

KEYWORD: Guideline E

DIGEST: The record contains substantial evidence that Applicant repeatedly over an extended period of time received payments from his employer to which he was not entitled. The record also contains substantial evidence that Applicant deliberately failed to mention a warning letter received from his employer on his SCA, and in an answer ro a DOHA interrogatory, he deliberately denied having been removed from a management position, when the evidence clearly indicated he had. The Judge’s favorable decision fails to consider relevant factors and offers an explanation for the decision that runs contrary to the weight of the record evidence. Favorable decision reversed.

CASENO: 10-03732.a1

DATE: 06/14/2013

DATE: June 14, 2013

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| In Re: |) | |
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| ----- |) | ISCR Case No. 10-03732 |
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| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Jason Perry, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 15, 2012, DoD 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 March 5, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 finding that Applicant had not deliberately provided false answers during the processing of his security clearance application (SCA) and whether the decision was arbitrary, capricious, or contrary to law. For the reasons set forth below, we reverse the Judge’s favorable security clearance decision.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issues addressed on appeal: Applicant is an employee of a Defense contractor. From 2001 through 2009, he worked for another contractor, C. He holds a master’s degree and was set to defend his Ph.D. dissertation in the month following the issuance of the decision.

In the late 2000s, Applicant and his colleagues had been advised to enter all hours worked on their time sheets, even if the amount exceeded 40. Previously, they had been required to enter their work time in 40-hour increments. As a consequence of this change in policy, Applicant began receiving overtime pay. Applicant had been promoted to a position that was not authorized overtime, but he was not aware of this limitation. He received a warning letter advising that they were not entitled to overtime.¹ Applicant reimbursed his employer for the pay he had improperly received.

Applicant testified that he was never removed from a management role or demoted. He stated that he was moved from a Supply Chain management role, where he supervised employees to an individual contributor role, where he was supervising subcontractors.

Applicant did not mention the warning letter in completing his SCA. He did not believe that he had been disciplined or reprimanded during his tenure at C. When confronted with the letter, he characterized it as administrative. He stated that others who had experienced the same issue did not want to provide letters of support through fear of retribution.

In early 2009, Applicant decided to look for another job. Management attempted to persuade him to remain at C. However, when he advised that he was tired of traveling, management told him that he owed \$45,000 in unauthorized expenses. He stated that it was not until after he had told management that he was leaving that he was confronted with allegations of unauthorized expenses.

¹The letter was dated October 2, 2008.

Applicant has been at his current job for nearly four years and has had no problems. He has been promoted twice since working there. He enjoys an excellent reputation for the quality of his work performance, his leadership ability, his honesty, and loyalty. He is held in high regard for his integrity and devotion to personal and professional ethics.

The Judge's Analysis

The Judge cleared Applicant on all allegations in the SOR, most of which addressed conduct other than that described above. Concerning the allegations that he improperly received overtime pay and failed to mention this during the clearance adjudication process, the Judge concluded that the letter constituted an official warning which he should have disclosed. However, she also concluded that his failure to have done so was not deliberate. She accepted his explanation that he had misinterpreted the nature of the letter as being administrative rather than corrective in nature. She also concluded that Applicant had not been removed from a supervisory position and that the improper receipt of overtime pay was a minor, relatively old offense.

Discussion

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 standard applicable in security clearance decisions "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).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's favorable conclusions were not consistent with the weight of the record evidence. Included in her argument is the contention that the Judge erred by finding that Applicant had not provided deliberately false answers during the processing of his SCA. We find this argument persuasive.

The SOR alleged, *inter alia*, that Applicant deliberately omitted the warning letter from his SCA (SOR ¶ 1.g) and that he deliberately failed to admit his removal from a "Supply Chain Management leadership role" in an answer to a DOHA interrogatory (SOR ¶ 1.i). The evidence supporting these allegations includes the following: Government Exhibit (GE) 5 contains several documents from C relating to Applicant, including the October 2, 2008, letter. This letter's subject

heading is “Last Chance–Final Written Warning.” It states that an investigation revealed that Applicant had, on over 40 different occasions during a two-year period, charged overtime without having obtained prior management approval. The letter specifies hours, rates, and amounts pertaining to the overtime, for a total of nearly \$23,000. It avers that Applicant’s explanations for his conduct were inconsistent and were not corroborated by other witnesses. The letter advises Applicant that he had “exhibited a pattern of disregard for [C] policies and practices and the leadership requirements of [his position].” It further states:

You have failed the integrity component of the [C] leadership model. Your responses throughout the investigation were inconsistent and lacked credibility. You paid yourself overtime out of your own budget without clear approval and/or authorization. Your behavior is inconsistent with what is expected from a leader at your level and will not be tolerated.

The letter continues:

You will no longer function in a Supply Chain Management leadership role. Your new role is an individual contributor with local business development responsibilities only . . . Consequences for continuing to demonstrate a lack of integrity will result in your immediate termination. Nothing in this documentation should be understood as modifying your status as an at-will employee. Your employment can be terminated with or without cause, and with or without notice, at any time, at [C]’s option. (emphasis added)

Applicant signed the letter on October 6, 2008, acknowledging that he had read, understood, and received a copy.

GE 1, SCA, dated September 29, 2009, asked the following question: “Have you ever received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace?” Applicant answered “no.” GE 4, Interrogatories, asked the following: “Records indicate you were removed from a supply management role, after submitting overtime hours for which you were ineligible. Please explain.” Applicant provided the following answer:

If records indicate that I was ever removed from a management role, the records are incorrect. In fact, many months after I was paid for overtime, I was promoted to a Project Manager role (a level and monetary increase), where I managed all a major program for [C]. As to the overtime, the same Finance Manager told me that all hours worked needed to be recorded. For a one month period (two pay periods) I did just that until I realized that my paychecks included overtime pay; I then immediately ceased the practice. Shortly after that [C Human Resources] told me that the overtime needed to be repaid and they were repaid through a reduction in my paycheck. This was simply an administrative error that was corrected quickly. Again, I was never removed form a supply management role for any reason.” (emphasis added)

The Judge acknowledged that Applicant should have divulged the warning letter in his SCA response. She concluded, however, that he had not been removed from a management role. This conclusion is not consistent with the evidence cited above. It also is not consistent with Applicant's testimony at the hearing, during which he acknowledged that, as a consequence of the letter, he no longer performed day-to-day supervisory duties regarding employees of [C] and that supervision is a distinguishing feature of managerial responsibility.² Applicant's contention that he had received merely a lateral move to an equivalent position contradicts the express language of the letter. It also contradicts the letter's overall tenor, which was to address conduct by Applicant that had impaired his status as a company leader. The clear import of the warning letter was that Applicant's malfeasance necessitated removing him from a position in which he exerted leadership over employees of C. This import is not contradicted, even on its face, by Applicant's testimony that he was not demoted or that his duties as an individual contributor entailed supervision of subcontractors. The Judge's conclusion that Applicant's interrogatory response was factually true is not sustainable on this record.

Of course, it is not sufficient to demonstrate that Applicant's answers were untrue. To raise security concerns under Guideline E, the answers must be deliberately so. In analyzing an applicant's intent, a Judge must consider the applicant's answers in light of the record as a whole. *See, e.g.*, ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012). We note Applicant's contention that he believed the letter to be administrative in nature rather than a warning regarding misconduct. However, as stated above, the letter was styled "Final Written Warning," and it addressed Applicant's having improperly received overtime pay, admonishing him for a lack of integrity and threatening him with termination if the conduct persisted. It is unreasonable on its face to suppose that a man near to completing a Ph.D. would not understand that such a letter was a warning about misconduct in the workplace or that he would simply have forgotten about it when he completed his SCA less than a year later. The Judge's conclusion that Applicant did not deliberately omit reference to the warning letter is not sustainable on this record.

The reasons cited above also constitute substantial evidence that Applicant's interrogatory answer was deliberately false. Additionally, we note the content of the answer itself, in which Applicant claimed that he had entered his actual work hours on his time sheet but, two pay periods later, discovered he was being paid overtime and immediately ceased the practice. This answer would convey to a reasonable person that Applicant had corrected a minor administrative error on his own initiative.

This is contradicted by the clear language of the warning letter, which charged that Applicant received overtime for *two-years*, rather than merely two pay periods, under circumstances that impugned his integrity and that subjected him to possible job termination. Moreover, we note Applicant's hearing testimony, in which he stated that he ceased submitting for overtime after receiving the warning letter, which is not totally consistent with the implication of the interrogatory

² "[Judge]: So your interpretation is that individual contributor job, on the pecking order, is a higher job than the supply management job? [Answer]: No, ma'am it's the same. You either supervise people, that's a management in the title . . . or you're an individual contributor, which means that you don't supervise people." Tr. at 129-130.

answer that he had discovered the improper payments on his own. His hearing testimony did not challenge the extent and duration of the overpayments that C charged against him, nor did he address other significant contradictions between his answer and the warning letter. Moreover, although he claimed that the admonitory tone of the letter was an effort by management to cover up their own complicity in the overpayments, Applicant did not corroborate his claim that his charging of overtime was in accordance with company policy.³

Apparent false statements about the circumstances of Applicant's overpayments were not alleged in the SOR. However, evidence of other false statements in the very same interrogatory answer is relevant to the question of Applicant's intent, undermining a possible conclusion of innocent mistake.⁴ These matters also undermine Applicant's credibility. The Judge did not address this aspect of the case in a reasonable manner.⁵ The record contains substantial evidence that Applicant deliberately falsified his SCA by omitting reference to the warning letter and that he deliberately falsified his answer to the interrogatory question by denying that he had been removed from a Security Chain Management leadership role. By erroneously concluding otherwise, and thereby failing to raise Guideline E security concerns, the Judge failed to address Applicant's conduct in light of his burden of persuasion as to mitigation. *See* Directive ¶ E3.1.15, *supra*.

Concerning the underlying misconduct itself, the Judge concluded that Applicant's receipt of overtime was minor and occurred a long time ago.⁶ The record does not support a conclusion that

³Regarding inconsistencies between Applicant's explanations and the warning letter issued by his employer, we note our prior decision, ISCR Case No. 10-03886 at 3 (App. Bd. Apr. 26, 2012), in which we stated that an employer's decisions and characterizations of events are entitled to some deference.

⁴*See* Federal Rule of Evidence 404(b): Evidence of other acts or wrongs may be admissible to prove motive, intent, knowledge, absence of mistake, etc. *See also* ISCR Case No. 07-16653 at 3, n. 1 (App. Bd. May 1, 2012). We also note the Judge's finding that C charged Applicant for \$45,000 in unauthorized purchases on his company credit card. This was alleged in the SOR, and the Judge resolved it in Applicant's favor. Although we are limiting this appeal decision to the allegations pertaining to overtime pay, evidence regarding this incident has a bearing on the issue of intent. According to a document contained in GE 5, an ethics audit disclosed that Applicant had repeatedly used his company credit card for personal, rather than business, purposes.

The employee improperly expensed personal charges through two methods: (1) obtaining reimbursement from the company by including personal charges on expense reports as business-related expenses; and (2) booking travel, expensing such travel to the company, cancelling the travel, and using the resulting refunds to his credit card account to fund personal purchases using the card. . . .The employee denied expensing any personal charges to the Company. Later in the investigation, he admitted making more extensive personal charges and expensing them to the [C]ompany. While the employee specifically identified a number of the improper charges, he was unable or unwilling to provide a complete accounting of them. GE 5 at 41.

⁵While we defer to a Judge's credibility determination, that deference is not without limits. A Judge should address evidence that raises questions about an applicant's credibility, such as inconsistent statements, contrary evidence, etc. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008).

⁶Directive, Enclosure 2 ¶ 17(c): "the 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[.]"

willful receipt of nearly \$23,000 of unauthorized overtime payments for two-years is minor. Moreover, evidence of Applicant's recent meretricious statements undermines a conclusion that his security-significant conduct is sufficiently attenuated so as to satisfy the Guideline E mitigating conditions.

To sum up, the record contains substantial evidence that Applicant repeatedly over an extended period of time received payments from his employer to which he was not entitled. As a consequence of this, Applicant received a letter warning him that future similar misconduct would result in his termination. The letter also removed him from his position of leadership. Applicant deliberately failed to mention the warning letter in his SCA, and, in an answer to a DOHA interrogatory, he deliberately denied having been removed from his management position. In addition, the record contains evidence of inconsistent and/or self-serving statements by Applicant, which bear directly on the deliberate nature of the omissions and which undermine his credibility. The Judge's favorable decision fails to consider relevant factors and offers an explanation for the decision that runs contrary to the weight of the record evidence. Given the totality of Applicant's security-significant conduct, the record does not support a conclusion that he has mitigated his security concerns under the *Egan* standard. In light of that holding, we do not need to address Department Counsel's arguments about the Judge's other favorable findings.

Order

The Decision is **REVERSED**.

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