KEYWORD: Guideline H; Guideline E

DIGEST: Department Counsel challenged the Judge's determination that Applicant's confession to use of marijuana 16 times between 2004 and 2008 was false. The Judge failed to examine the record in light of Applicant's burden of persuasion. Favorable decision reversed.

CASENO: 10-08257.a1

DATE: 12/12/2011

DATE: December 12, 2011

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Raashid D. Williams, Esq., Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 29, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 25, 2011, after the hearing, Administrative Judge Juan J. Rivera 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 his credibility determination and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is an electrician working for a Government contractor. Not married, he has three daughters. He has worked for his current employer since 2003. In 1999, at age 14, Applicant experimented with marijuana. In 2006, he submitted his first security clearance application (SCA), in which he answered "no" to a question inquiring if he had illegally used any controlled substance during the previous 7 years or since age 16, whichever is shorter. In a follow-up interview, he answered the question in the same way.

On May 21, 2008, as part of a security clearance investigation, Applicant was questioned by an investigator from another Government agency (Agency). The questioning was pursuant to a "polygraph-assisted" interview. Although Applicant initially stated to the interviewer that he had used marijuana only once, he eventually stated that he had used marijuana "approximately 16 times since 2004, with his most recent use being on May 15, 2008." Decision at 3. After Applicant's initial statement of one use in 1999, the interviewer told Applicant that he was lying and pressured him to admit to other uses. Applicant wanted to terminate the interview, so he falsely told the interviewer about the subsequent uses between 2004 and 2008.

On two occasions in 2010, Applicant submitted SCAs in which he denied any use of marijuana during the seven preceding years. The Judge found Applicant credible when he testified that he had used marijuana only once, at age 14. Applicant is remorseful "about having lied to the investigator about using marijuana when in fact he had not." *Id*. at 4.

Applicant enjoys a reputation for being a dedicated and loyal employee. He receives excellent feedback from customers concerning his behavior, work ethic, and expertise.

In the Analysis, the Judge concluded that Applicant's having used marijuana once in 1999 raised Guideline H security concerns, which Applicant had successfully mitigated through evidence of his youth at the time of use, the lack of recency of the use, and other evidence from which the Judge concluded that the use does not impair Applicant's current reliability. Concerning Applicant's denials of drug use during the various security clearance investigations, the Judge concluded that these denials were truthful. He concluded that the Government had not presented substantial

evidence of the false statements alleged in the SCA under Guideline E. The Judge did find that Applicant's one use of marijuana in 1999 established a Guideline E concern, but, for reasons described in his discussion of Guideline H, the Judge concluded that the concern had been mitigated.

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. In rendering a final decision, an "agency must 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 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).

Department Counsel challenges the Judge's credibility determination. Specifically, he argues that the Judge erred in his evaluation of Applicant's credibility in denying having used marijuana subsequent to once in 1999 and in claiming that his admission to the Agency interviewer in 2008 was a false admission induced through duress.

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 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). Regarding Applicant's claim of a false admission of drug use induced by the conduct of the Agency interviewer, we hold the Applicant to the standard expected of a reasonable person in the same or similar circumstances. *See, e.g.*, ISCR Case No. 97-0184 at 4 (App. Bd. Dec. 8, 1998). We note that Federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See, e.g.*, ISCR Case No. 07-18324 at 6 (App. Bd. Mar. 11, 2011).

In this case, the evidence of Applicant's admission of subsequent marijuana use is contained in Government Exhibit (GE) 3, which is a one-page decision statement by the Agency. The decision statement is on plain paper without an Agency letterhead and, as the Judge noted, is not accompanied by the pertinent questions and answers. However, Applicant did not object to this document when it was offered into evidence, and, throughout his hearing, he never denied the accuracy of its contents, insofar as it is a reflection of his statement to the interviewer. That is, although Applicant claims that his admission of drug use was not true, he did not deny that GE 3

accurately recorded this purportedly untrue statement. Moreover, the Judge himself treated GE 3 as an accurate rendition of Applicant's actual statement to the interviewer, despite his negative conclusion as to its truth. Neither Applicant's testimony, the other record evidence, nor the Judge's decision provide a reason to deny that Applicant stated to the Agency interviewer during the 2008 security clearance interview that he had used marijuana on multiple occasions between 2004 and 2008. The one issue is whether this statement was a false admission coerced by the interviewer.

The only information in the record concerning the circumstances of the Agency interview is from Applicant himself. Applicant testified that he had been advised that he could terminate the interview at any time. Tr. at 57. He was given an opportunity to review the questions in advance. Tr. at 58. Although Applicant testified that he felt threatened during the interview, he described no efforts at actual physical intimidation.[1] The gravamen of Applicant's testimony was that, during the course of the "polygraph-assisted" interview, the interviewer told Applicant that his claim to have used marijuana only once was not true. He pressed Applicant to admit to the full extent of his use. Applicant testified that he was told that, if he terminated the interview, he would likely be denied a clearance. Assuming the interviewer actually used those words, in doing so he did not contradict DoD policy.[2] Applicant testified that, of the 90 minutes comprising the entire interview, about 25 to 30 minutes were spent on the subject of drugs. Tr. at 65. This does not strike us as to have been so lengthy as to have worn down the resolve of a reasonable person.[3]

Applicant did not assert that the interviewer suggested any particular response to the questions about additional drug use,[4] and Applicant's reply, specific as to numbers, dates, and the type of drug, is not the sort that one would expect of a person simply tossing an admission off the top of his head to satisfy an overbearing interrogator. Applicant's testimony describes no threats, no deceptive promises, or any other conduct that would induce a reasonable person to falsely claim to have used marijuana. In short, there is no evidence in the record to establish that Applicant's admission of subsequent marijuana use was "'the result of physical abuse, psychological

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[1]Tr. at 58: "Q: At any time, did you feel physically threatened by the administrator of the polygraph? A: In a way. Q: How so? A: Just the way he was coming on with the drug questions. Q: Was he standing over you when he asked you questions? A: No, but he was real close, like sitting–he was sitting there and talking to me, and he was real close."

[2]"He did say that if you do leave, they'll take what information they have, and go towards it, and it could–you could have no chance of getting it." Tr. at 61. *See* Directive, Enclosure 2 ¶ 15: "The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for a subject interview[;] (b) refusal to provide full, frank and truthful answers to lawful questions of investigators . . . in connection with a personnel security or trustworthiness determination."

[3]*See, e.g.*, *Maine v. Coombs*, 704 A.2d 387 (1998), in which the court held that a two to three hour custodial interrogation was not inherently coercive in length. *See also Wilson v. Walker*, 2001 U.S. District LEXIS 18595 (2001), in which the court held that a seven-hour non-custodial interrogation, while substantial in length, was not coercive, considering the totality of circumstances.

[4]"Q: Did he tell you what he wanted to hear? A: No; not exactly . . . he said that he knew that I'd done it more. And then . . . I just threw some stuff out[.]" Tr. at 60.

intimidation, or deceptive interrogation tactics'" sufficient to overcome the free will of a reasonable person. *United States v. Villalpando*, 588 F.3d. 1124 at 1128 (7th Cir. 2009), quoting *United States v. Dillon*, 150 F.3d. 754 at 757 (7th Cir. 1998). The record is not sufficient to establish a false admission or to rebut the presumption of good faith in the interviewer's conduct of his duties. Under the circumstances, the Judge's favorable conclusion as to Applicant's credibility in claiming to have made a false confession is not sustainable.

In light of the above, and considering GE 3 in the context of the entire record, we conclude that there exists substantial evidence that Applicant used marijuana from 2004 until 2008 and that he provided false information about his drug use during the course of several security clearance investigations.[5] The Judge erred in that he failed to examine the record in light of Applicant's burden of persuasion as to rebuttal of the facts alleged in the SOR, and as to mitigation regarding the full panoply of Applicant's misconduct. We further conclude that the record does not support a conclusion that Applicant has met this burden, under the *Egan* standard. Accordingly, we conclude that the Judge's favorable decision fails to consider an important aspect of the case and offers an explanation for the decision that runs contrary to the weight of the record evidence. ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). The Judge's decision is not sustainable.

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

[5]We also note Department Counsel's argument to the effect that, even if one accepts the Judge's credibility determination as reasonable, one would still have to conclude that Applicant had made a false statement during the course of a security clearance investigation. This argument suggests our analysis in ISCR Case No. 95-0178 (App. Bd. Mar. 29, 1996). In that case, the Judge had concluded that the applicant had made a false confession during a polygraph exam. We stated that, "[i]f the Judge finds [an] affirmative defense of alternative misconduct believable, then it would be unduly stringent for the Judge to ignore such admitted misconduct in deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for [the applicant]."

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