KEYWORD: Guideline J

DIGEST: The Judge did not abuse her discretion in amending the SOR. Applicant failed to meet his heavy burden of persuasion that the Judge was biased against him. The Judge did not shift the initial burden of producing evidence of security concern from the Government to Applicant.

CASE NO: 14-00019.a1

DATE: 09/18/2014

DATE: September 18, 2014

In Re:	)))	
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Applicant for Security Clearance	))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Daniel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 4, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer I. Goldstein denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge abused her discretion by amending the SOR; whether the Judge was biased against Applicant; whether the Judge erred in concluding that the Government had met its burden of production regarding certain of the allegations; whether the Judge erred by considering conduct not alleged in the SOR; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law.

The Judge's Findings of Fact

Applicant has worked for a Government contractor since 2008. He had a difficult childhood, his father being a heroin addict. His earliest childhood memories are of watching people overdose on narcotics in his living room.

Applicant's SOR alleged numerous instances of criminal misconduct. In January 1993, he was arrested and charged with forcible rape, sexual penetration with a foreign object, unlawful intercourse with a minor, and conspiracy. Applicant described the circumstances of the offense. He had consumed alcohol with two male friends and with two females who were minors. He stated that the victim had become drunk and one of his friends lay on top of her and sexually assaulted her. Applicant contends that he did not participate in the assault. Nevertheless, Applicant pled guilty to assault with intent to commit rape and was sentenced to 365 days in jail and five years probation. He was released from confinement after having served six months.

In late 1994, Applicant was arrested and charged with possession of marijuana; felony selling marijuana; and felony unlawful taking of a vehicle. He claimed he was "set up." Decision at 4. A search of the car uncovered large quantities of marijuana. Applicant was arrested, and his probation was revoked. He was convicted of taking a vehicle without the owner's consent. Sentenced to 34 months in prison, he served 25.

In June 2002, Applicant entered his ex-girlfriend's house to retrieve items he believed belonged to him. He pled guilty to "theft with a prior." *Id.* In September 2003, Applicant was charged with a June 11, 2003, failure to register as a sex offender. Applicant was transient at the time, and he falsely listed his father's address as his own. He pled no contest and was sentenced to 24 months summary probation and to 45 days of time served. He was required to register as a sex offender and to carry proof of registration at all times.

In August 2003, Applicant was arrested and charged with petty theft and burglary after shoplifting a baseball cap. He was convicted of petty theft and sentenced to 270 days in custody; fines, restitution, and fees; and 36 months probation.

In September 2005, while on probation, his home was searched by probation authorities. They discovered illegal drugs on the premises. Not home at the time, Applicant knew he would be arrested, so he hid from police until he had made living arrangements for his wife and had obtained enough money to pay for his lawyer. He then turned himself in. His probation was terminated, and he was re-sentenced for the August 2003 petty theft charge.

Applicant was charged with contempt of court in August 2006 for failure to appear for a child support hearing. He did not appear because he was in jail on the petty theft charge. Finally, Applicant was arrested for violating the terms of his parole by having a minor living in his house. This charge was withdrawn, however, after it was discovered that Applicant's prior parole officers had granted him permission to have his daughter and grandson live at his residence. He was discharged from parole in 2009.

Applicant is in compliance with his sex offender registration requirements. He has not used or sold drugs since 2005. He is an active participant in his church, and he is dedicated to helping others who find themselves in unfortunate situations. He enjoys an outstanding reputation for his community service activities, his kindness, and his integrity. He has received recognition for his work performance. His facility security officer (FCO) testified that she herself had been a victim of an attempted rape. She testified that Applicant is an honest person who has demonstrated responsibility. "I know that not an extremely long distant period of time has passed but the way he's been going forward, he's almost over-compensating." *Id.* At 6.

The Judge's Analysis

The Judge concluded that neither the 2006 contempt charge nor the 2008 parole violation raised security concerns under Guideline J. However, she concluded that the remaining allegations raised two disqualifying conditions: 31(a)[1] and (e).[2] In evaluating Applicant's case for mitigation, the Judge cited to evidence that he had spent several years of his life in jail and that he had engaged in criminal activity such as drug use and narcotics trafficking as recently as 2005.

The Judge noted that, since his last incarceration, Applicant had changed in significant ways, as evidenced by his charitable endeavors and his excellent employment record. Although Applicant "is well on his way to demonstrating substantial behavioral changes," (*Id.*, at 8), she stated that his criminal activity spanned 12 years and that he had been discharged from parole only five years ago. She concluded that insufficient time had passed to demonstrate that Applicant's security-significant conduct is behind him.

In the whole-person analysis, the Judge cited to Applicant's evidence of good character and work performance. She cited explicitly to the testimony of his FSO, who recommended him for a clearance. However, she also noted the lengthy span of Applicant's criminal conduct, reiterating her view that insufficient time had passed to permit a conclusion that recurrence is unlikely. Insofar as any doubt must be resolved in favor of national security, the Judge concluded that Applicant had not met his burden of persuasion as to mitigation.

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[1]Directive, Enclosure 2 ¶ 31(a): "a single serious crime or multiple lesser offenses[.]"

[2]Directive, Enclosure 1 ¶ 31(e): "violation of parole or probation, or failure to complete a court-mandated rehabilitation program[.]"

Discussion

SOR Amendment

Applicant argues that the Judge erred in amending the SOR. We review a Judge's decision to amend the SOR for an abuse of discretion. *See, e.g.*, ISCR Case No. 09-07219 at 4 (App. Bd. Sep. 27, 2012). *See also* ISCR Case No. 04-08547 at 3-4 (App. Bd. Aug. 30, 2007).[3]

During the course of the hearing, Department Counsel moved to amend two of the SOR allegations. SOR ¶ 1(d) originally read as follows: "You were arrested on or about June 11, 2003, in [City, State] for Failure to Register as a Sex Offender. You pleaded nolo contendere and were sentenced to 24 months summary probation, time served (45 days in jail), and you were required to register as a sex offender and carry proof of registration at all times."

The Judge amended the first clause to read: "You were charged on or about June 2003," and left the remainder of the allegation unchanged.

SOR ¶ 1(g) originally read as follows: "You were arrested on or about December 6, 2005, in [City, State] for Petty Theft (with prior jail)."

The Judge added the words "or received" after the word "arrested" and before the word "on." She made no further changes to the allegation. The Judge offered Applicant additional time in which to prepare, but he declined. In the alternative she held the record open for two weeks to enable him to submit additional evidence.

Directive ¶ E3.1.17 provides:

> The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as . . . appropriate for further preparation or other good cause.

Applicant contends on appeal that the Judge violated this provision of the Directive by improperly colluding with Department Counsel. He cites to the Judge's colloquy with Department Counsel concerning the proposed amendment to (g):

[3]"[A] liberal mandate exists with regard to granting motions to amend SORs. The Board has recognized the proposition that administrative pleadings should be liberally construed and easily amended (internal citation omitted). As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues not concerned with pleading niceties (internal citation omitted). The overall purposes of the industrial security program are not well-served by interpreting the Directive in a manner that emphasizes pleading formalities over a full and fair adjudication of the cases on the merits."

> [Judge]: So do you want to amend that at all or do you want to leave g. as is? . . .
>
> [DC]: It doesn't have evidence . . .
>
> [Judge]: Okay. An arrest or – wait. Would it be an arrest or report was received on or about? I don't know. You tell me what language you want. Why don't you read the whole g. in . . . exactly your words and we will amend that. Tr. at 85-86.

Applicant contends that the Judge should simply have granted or denied the motion without the discussion quoted above. He appears to be arguing that by using such phrases as "You tell me what language you want" and "we will amend" the Judge was joining Department Counsel in wording a motion, the formulation of which should have been Department Counsel's sole responsibility. He argues that the Directive permits a motion to amend either by the Judge or by Department Counsel but not by both.

We find no merit in this argument. The record demonstrates that Department Counsel moved to amend the SOR, and the Judge granted the motion. We read her discussion with Department Counsel as an attempt to clarify the proposed wording rather than a divestiture of her impartiality. Although the allegation originally used the word "arrested," the evidence submitted by Department Counsel included the words "or received" in its description of the offense. Government Exhibit 4, FBI Identification Record, at 3. As such, the amendment did indeed conform the allegation to the evidence, and the Judge did not abuse her discretion in ruling as she did. We find no reason to believe that the Judge failed to comply with the Directive in her treatment of Department Counsel's motion.

Bias

Applicant's argument on the SOR amendment included an assertion that the Judge was biased against him. He also contends that the Judge showed bias in her ruling on his request for additional time to submit evidence. He cites to the following:

> [Applicant Attorney]: I light of today, I'm trying to think of what else – two weeks. Two weeks from today.
>
> [Judge]: I'm not sure I can do that for you.
>
> [DC]: Yes, you can.
>
> [Judge]: I can? All right. [DC] is retiring at the end of the month so the post-hearing documents will have to be handled . . . by another attorney at DOHA, but I'll let you handle that.
>
> [Applicant Attorney]: No problem, Judge. Thank you for the extension or keeping the record open. Tr. at 87-88.

Applicant argues that the Judge sought permission of Department Counsel before granting the extension, thereby demonstrating a lack of impartiality. This argument is frivolous. Although the Judge expressed initial concern that Department Counsel's impending retirement might have an impact on the processing of Applicant's additional evidence, he assured her that it would not. There is nothing in the record, and especially nothing in the Judge's rulings on the SOR amendment and on the time extension, that would persuade a reasonable person that the Judge lacked the requisite impartiality. Applicant has not rebutted the presumption that the Judge was unbiased. *See, e.g.*, ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013).

Burden of Production

Applicant contends that the Judge erred in concluding that the Government had met its burden of production regarding allegations (d) and (g). These allegations as originally drafted included the word "arrest." Applicant contended that the evidence did not establish that he had been arrested. The Judge stated "the burden is on you to show documentary evidence that he wasn't arrested." Tr. at 87. Applicant contends that the Judge improperly shifted the burden of production to Applicant, in that it was the Government's responsibility to produce evidence of an arrest.

When an applicant denies an allegation, the Government has the burden of producing substantial evidence of the facts underlying the allegation. Substantial evidence 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 ¶¶ E3.1.14; E3.1.32.1. *See* ISCR Case No. 10-09035 at 5 (App. Bd. Jun. 10, 2014).

The amended SOR paragraphs at issue here either omit, or substantially qualify, the word "arrest." As amended, allegation (d) states merely that Applicant was charged on or about June 2003 for failing to register as a sex offender and (g) that Applicant was "arrested or received" on or about December 6, 2005, for petty theft. Applicant had denied these allegations. Accordingly, it was the Government's task to produce evidence in support of them. Regarding (d), the Government offered GE 2, Court Records, that show that Applicant was charged with the offense in question.[4] As to (g), the Government presented GE 4 at 3, as stated above. This document states that Applicant was "arrested or received 2005/12/06" for petty theft. Both GE 2 and GE 4 are official records within the meaning of Directive ¶ E3.1.20. Applicant did not object to these documents and, in fact, stipulated to their admissibility. Tr. at 12.

When read in conjunction with other evidence, including GE 6, Answers to Interrogatories, and Applicant's own hearing testimony, the documents constitute substantial evidence of the

[4]GE 2 actually presents June 2003 as the date of the offense rather than of the charge. The Judge made findings of fact consistent with GE 2. Accordingly, there is a variance between her factual findings and her adverse formal finding for this allegation. However, as the gravamen of the allegation was Applicant's failure to register as a sex offender rather than the date upon which he was charged, there is no reason to believe that Applicant's ability to prepare his case for mitigation was impaired. Accordingly, the variance is not material. *See, e.g.*, ISCR Case No. 12-01266 at (App. Bd. Apr. 4, 2014).

controverted allegations. Insofar as the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's clearance worthiness (*See* ISCR Case No. 10-09035, *supra*, at 5), we find no reason to disturb the Judge's conclusion that the Government had met its burden of production, thereby shifting responsibility to Applicant to mitigate the concerns raised by his conduct. In examining the Decision in its entirety, we find no reason to conclude that the Judge failed properly to allocate the burdens between the parties as the Directive requires. Even if a reasonable person could find an error in the challenged statement by the Judge, it is harmless.

Consideration of Non-Alleged Conduct

Applicant contends that the Judge erred by considering evidence of his drug abuse. Specifically, he alleges that it was improper for the Judge to question him about drug abuse, since that was not alleged in the SOR. Citing Appeal Board precedent, he argues that the Judge cannot base an adverse decision on uncharged conduct. Appeal Brief at 8.

While an adverse decision may not be based on concerns that are outside the SOR, a Judge may consider non-alleged conduct for other reasons. Such conduct may be relevant to evaluating an applicant's evidence for extenuation or mitigation and/or to a whole-person analysis. *See, e.g.,* ISCR Case No. 12-04554 at 2, n. 1 (App. Bd. Jul. 25, 2014). We note first of all that Applicant himself brought up his drug use during direct examination. Tr. at 35. The SOR ¶ (b) alleged that he had been charged with possession and selling of marijuana in 1994. Moreover, the presence of drugs at Applicant's residence in 2005 was part of the *res gestae* of the parole violation alleged in SOR ¶ (h). In her Decision, the Judge discussed Applicant's drug use in the context of his case for mitigation and in her whole-person analysis. Therefore, she examined this evidence in its proper context. We find no merit in Applicant's argument.

Mitigation

Applicant challenges the Judge's analysis of his case for mitigation, arguing that he has clearly demonstrated rehabilitation. The Judge addressed in some detail Applicant's evidence that he has changed his behavior and enjoys an excellent reputation for his character and his work performance. However, she concluded that the period of five years that had elapsed between his release from parole and the close of the record is not sufficient to show rehabilitation to a degree that would mitigate the concerns raised by his criminal conduct. Given evidence of the seriousness of some of Applicant's offenses, the extensive span of time during which his security-significant conduct took place, and that he has spent over two years of his life in jail, we cannot say that the Judge's adverse conclusion was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-01302 at 3 (App. Bd. Feb. 15, 2006), to the effect that recency of conduct must be decided on a case by case basis in light of the entirety of the evidence in the record.

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): "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 Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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