Applicant's age, his level of education,[2] the complexity of his professional responsibilities, and his admission that he has held a clearance "for over 10 years"[3] as reasons to believe Applicant was capable of understanding the questions. Department Counsel argues that the record demonstrates Applicant to be an individual "particularly capable" of understanding not only the SF86 but also his obligation to fill it out with due care, and to be forthcoming about even embarrassing events. Brief at 8.

The Board finds Department Counsel argument persuasive. It is not clear from the decision or from the record why the Judge found Applicant's explanation for his false statement to be credible. It is significant that, this case having been decided on the written record, the Judge did not have an opportunity to evaluate Applicant's demeanor while testifying. *See* ISCR Case 04-04302 at (App. Bd. Jun. 30, 2005) ("[W]hen an applicant waives a hearing and chooses to have his or her case decided by a Judge based on a written record, the Judge has no ability to make a credibility determination based on observation of the applicant's demeanor. Accordingly, a credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observation of a witness's demeanor.") *See also* ISCR Case No. 97-0752 at 3 (App. Bd. Dec. 4, 1998); ISCR Case No. 97-0625 at 2-3 (App. Bd. Aug. 17, 1998).

In addition to the contrary facts listed above, we also note that, in his response to the FORM, Applicant contends that the questions at issue are ambiguous, in that neither mention the terms "arrested" or "court appearances." However, as the Judge's own finding demonstrates, Question 26 does in fact explicitly use the term "arrested." Her decision does not address this apparent inconsistency with Applicant's response. Nor does it address another factor, raised implicitly in Applicant's evidence attesting to his good job performance, that Applicant's concern over his continued employment provides a possible motive for not answering the questions truthfully. All in all, the Judge's decision does not reflect serious consideration of the contrary record evidence. Accordingly, we are unable to conclude that the challenged findings are supported by substantial

[2]Applicant holds a Bachelor of Science degree.

[3]Applicant Exhibit A at 1.

record evidence.[4]

We believe that the appropriate remedy in this case is to remand it to the Judge for a new decision, one in which her findings take into account all the record evidence on the question of Applicant's knowledge and intent in his response to Questions 24 and 26. The decision should address those matters identified in this opinion as bearing on the issue, as well as any others fairly raised by the evidence. The remaining issues on appeal are not ripe for adjudication.

Order

The Judge's decision granting Applicant a clearance is REMANDED.

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

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

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

[4] Department Counsel challenges another statement by the Judge, found in her Conclusions section, in which she says, "Applicant's explanation that he did not intentionally withhold information, but instead misunderstood the question, is reasonable, and not contradicted by any substantive evidence from the Government." Decision at 5. The Judge has, through this sentence, effectively shifted the burden of persuasion to the Government. That is, the Judge's decision seems to imply that Applicant's denial of a knowing falsehood required the government to produce additional evidence on that point beyond that already contained in the record. The Government has no burden of persuasion in an ISCR case. *See* Directive ¶ E3.1.15. In any event, the Judge does not explain why those matters discussed in the text of this opinion do not, at least arguably, contradict Applicant's denial.