KEYWORD: Guideline J; Guideline G

DIGEST: Department Counsel persuasively demonstrates that the Judge's decision fails to take into account substantial contrary record evidence. Favorable decision reversed.

CASENO: 08-02404.a1

DATE: 06/05/2009

DATE: June 5, 2009

In Re:	)	
	)	
------	)	ISCR Case No. 08-02404
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 9, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 12, 2009, after the hearing, Administrative Judge Arthur E. Marshall, Jr., 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's application of the Guideline J mitigating conditions is erroneous; whether the Judge's application of the Guideline G disqualifying conditions is erroneous; and whether the Judge's whole-person analysis is unsupported by the record evidence. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a 28-year-old systems analyst for a Defense contractor. In February 2002, Applicant worked at a sporting goods store. A co-worker accused him of stealing a pair of shoes. He was charged with petit theft and acquitted at trial, at which he "apparently produced receipts for the items." Decision at 2. Two years later, Applicant was arrested for DUI. He pled "no contest" and was sentenced to six months probation and 80 hours of community service. His drivers license was suspended. His probation ended in February 2005. In February 2004 Applicant was charged with battery committed on his girlfriend. Applicant's girlfriend denied that she had been hit and Applicant was acquitted at trial.[1]

In April 2006 Applicant was involved in an automobile accident. The police suspected that Applicant had been drinking. After performing a field sobriety test, the police charged Applicant with DUI. He was taken to the police station and asked to take a breathalyzer test. He refused to submit to the test. His case was dismissed through lack of evidence. The following May Applicant was charged with disorderly conduct arising from an incident involving his girlfriend and another woman. Both Applicant and his girlfriend had been drinking, although Applicant later claimed that he was drinking cola. Applicant pled "no contest" and was fined.

Although Applicant continues to consume alcohol, he denies that he does so to excess. He has never been diagnosed as having an alcohol problem.

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 same record."

[1]Government Exhibit (GE) 2, Criminal Justice Information Sheet, and Applicant Exhibit F, Circuit Court Record, reflect that the final disposition of this case was *nolle prosequi* rather than an acquittal at trial.

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 (1966). In evaluating the Judge's findings, we defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

In her brief, Department Counsel states that the Judge's decision did not take into account contrary record evidence. The Board will address this argument in the discussion below.

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 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). 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 argues that the Judge's decision does not take sufficient stock of contrary record evidence. This argument is persuasive. Department Counsel cites to instances of inconsistent statements by Applicant that undermine his credibility and vitiate his case for mitigation.

Concerning the 2002 theft allegation, for example, Applicant denied that he committed the crime, pointing to his acquittal as substantiation. However, Government Exhibit (GE) 8 is a handwritten statement by Applicant, made at the time of the alleged theft, in which he admitted to the offense. At the hearing he stated that he had made the statement in the presence of the store manager and assistant manager. "I wrote this statement so I could leave because . . . I didn't want to be in that atmosphere." Tr. at 19. The Judge's decision does not sufficiently address GE 8, either as evidence of the underlying offense or as an inconsistent statement which impugns Applicant's credibility. Although Applicant was acquitted at trial, a DOHA administrative hearing is not bound by the same presumptions and burden of proof applicable to criminal prosecutions. *See, e.g.*, ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999) ("[T]he fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges.") Failure to address this contrary record evidence undermines the Judge's favorable conclusion.

The record contains evidence of another apparently inconsistent statement by Applicant. GE 3, Applicant's response to interrogatories, contains a summary of his subject interview. Concerning the May 2006 disorderly conduct charge, Applicant is reported as having advised the investigator that "he and [girlfriend] were at a local nightclub . . . and both of them had been drinking. He was not intoxicated, but he believes [girlfriend] was somewhat intoxicated . . ." The next to last page of this exhibit consists of a handwritten and signed statement by Applicant attesting to the accuracy of the investigator's summary. In this handwritten statement Applicant describes some of the events which underlay the allegation of disorderly conduct, but he never attempts to clarify or correct the meaning of the term "drinking." Nevertheless, at the hearing, under cross-examination, Applicant claimed that he had been drinking only soft drinks and denied having consumed alcohol. Applicant attributed the implication that he had consumed alcohol to the investigator. Tr. at 35. ("Q: You said that . . . both of you had been drinking. A: This is what the investigator wrote.") When a person states that he had been drinking at a nightclub, the fair implication is that he had been consuming alcohol. When Applicant denies the consumption of alcohol only after receiving a SOR alleging Guideline G security concerns, a reasonable person could believe that his denial was merely self-serving, especially, as in this case, where Applicant has a prior DUI conviction on his record. This apparent contradiction is of sufficient significance to merit some discussion in the Judge's decision. While the Judge did describe Applicant's testimony in a footnote to his decision, he did not discuss the apparent inconsistency between the testimony and the subject interview in the context of an evaluation of Applicant's credibility and, specifically, why the found Applicant's testimony on this matter to be truthful. Department Counsel's argument that he substituted a favorable impression of Applicant's demeanor for record evidence is, therefore, persuasive.[2] The Judge's failure to address this aspect of the case undermines his favorable decision.

[2]"An Administrative Judge's decision to accept an applicant's explanation about a matter cannot exclusively turn on a Judge's assessment of Applicant's demeanor when Applicant testifies. Rather, the Administrative Judge must make findings of fact that reflect careful consideration of pertinent record evidence including record evidence that reasonably detracts from the Administrative Judge's reasoning . . . not just record evidence that supports those findings of fact." Department Counsel Br. at 12, citing, *inter alia*, ISCR Case No. 99-0435 at 3 (App. Bd. Sep. 22, 2000) concerning a Judge's obligation to take into account contrary record evidence in arriving at his findings of fact.

Department Counsel persuasively argues that the Judge did not take into account other contrary record evidence, specifically the police reports underlying his battery charge and his second DUI. These reports describe the circumstances of the two charges in detail and provide the names and badge numbers of the reporting officers. Concerning the battery, the officer stated that several witnesses told him that they had seen Applicant strike Applicant's girlfriend. The officer further stated that he himself saw a red mark on the girlfriend's face and "a drop of blood on her nose." GE 5, Offense Report, dated February 2, 2004. The other report contains a description of the 2006 DUI charge. In this document the policeman stated, *inter alia*, that Applicant admitted that he had been drinking prior to an automobile accident. The report describes Applicant as "staggering across the roadway" and that he had a "strong odor of an alcoholic beverage emitting from his breath and person." The report also describes Applicant's inability to comply with directions during a field sobriety test. GE 6, Offense Incident Report, dated April 2, 2006. These two reports are difficult to reconcile with Applicant's denial of wrongful conduct. Under the facts of this case, it was incumbent upon the Judge to discuss the police reports and, if he discounted their contents, explain why. The Judge's decision leaves the reader under the impression that Applicant's testimony and the police reports of the incidents are equally objective. Given the fact that there are multiple events and police reports by different police officers from different jurisdictions, the Judge's conclusion is not sustainable. The fact that charges in both cases were dropped is not, in and of itself, a reason to believe that two different police officers, on separate occasions in different cities, prepared reports falsely implicating Applicant in criminal misconduct. The decision as it stands does not reflect that the Judge considered the record as a whole; rather, he appears to have considered each SOR incident in isolation. *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006); ISCR Case No. 05-00488 at 3 (App. Bd. Oct. 2, 1007). This undermines his favorable decision.

The Judge himself appears to have recognized the difficulties which Applicant's circumstances posed to his efforts to obtain a clearance. Although mitigating the Guidelines J and G security concerns, the Judge stated that "some reservations may have remained had the SOR cited to issues regarding personal conduct[.]" Decision at 8-9. In other words, the Judge intimated that, had the SOR alleged security concerns under Guideline E, which addresses "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations,"[3] he might have decided the case differently. The Directive authorizes a Judge to amend a SOR "so as to render it in conformity with the evidence admitted[.]" Directive ¶ E3.1.17. If, as is apparently the case here, a Judge believes that an applicant's case raises security concerns other than those alleged, he or she can, *sua sponte*, amend the SOR, granting either party (or both parties) additional time to prepare, as appropriate. On the one hand the Directive's language regarding amendment of the SOR is permissive. On the other hand, in this instance the Judge, by failing to move to amend the SOR, allowed a situation to stand wherein the record evidence gave him doubts about Applicant's eligibility, and he felt that the issues which presented those doubts were not before him. Under *Egan*, doubts must be resolved in favor of national security.

[3]Directive ¶ 15. Conduct raising a Guideline E security concern includes "any failure to provide truthful and candid answers during the security clearance process."

Normally, the proper disposition of this case would be to remand it to the Judge with instructions to amend the SOR to include Guideline E and to give the parties an opportunity to address that Guideline. However, the judge's favorable analysis under Guidelines G and J is not sustainable, in light of the record evidence as a whole. Therefore, no purpose would be served by remanding the case. Accordingly, the Judge's favorable security clearance decision is not sustainable on this record.

Order

The Judge's favorable security clearance decision is REVERSED.

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