KEYWORD: Guideline J; Guideline E

DIGEST: The Judge's favorable conclusions were not supported by his findings that Applicant engaged in theft 12 times over a five month period that was somewhat recent. Favorable decision reversed.

CASENO: 08-03726.a1

DATE: 10/02/2009

DATE: October 2, 2009

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 29, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 23, 2009, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge's conclusions under Guidelines J and E are arbitrary and capricious because they are unsupported by the record evidence; and whether the Judge's whole-person analysis is unsustainable because it is contrary to and unsupported by the totality of the record evidence. Finding error, we reverse the Judge's decision.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following relevant factual findings: Applicant is 39 years old and has a master's degree in mathematics. In July 2006, Applicant was arrested and charged with theft after he left a bookstore carrying three shopping bags of books without paying for them. Applicant pleaded no contest, and the court deferred adjudication. In a security investigation in 2007, Applicant admitted to an investigator that he had stolen books from the same chain of bookstores approximately ten times between February and June 2006 without being caught. Applicant told the investigator that he doubted that "he would ever have the nerve to tell [the bookstore] about the other stolen books." Decision at 3. At the time of the hearing, Applicant had told his wife, his parents, and his employer about the thefts. However, he had not told his children. After the hearing, Applicant told his two older children and the management of the bookstore about his behavior and submitted evidence to that effect. Applicant's employer knows of his thefts and still praises him and recommends reinstatement of his security clearance.

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." 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, the Board shall give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not challenged the above factual findings. Therefore, they are not at issue on appeal. Department Counsel's appeal concerns the Judge's conclusions, which will be discussed 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, explain, extenuate, 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 contends that the Judge's conclusions under Guidelines J and E are arbitrary and capricious because they are unsupported by the record evidence. Department Counsel's contention has merit. The Judge found significant security concerns under Guidelines J and E, but found Applicant's conduct to be mitigated under both Guidelines.

Under Guideline J, the Judge applied Criminal Conduct Mitigating Conditions (CCMC) (a) and (d).[1] The Judge himself stated that Applicant's thefts were "somewhat recent" and that, because

[1]"[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;" . . . and "there 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, or constructive community involvement[.]" Directive ¶ E2.32(a) and (d).

the thefts occurred on about 12 occasions, "they are not 'isolated.'" Decision at 6. However, the Judge found that "the thefts do not continue to cast doubt on Applicant's current reliability, trustworthiness and good judgment because he has been rehabilitated." *Id.* To reach his conclusion of mitigation, the Judge engaged in a piecemeal analysis of the record. In his analysis, the Judge minimized Applicant's behavior and failed to consider the totality of that behavior and its security implications. Such analysis constitutes error. *See, e.g.,* ISCR Case No. 04-12648 at 3-4 (App. Bd. Oct. 20, 2006). The record evidence does not support the Judge's findings of rehabilitation, especially in light of the nature and seriousness of Applicant's conduct and the fact that Applicant himself cannot explain why the conduct occurred. Applicant's thefts occurred only three years before the hearing. There were ten to twelve thefts over a five-month period, and Applicant's behavior involved poor judgment, lack of reliability, untrustworthiness, and risk-taking which could have serious security implications. The Board has held that "[t]he more serious or long-term an applicant's conduct is, the stronger the evidence of rehabilitation needs to be for the Judge to find the applicant has overcome the negative security implications of that conduct." ISCR Case No. 94-0964 at 6 (App. Bd. Jul. 3, 1996). Moreover, Applicant did not admit to the bookstore management the thefts other than the one for which he was caught until after the hearing.[2] Considering the record as a whole, the Judge's reliance on CCMC (a) and (d) is not sustainable.

Under Guideline E, the Judge applied Personal Conduct Mitigating Conditions (PCMC) (c), (d), and (e).[3] Here also, the Judge stated that Applicant's thefts are "very unlikely to recur" and do not cast doubt on his reliability, trustworthiness, or good judgment, and therefore the Judge found mitigation under Guideline E. Decision at 8-9. The record as a whole does not support the Judge's application of PCMC (c), (d), and (e). For the reasons that follow, the Judge's conclusions that Applicant's thefts are very unlikely to recur and do not cast doubt on Applicant's reliability, trustworthiness, or good judgment, are not sustainable.

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[2]As noted above, Applicant told an investigator that he did not think he could ever bring himself to inform the company about the earlier thefts. Prior to the hearing, Applicant wrote to the company three times—to ask for leniency, to request that the Order of Trespass preventing him from entering the store be lifted, and to request formal documentation that the Order of Trespass had been lifted. However, he did not mention the other thefts in those letters. At the hearing, Applicant stated that he feared further criminal proceedings. Decision at 3. Applicant testified that he had intended to inform the company of the earlier thefts after three years had passed. Transcript at 39. After being questioned on the issue at the hearing, Applicant wrote to the company immediately after the hearing and submitted a copy of the letter as evidence.

[3]"[T]he offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;"

"the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;"

and "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]" Directive ¶ E2.17(c), (d), and (e).

The Judge's application of mitigation is also related to his finding that Applicant "has done everything the he reasonably can do to establish his rehabilitation." The record contains evidence from which the Judge could find that Applicant reduced his vulnerability to duress, but the conclusion about Applicant's rehabilitation is also based, significantly, on the finding that the circumstances were "unique" and are "very unlikely to recur." Decision at 8-9. In this regard, the Judge does not articulate any reasonable explanation as to why the circumstances in which Applicant found himself were unique, how they prompted Applicant to engage in the conduct involved, and why such circumstances are very unlikely to recur. As described above, Applicant himself cannot explain why he engaged in this conduct. Viewed objectively, the conduct reflects an unexplained, recent and recurrent pattern of questionable judgment, risk-taking, lack of reliability and trustworthiness, and irresponsibility. The passage of a significant amount of time without recurrence, does not exist here; and no other evidence in the record plausibly tends to provide proof of rehabilitation.

Department Counsel also contends that the Judge's whole-person analysis is unsustainable because it is contrary to and unsupported by the record evidence. Department Counsel's contention has merit. A whole-person analysis is intended to be a commonsense evaluation of an applicant's conduct and circumstances as a whole. *See, e.g.,* ISCR Case No. 05-07983 at 6 (App. Bd. Oct. 1, 2007). Here, the Judge reviewed the evidence in a piecemeal manner, looking at individual acts and circumstances, rather than the totality of Applicant's situation. As explained in the preceding paragraph, the conduct reflects an unexplained, recent and recurring pattern of questionable judgment, risk-taking, lack of reliability and trustworthiness, and irresponsibility. Directive ¶ E2.2(d). The record evidence does not support the Judge's decision.

Order

The Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, 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