KEYWORD: Guideline J

DIGEST: It is reasonable to conclude that a man who has been arrested 17 times had a problem with law enforcement. There is no evidence to demonstrate the problem originated with the police rather than Applicant. The fact that the charges may have been dropped does not in and of itself establish that Applicant did commit the alleged misconduct. The Judge impermissibly shifted the burden of persuasion. Favorable decision Reversed.

CASENO: 07-02275.a1

DATE: 03/06/2008

DATE: March 6, 2008

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 25, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under 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 September 17, 2007, after considering the record, Administrative Judge Joseph Testan 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 raised the following issue on appeal: whether the Judge's application of the Guideline J mitigating conditions was arbitrary, capricious, or contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following relevant findings:

Applicant is an employee of a defense contractor. In August 1990, he was charged with selling cocaine. He was sentenced to 5 years probation and a fine of $2500.00.

In 1993, he was charged with possession of a Drug Related Object. He was fined $300.00. Also in 1993, he was charged with Criminal Trespass and Simple Battery, for which he received a $300.00 fine and 12 months probation.

In 1998, he was charged with DUI. He was sentenced to 2 days in jail, a $655.00 fine, and 12 months probation. Later that year he was charged with Battery. His sentence consisted of a $745.00 fine and 12 months probation.

In September 1999, Applicant was charged with Terroristic Threats and Acts and with Obstruction of Officers. The former charge was dropped. Applicant was convicted of two counts of Obstruction and one count of Stalking. He was fined $1000.00 and received three consecutive periods of probation of 12 months each.

In addition to these six offenses, of which he was convicted, Applicant had numerous other arrests for which the charges were dropped. Those arrests, as alleged in the SOR, occurred between 1991 and 2006, for such offenses as battery (multiple charges), possession of a firearm by a felon, criminal trespass, and aggravated assault. During 2002 he was also charged with a probation violation.

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 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 finding 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 has not expressly challenged the Judge's findings of fact. Therefore, these findings are not at issue in this appeal.

Whether the Record Supports the Judge's Ultimate Conclusions

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 choices 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). 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 establish any appropriate mitigating conditions. *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).

In analyzing this case, the Judge concluded that the evidence was sufficient to establish security concerns under Guideline J, specifically Criminal Conduct Disqualifying Condition (CCDC) 31(a), "a single serious crime or multiple lesser offenses,"[1] and CCDC 31(e), "violation of parole or probation . . ."[2] He stated, "[t]he evidence establishes that Applicant was arrested and convicted of various crimes on six occasions beginning in 1990 and ending in 1999. Applicant's criminal conduct reflects adversely on his judgment, reliability, and trustworthiness and suggests he cannot

[1]Directive ¶ E2.31(a).

[2]Directive ¶ E2.31(e). In his decision the Judge misidentifies this as subparagraph 31(d).

be relied upon to safeguard classified information."[3] In light of the Judge's application of Criminal Conduct Mitigating Condition (CCMC) 32(c),[4] the Board interprets the decision to mean that the Judge found the Government to have met its burden of production as to all allegations rather than merely those for which Applicant was convicted. The legal effect of this was to shift the burden of persuasion to Applicant in establishing possible mitigating conditions.

The gravamen of the Judge's favorable decision lies in his view that Applicant's dropped charges point to factual innocence. He stated, "Although a quick glance at the SOR would create the impression that [A]pplicant is completely unworthy of a security clearance, when the facts are reviewed, it is clear there is significant mitigation present. First, more than half of charges alleged in the SOR were dismissed. This strongly suggests that [A]pplicant had a problem with local law enforcement. But even if he didn't have such a problem, the mere fact that charges were dismissed on so many occasions strongly suggests that [A]pplicant did not engage in the conduct for which he was charged."[5] The Board is not persuaded by this reasoning. While it is reasonable to conclude that a man who has been arrested 17 times since 1990 had a problem with law enforcement, there is no evidence in the record to demonstrate that this problem originated with the police rather than with Applicant's own conduct. The fact that charges have been dropped does not in and of itself establish that Applicant did not commit the alleged misconduct.[6] Under DOHA procedures, it is Applicant's responsibility to present evidence to demonstrate that the security concerns presented by his conduct or circumstances have been mitigated. In this case, Applicant's evidence is scant. In his response to the SOR, he provided exculpatory responses for two of the allegations;[7] however, for most of them, he merely admitted that he was arrested and that the charges were dropped, but he provided no explanation as to the why this was done, whether for factual innocence or for other reasons that do not rule out actual guilt. On this record, the Judge's conclusion that Applicant had met his burden of persuasion under CCMC 32(c) is not sustainable.

For similar reasons, the Board cannot uphold the Judge's conclusion that Applicant's misconduct has been mitigated through attenuation[8] or rehabilitation.[9] As to the former, the Judge

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[3]Decision at 3.

[4]Directive ¶ E2.32(c): "[E]vidence that the person did not commit the offense."

[5]*Decision*. at 3-4.

[6]*See* ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999).

[7]In Item 3, Response to SOR, Applicant states that the charges involving possession of drug paraphernalia and possession of a firearm were due to his having, on two separate occasions, been in a car in which these objects were found. As regards the first, Applicant does not explicitly deny that the contraband was his. As regards the second, he avers that the firearm was placed under the seat of the car by another passenger, but he does not explicitly state who owned the gun, nor does he deny the legal sufficiency of his conviction.

[8]Directive ¶ E2.32(a): "[S]o much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment . . ."

[9]Directive ¶ E2.32(d): "[T]here is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement . . ."

concluded that "there is no credible evidence that [A]pplicant has committed any criminal act since 1999. . ."[10] However, this conclusion cannot logically be derived from the limited evidence supplied by Applicant. In addition to his response to the SOR, which did not address the facts underlying most of the alleged offenses, Applicant provided some character references. One of these is from a former employer, who states that "while under our employment [Applicant] made no attempt to conceal the facts" about his misconduct, a comment that is scarcely exculpatory. There is no other evidence addressing the circumstances of Applicant's criminal record. Therefore, the Judge's conclusion that Applicant's misconduct occurred so long ago that it does not now impugn his reliability is based upon an impermissible shifting to the Government of the burden of persuasion, which is error.[11]

Applicant did provide a greater quantum of evidence on the question of rehabilitation, insofar as he has demonstrated good job performance. However, no favorable conclusion on this mitigating condition can be reached without explaining why Applicant's alleged misconduct, the most recent incident of which is 2006, either did not occur or is of relatively minor significance when balanced against favorable evidence in the file. As with CCMC 32(a), one of the criteria pertinent to this issue is that of passage of time without recurrence of criminal activity. Applicant's failure to explain the bulk of the allegations against him or otherwise provide evidence to exculpate or mitigate the misconduct renders a favorable decision under this mitigating condition unsustaintable.

As noted above, the Judge found that Applicant's case raised CCDC 31(e), "violation of parole or probation . . ." In his response to the SOR, Applicant stated only that he admitted that he was charged with a probation violation and that he "completed [his] sentence successfully."[12] The Judge appears not to have questioned the fact that Applicant did indeed violate the terms of a previously imposed probation. However, he concluded that this disqualifying condition was mitigated insofar as there was no record evidence showing that the underlying act constituted a crime. This conclusion is not totally consistent with the record evidence. Item 5 is a report of Applicant's criminal record, which contains a reference to the probation violation. There is nothing in the record, certainly nothing supplied by Applicant, to contradict the implication that an act included in an applicant's criminal history is criminal in nature. In any event, whether the underlying act was criminal or not, a probation violation in 2002 certainly undermines the Judge's conclusion that Applicant has shown successful rehabilitation in the years intervening between his 1999 misconduct and the date of the decision.

The Board has considered the record as a whole. Insofar as Applicant has admitted the many arrests cited in the SOR and, in his response to the FORM, has provided no evidence in mitigation or extenuation save that described in Footnote 7, the Board concludes that the Judge's favorable security clearance decision is not sustainable. We hold that his decision is arbitrary, capricious, and contrary to law.

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[10]Decision at 4.

[11]*See* Directive ¶ E3.1.15: "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

[12]Item 3 at 3.

Order

The Judge's favorable security clearance decision is REVERSED.

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

Signed; William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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