

KEYWORD: Guideline E

DIGEST: The Judge's favorable decision is unsustainable because it relies on: 1. An unsustainable credibility determination and 2. Two inaccurate premises-- that the disqualifying conduct was infrequent and that Applicant had exhibited remorse. Cumulatively, the errors warrant reversal. Favorable decision reversed.

CASENO: 10-03886.a1

DATE: 04/26/2012

DATE: April 26, 2012

In Re:	)	
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Applicant for Security Clearance	)	ISCR Case No. 10-03886

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, 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 April 15, 2011, DOHA 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 January 27, 2012, after the hearing, Administrative Judge Rita C. O’Brien 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 E mitigating conditions was erroneous and whether the Judge analyzed the evidence in a piecemeal fashion. Consistent with the following, we reverse the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an engineering technician who has prior military service. He has held a security clearance without incident since 1986.

During a prior civilian employment, Applicant had been assigned to work on three contracts. His primary supervisor was not happy to have to share Applicant’s time with others. On three occasions, the supervisor called Applicant at his work location, and Applicant was not there. The supervisor concluded that Applicant had left work. Applicant testified that he had been working the other contracts in different locations. When he charged for hours that the supervisor believed he was not entitled to, the supervisor accused him of fraud. Applicant was dismissed from his job, despite having received outstanding ratings for duty performance.

When Applicant completed his security clearance application (SCA), he was asked if he had ever been fired from a job. Believing that he had been wrongfully terminated and that “fired” did not describe his actual circumstances, Applicant answered that he had been “laid off.”

When he subsequently met with an investigator, Applicant did not tell her he was fired. After the interview he realized that he had made an error. He tried several times to reach the interviewer by phone and by e-mail. He spoke with his FSO and with his current supervisor, both of whom advised him to explain the issue when Applicant was contacted for a second interview. He did not hear from her for some time, but when she called Applicant she told him that she had been traveling and did not always have access to her work phone or e-mail. During the second interview, Applicant explained his circumstances fully, telling the investigator that he had disclosed the events to his program manager, team leads, and other co-workers.

Applicant acknowledges that he should have answered the SCA questions differently, and that he was concerned for his security clearance and his job, upon which his family relies. He has stated that he is sorry for his actions. Applicant enjoys an excellent reputation for the quality of his work performance, character, and honesty.

In the Analysis, the Judge concluded that Applicant's circumstances established Guideline E security concerns.<sup>1</sup> In examining Applicant's case for mitigation, the Judge concluded that the conduct at issue was not frequent.<sup>2</sup> She also concluded that his disclosures to his family and co-workers, his efforts to contact the investigator soon after his first interview, and his sincere remorse and absence of subsequent misconduct demonstrated that the misconduct is not likely to recur.<sup>3</sup> In the whole-person analysis the Judge discussed Applicant's lack of subsequent misconduct, his disclosures, and his long history of holding a security clearance. She stated that his demeanor and other indicia of credibility convinced her that he would not commit similar infractions in the future.

Department Counsel argues that the evidence, taken as a whole, does not support the Judge's favorable decision. Department Counsel stresses the significance of the time card fraud charges underlying Applicant's job dismissal prior to the deliberate falsification the SCA and Applicant's false statements to the investigator after the deliberate falsification of the SCA. Department Counsel's argument has merit.<sup>4</sup>

The Judge's favorable decision relied to a substantial extent on her favorable credibility determination. This is most evident from her conclusion that Applicant's firing had been "unjust." The Judge found that Applicant had deliberately committed the falsification cited in the SOR and he had not been forthright in his interview statements after that to the investigator. Yet, she chose to accept Applicant's version of his firing over the employer's version that he had been fired for time card fraud. Further undermining that choice was the evidence that a state authority had denied Applicant's unemployment claims because they believed he had been fired for fraud. This set of facts warranted a heightened degree of critical evaluation of Applicant's testimony.

The deference we owe to a Judge's credibility determination has its limits. We evaluate a credibility determination in light of the record as a whole. *See, e.g.*, ISCR Case No. 09-02839 at 4 (App. Bd. May 17, 2010). When a witness's story is contradicted by other evidence or is so

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<sup>1</sup>The SOR contained only one allegation, the false statement on the SCA. It did not allege the false statements made to the investigator. However, as Department Counsel points out in his brief, this subsequent conduct can be considered on the question of mitigation, rehabilitation, credibility, etc. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

<sup>2</sup>Directive, 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[.]"

<sup>3</sup>Directive, Enclosure 2 ¶ 17(d): "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[.]"

<sup>4</sup>Department Counsel's brief also cites to the state authority's denial of Applicant's applications for unemployment compensation. Given the quantum of evidence on those proceedings in the record the Board cannot conclude, as Department Counsel argues, that the state's administrative decisions obligated the Judge to apply the doctrine of collateral estoppel as to the fraud issue. Nonetheless, there was some record evidence on the denials which the Judge needed to consider and explain, especially in the context of other record evidence which also detracted from her reasoning regarding mitigation and the whole person concept.

internally inconsistent or implausible that a reasonable fact finder would not credit it, we can find error despite the deference owed a Judge's credibility determination. *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). In this case the Judge relied on a favorable credibility determination to choose between two conflicting versions of events. The version she chose to accept was presented by an interested party with a record of making false official statements both verbally and in writing on the very point in question (his firing by his employer). The version she chose not to accept was put forth by Applicant's employer and was accepted by a state authority. We conclude that Judge's choice was not sustainable. An employers' decisions and characterizations of events are entitled to some deference. A judge discounting or contradicting those decisions and characterizations should be able to offer a cogent explanation as to why they are erroneous. In the case before us the employer's views are bolstered by the state authority's decision to accept those views, while the Applicant's version of events is undercut by his known falsifications. The Judge's favorable credibility determination is not sustainable.

The Judge's favorable analysis under the Guideline E mitigating conditions and the whole person concept relied on two premises which were not supported by the record evidence. First, she focused on the infrequency of the conduct (alternatively discussed as the lack of subsequent misconduct). As Department Counsel notes, the falsification was not a single act in isolation. The record evidence shows that Applicant was charged with time card fraud, denied unemployment benefits because of the fraud, falsified his SCA, and then made false statements to the investigator. The Judge's theory of infrequency is not sustainable given those facts.

Second, the Judge's favorable discussion of Applicant's remorse for the falsification of the SCA is not sustainable in light of the same set of facts. Considering Applicant's false statements to the investigator were uttered *after* the falsification of the SCA, it is difficult to see how Applicant has demonstrated remorse for the deliberate falsification.

In light of the Judge's multiple errors set out above, we conclude that the decision is not sustainable. We further conclude that the record as a whole cannot support a conclusion that Applicant has met his burden of persuasion as to mitigation.

### **Order**

The Judge's favorable security clearance 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

### **Dissenting Opinion of Administrative Judge James E. Moody**

I disagree with my colleagues in their resolution of this case. For reasons set forth below, I would affirm the Judge's decision.

The Judge made relatively extensive findings which, because Department Counsel has not challenged them, are binding on us. *See, e.g.*, ISCR Case No. 04-05802 at 3 (App. Bd. Jun. 13, 2007). I note the following, drawn from the Judge's findings: (1) Applicant's 25 years of having held a security clearance; (2) Applicant's concern following his first interview that he had not been truthful; (3) Applicant's having taken immediate steps to contact the interviewer; (4) Applicant's expressions of remorse; (5) Applicant's candor in his second interview; (6) the absence of subsequent misconduct; and (7) the Judge's favorable opinion of Applicant's demeanor while testifying. On this last point, a Judge should not substitute a credibility determination for record evidence. However, we must defer to the Judge's credibility determination unless it is unreasonable, contradicted by other findings, etc. Directive ¶ E3.1.32.1. *See Fieldcrest Cannon v. National Labor Relations Board*, 97 F.3d. 65, at 69 (4<sup>th</sup> Cir. 1996). I note the testimony of Applicant's wife to the effect that, after his first interview, Applicant expressed concern that he had not been truthful, and the two discussed it. This is consistent with Applicant's testimony and lends plausibility to his claim that he tried immediately to contact the investigator and correct his false statement.<sup>5</sup> Although the Judge did not explicitly address Personal Conduct Mitigating Condition 17(a), I believe that the record supports a whole-person conclusion that Applicant made a good-faith attempt to correct his misstatements before being confronted with the facts.<sup>6</sup>

The findings and record evidence cited above support the Judge's conclusion, contained in her whole-person analysis, that Applicant was actually remorseful, that he has demonstrated rehabilitation, and that he has taken steps that lessen his susceptibility to coercion. I give no opinion as to whether I would have decided the case in the same way as the Judge. The Board does not have to agree with a Judge's decision to find it supportable. *See, e.g.*, ISCR Case No. 09-02281 at 3 (App. Bd. Apr. 18, 2011).

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<sup>5</sup>“[Judge]: So the day that he had the interview with the Agent . . . is when you said he came home and talked with you about it? [Wife]: Yes. [Judge]: And that's when you had this discussion that you described about honesty, etcetera? [Wife]: Yes, yes. [Judge]: And do you know what he did subsequently? Did he [do] anything or do you know that? [Wife]: He tried to contact the Interviewer by phone and tried to rectify that error . . . [Judge]: Do you know if it was by phone, by email? [Wife]: By phone and by email. I believe he tried by phone several times and then did try email.” Tr. at 79-80.

<sup>6</sup>Directive, Enclosure 2 ¶ 17(a): “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts[.]”

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