

KEYWORD: Guideline B; Guideline E

DIGEST: Judge’s finding that Applicant’s omissions were deliberate was supported by substantial evidence. Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. The Judge’s whole-person analysis complied with the requirements of the Directive. On cross-appeal, Applicant’s settlement agreement between himself and his agency, with subsequent termination of adverse action, was not sufficient to demonstrate that the allegations underlying the adverse action were unfounded. The Judge erred in concluding that the Government failed to meet its burden of production regarding an allegation that Applicant doctored a certain e-mail. However, given the voluminous record and possible failure of the Government clearly to identify the document, the Judge probably simply overlooked the document. Adverse decision affirmed.

CASE NO: 12-05232.a2

DATE: 06/30/2014

DATE: June 30, 2014

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In Re: )  
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 ----- ) ISCR Case No. 12-05232  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Cathryn E. Young, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 11, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). DOHA amended the SOR on February 21, 2013, and again on August 12, 2013. Applicant requested a hearing. On November 8, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On February 10, 2014, the Appeal Board remanded the case to the Judge for further processing. On March 12, 2014, the Judge issued a Remand Decision. Applicant again appealed pursuant to the Directive. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge erred in finding that certain omissions during Applicant's clearance interview were deliberate and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross-appeal: whether the Judge erred by failing properly to analyze certain Guideline E security concerns. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

The Judge apparently incorporated his findings from the first Decision. Although he does not explicitly state that, we are construing his Decision that way. Applicant was born and raised in Afghanistan. He came to the U.S. in the early 1990s and became a naturalized citizen in the late 1990s. His mother is a citizen and resident of Afghanistan, with whom Applicant speaks "every two or three months." Decision at 4. He has several siblings who are citizens and residents of Afghanistan. He speaks with some of them about once every one to three months. He has visited Afghanistan three times in the last 10 years, the last occasion being a few years ago. He has no plans to return.

Afghanistan and the U.S. signed a strategic partnership, committing the U.S. to assisting Afghanistan in rebuilding after decades of conflict. The Taliban, Al Qaeda, and narcoterrorists operate in Afghanistan. There is an ongoing risk of kidnapping and assassination of U.S. citizens throughout the country.

Beginning in mid-2000s and for several years thereafter, Applicant worked for a Federal agency. He was placed on administrative leave for failing to work his prescribed schedule and for improperly recording his time and attendance. He denied the charges. Eventually Applicant and his employer settled the dispute. The employer rescinded the removal letter and removed documents regarding the proposed termination, and agreed to pay Applicant a sum of money. In exchange, Applicant resigned and did not pursue further legal action.

Applicant enjoyed an excellent reputation for the quality of his work. He received a Superior Accomplishment Award for his services to the Federal agency.

In 2011, Applicant was interviewed pursuant to his effort to obtain a clearance. During his interview, he did not disclose that he was on administrative leave. A month later he was re-interviewed. When asked why he omitted the leave, he made inconsistent statements. He said that he did not think that the issues pertaining to the leave were relevant. Later in the same interview

he claimed that he had suppressed his employment problems from his memory. At the hearing, he characterized the suppression as “unconscious,” offering no further explanation. *Id.* at 6.

### **The Judge’s Analysis**

One of the Guideline E allegations concerned Applicant’s having falsified his time and attendance cards. The Judge cited to the settlement agreement, which he characterized as having rescinded the allegations in exchange for Applicant’s agreement to forego potential claims. The Judge stated that, given Applicant’s good work record, his affirmative defense against his employer’s allegations was made in good faith. The Judge resolved this particular allegation in Applicant’s favor. The Judge also favorably resolved an allegation to the effect that Applicant had provided a doctored e-mail in response to the SOR. He stated that the Government had failed to establish this allegation.

However, the Judge concluded that Applicant’s omission of his adverse action during his clearance investigation was deliberate. He noted Applicant’s inconsistent statements during the subsequent interview and concluded that Applicant’s hearing testimony “was incredible and evasive.” *Id.* at 7. He stated that none of the mitigating conditions applied to this matter.

In evaluating the allegations under Guideline B, the Judge noted that the risk of terrorism is present in Afghanistan. He stated that Applicant’s relatives created a heightened risk of foreign exploitation or pressure. In evaluating Applicant’s case for mitigation, the Judge stated that Applicant was not credible, given evidence of his inconsistent statements. As a consequence, he stated that he could not accept as truthful Applicant’s evidence as to the extent of his contacts with his foreign relatives, nor could he conclude that Applicant would resolve any conflict of interest in favor of the U.S.

### **Discussion**

#### Applicant’s Appeal

Applicant contends that the Judge erred in his finding that his omission during the interview was deliberate. In analyzing an applicant’s *mens rea*, a Judge must consider the applicant’s answers in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014). In this case, the Judge’s treatment of this issue is supported by the record. Applicant’s inconsistent explanations for his omission could persuade a reasonable person that he was not truthful. We defer to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. *See also* ISCR 10-06089 at 3 (App. Bd. Sep. 11, 2013). Moreover, a reasonable person could conclude that Applicant had a motive to conceal the adverse action that was ongoing at the time of the interview, in that it might have had an impact on his effort to get a clearance. We find no reason to disturb the Judge’s finding about the deliberate nature of Applicant’s omission.

Applicant cites to other hearing office cases concerning Guideline B, which he believes support his effort to obtain a clearance. We have given these cases due consideration, as persuasive

authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 13-00464 at 3 (App. Bd. Feb. 20, 2014). Applicant's case has some aspects that distinguish it from the ones he has cited in his brief, and, in any event, each case must be judged on its own merits. The cases cited by Applicant are not sufficient to show that the Judge's adverse decision under Guideline B was arbitrary, capricious, or contrary to law. We also conclude that the Judge did not err in considering Applicant's inconsistent statements about his omission in the context of evaluating the extent to which Applicant had shown mitigation under Guideline B.

Despite Applicant's argument to the contrary, we conclude that the Judge's whole-person analysis complied with the requirements of the Directive, in that he considered Applicant's circumstances in light of the entirety of the record. *See, e.g.*, ISCR Case No. 11-13984 at 4 (App. Bd. Feb. 20, 2014). The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The presence of terrorist activity in a foreign country is a significant factor in Guideline B cases. *See, e.g.*, ISCR Case No. 13-00375 at 3 (App. Bd. Mar. 28, 2104). An applicant's failure to provide truthful answers is "[o]f special interest" in evaluating his or her fitness of a clearance. Directive, Enclosure 2 ¶ 15. "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): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

### Cross-Appeal

Department Counsel argues that the Judge erred in his treatment of the settlement agreement. He argues that settlement of the dispute was no reason to conclude that the dispute was groundless. *See, e.g.*, ISCR Case No. 09-08394 at 6 (App. Bd. Jan. 16, 2013).

In the case before us, the record contains the letter from the agency outlining its reasons for proposing Applicant's removal from Federal Service. Government Exhibit (GE) 6, Removal Letter, dated April 13, 2011. These reasons are 101 separate instances of Applicant's failure to work his prescribed schedule and 97 instances of his failure properly to record his time and attendance. The allegations are sufficiently specific as to times, dates, and circumstances that GE 6 could properly be considered not only as evidence that Applicant's employer proposed his termination but as evidence of the infractions that formed the basis of that proposal. While a Judge cannot be expected to discuss each piece of evidence in a record, he or she should address "significant evidence that has a material bearing on the case." ISCR Case No. 09-08394, *supra*, at 7. The Judge's failure to discuss GE 6 in the context of the Guideline E disqualifying conditions impaired his analysis. To the extent that a reasonable person could believe that he treated the settlement agreement by itself as evidence that the infractions were unfounded, without reference to contrary evidence, he erred. However, any such error did not affect the overall outcome of the case and, therefore, was harmless.

Department Counsel argues that the Judge erred in concluding that the Government had failed to meet its burden of production regarding the allegation of a doctored e-mail. The allegation

read as follows: “In your March 13, 2013, Answer to the Amendment to the Statement of Reasons, you falsified material facts when you submitted a false document containing email correspondence with altered text.” We note that Department Counsel’s documents were identified with small stickers, the last one designated 2-F. The document cited by Department Counsel in support of this allegation is in the file. The absence of stickers after 2-F probably accounts for the Judge’s conclusion. Given the voluminous documentary evidence in this case and the multiple amendments to the SOR, the Judge may simply have overlooked the cited document. Any error in this regard is harmless, however, because it did not likely affect the outcome of the case.

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan  
Michael 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