

KEYWORD: Guideline E; Guideline J

DIGEST: The Appeal Board is required to defer to a Judge’s credibility determination. We examine a Judge’s findings of fact to see if they are supported by substantial record evidence. The Judge’s whole-person analysis complied with the Directive in that it considered the totality of Applicant’s conduct. Adverse decision affirmed.

CASE NO: 10-06089

DATE: 09/11/2013

DATE: September 11, 2013

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In Re:)	
-----)	ISCR Case No. 10-06089
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Amy C. Broderick, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. DoD issued a statement of reasons (SOR)¹ advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 25, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

¹The SOR is undated. Applicant’s reply to the SOR is dated July 6, 2012.

Applicant raised the following issues on appeal: whether the Judge's findings of fact contained errors; whether the Judge's credibility determination was erroneous; whether the Judge failed properly to apply the mitigating conditions; whether the whole-person analysis was erroneous; and whether the overall decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge's findings consisted in large measure of detailed summaries of witnesses' testimonies, with his resolution of conflicts among those witnesses being reserved for the Analysis. In essence, the Judge made the following findings: Applicant worked for a contractor who permitted those of his employees who were pilots to spend five hours a month flying in order to maintain their skills. Applicant's employer would reimburse the employee for costs associated with this proficiency training. The vice president of Applicant's employer discovered an apparent discrepancy in documentation concerning Applicant's training flights. After visiting the aero club where this training purportedly occurred, examining documentation, and speaking with persons at the club, the employer discovered that Applicant had been submitting claims and receiving compensation for flights that he had never actually undertaken. Among other things, they discovered that Applicant had repeatedly used a blank copy of the same voucher rather than a separate voucher for each claim. The employer fired Applicant due to this misconduct.

The Judge's Analysis

In the Analysis, the Judge explained why he found the inculpatory evidence provided by Applicant's employer and the vice president of the company to be more credible than Applicant's denials of wrongdoing. He stated that he found the testimony of these two persons to be credible because they seemed surprised and disappointed by Applicant's misconduct; they had devoted a substantial amount of time to examining the records of the aero club; and Government auditing practices would not have permitted Applicant to have submitted multiple receipts from a single voucher, as Applicant testified he had been authorized to do. The Judge also explained why he did not find credible Applicant's evidence, principally a flight log and a chart derived therefrom, that purported to support his denial of wrongdoing. The Judge stated that these documents were written by Applicant and were not corroborated by independent evidence. He concluded that Applicant's conduct raised security concerns under both Guidelines alleged in the SOR and that none of the mitigating conditions applied. He concluded that Applicant had not mitigated the concerns in his case.

Discussion

Applicant argues that the Judge erred in finding that he had deliberately submitted false vouchers for flight training. In presenting his appeal he challenges the Judge's credibility determination. He contends that his own evidence was more worthy of belief than that of the Department Counsel. We examine a Judge's findings of fact to see if they are supported by substantial evidence, that is "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 ¶ E3.2.32.1. *See* ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012). We are required to defer to a Judge’s credibility determination. Directive ¶ E3.1.32.1. *See* ISCR Case No. 09-00266 at 4 (App. Bd. Jan. 26, 2012). However, this deference does not immunize a credibility determination from review or preclude us from concluding that a challenged credibility determination cannot be sustained, in light of the totality of the record evidence. *See, e.g.*, ISCR Case No. 07-17801 at 6 (App. Bd. Dec. 5, 2012).

We have considered the Judge’s essential findings in light of the record. The two witnesses for the Government provided detailed, mutually corroborating testimonies that were not undermined on cross-examination.² These testimonies were corroborated by independent documentary evidence. By contrast we note that Applicant’s case rested in large measure on his own uncorroborated denials of misconduct. Moreover, his testimony at the hearing was contradicted by evidence that he had admitted the wrongdoing to a fellow employee.³ The evidence provides no reason to disturb the Judge’s credibility determination. We conclude that the Judge’s material findings of security concern are based upon substantial record evidence.

Applicant contends that the Judge should have extended more weight to the flight log. However, a disagreement with the Judge’s weighing of the evidence or an ability to argue for an alternative interpretation of the evidence is not sufficient to demonstrate that the Judge’s treatment of the evidence was unreasonable. *See, e.g.*, ISCR Case No. 05-02471 at 2 (App. Bd. Apr. 11, 2007). The Judge provided a reasonable explanation as to why he discounted the flight log, for example that it was partly illegible and that it was not corroborated by other evidence. Applicant has not demonstrated that the Judge mis-weighed this evidence.

The Judge’s discussion of the mitigating conditions and whole-person factors was somewhat cursory. However, given his detailed explanation of why he found the allegations to have been substantiated and his supportable credibility determination, the Judge’s conclusion that none of the mitigating conditions applied was consistent with the record that was before him. The Judge’s whole-person analysis complied with Directive, Enclosure 2 ¶ 2(a), in that he considered the totality of Applicant’s conduct in reaching his decision. *See, e.g.*, ISCR Case No. 10-03598 at 3 (App. Bd. Oct. 10, 2012). The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “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). *See also* Directive, Enclosure 2 ¶ 2(b):

²“Normally, we don’t get Invoices with the same number, and that was the problem we had when we went to the Aero Club. You know, all these Invoices were just the same number . . . And, you know, we talked to the Aero Club Manager . . . The guy just basically threw in the towel and said – look, [Applicant] hasn’t been here for months. I haven’t [seen] him. So, the one airplane that he is actually claiming he was flying had been down for maintenance for some time. So, he said he noticed that airplane hasn’t been flying for a long [time].” Tr. at 51-52.

³Government Exhibit (GE) 3, Personnel Documents, includes a transcription of text messages Applicant sent to the employee. Applicant stated that he had “[s]ubmitted . . . re-embursement (*sic*) even when didn’t fly.” Applicant acknowledged that he had “no leg to stand on.” GE 3 at 8-9.

“Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

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