KEYWORD: Guideline E; Guideline B; Guideline F; Guideline G

DIGEST: The Judge's finding that Applicant's false statements were not deliberate was not supported by the record viewed as a whole. The multiple nature of false statements is a reason to believe that they were deliberate. Inconsistent statements can undermine a witness's credibility. Evidence that charges were dismissed is not enough in and of itself to show that Applicant did not commit the underlying misconduct. Favorable decision reversed.

CASE NO: 14-02567.a1

DATE: 10/05/2015

DATE: October 5, 2015

In Re:	)	
	)	ISCR Case No. 14-02567
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 30, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct), Guideline B (Foreign Influence), Guideline F (Financial Considerations), and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On June 15, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines B, F, and G are not at issue in this appeal. Consistent with the following, we reverse the decision.

The Judge's Findings of Fact

The Judge made the following findings pertinent to this appeal: Applicant is a prospective employee of the Defense contractor, awaiting the adjudication of his first security clearance application (SCA). Applicant's SOR lists numerous instances of criminal or inappropriate conduct, several of which resulted in convictions. In 1986, he and his employer, a store owner, chased some shoplifters out of the store, wielding a baseball bat. Charged with assault with a deadly weapon, Applicant was convicted of disturbing the peace, for which he was fined.

A year later, Applicant was again charged with assault with a deadly weapon, which was reduced to brandishing a deadly weapon other than a firearm. He was sentenced to six months probation and a fine. Applicant denies any knowledge of this latter incident.

In 1990, Applicant was placed on disability following a work-related injury. He continued to receive and cash disability checks after he returned to work. Applicant was charged with making false statements to obtain aid, which was apparently reduced to forgery. Convicted of forgery, he was sentenced to five years probation and to pay restitution.

In 1995, Applicant was convicted of driving while intoxicated (DWI) and sentenced to one year probation and to attend a Mothers Against Drunken Driving program. In 1997 or 1998, Applicant was charged with assault upon his wife, though the charges were dismissed. Also in 1998, Applicant was charged with DWI. The Judge found that, after spending the night in jail, Applicant was released and his $500 bond returned. "An investigation ensued, and in January 1999, the charge was dismissed." Decision at 5. Other than Applicant's comments, there is no other evidence of this offense.[1]

Applicant was charged again with DWI in mid-2001. He was sentenced to four days in jail, a $2,000 fine, and suspension of his drivers license. In early 2003 and again a couple of months later, Applicant was charged with two separate instances of DWI. These charges were tried together, and Applicant was sentenced to ten years probation and a $5,000 fine per charge. He was also required to wear an ankle bracelet for 36 months, install a breathalyzer in his car, attend 90 Alcoholics Anonymous (AA) meetings, and attend an anger management class. Applicant successfully completed his probation and community supervision in 2014.

In 2005, Applicant was charged with violation of the terms of probation and/or of a restraining order and, in 2007, was convicted of harassment and probation violation. Applicant was sentenced to180 days in jail, serving 30, and nine months probation. The conviction resulted from

[1]The Judge's findings on this were based substantially on Applicant's testimony. *See* note 7, *infra.*

Applicant having requested another person to repay a debt the person owed to Applicant's father. Applicant called the debtor and begged for some money, which resulted in the charge of which Applicant was convicted.

In 2012, Applicant's landlord sought to have Applicant's probation revoked for alcohol consumption and for purchasing a car without a breathalyzer. This effort was not successful.[2] Applicant has abstained from consuming alcohol since 2003 and, prior to his two DUIs in 2003, had never received any kind of treatment or counseling. Applicant continues to participate in AA.

In 2012, Applicant served as an advisor for a foreign company. His advice pertained to web site design and business issues, and he was paid $10,000. When Applicant completed his SCA the following year, he failed to list his work for this company. He also failed to disclose this same foreign company on the question as to whether he had provided advice or support to a foreign business or organization. The Judge stated that there was no evidence of an employment contract or that the company viewed Applicant as an employee.

During his clearance interview, when asked to list all of his employers, he again did not disclose this foreign company. On yet another SCA question, that inquired as to whether, within the prior seven years, any of Applicant's debts had been turned over to collection agencies, he replied "no." This was not true, insofar as Applicant had numerous collection accounts on his record.

The Judge's Analysis

The Judge found that Applicant's omissions from his SCA and during his interview were either not objectively false, in that there was no evidence of actual employment with the foreign company, or that they were the results of honest mistakes. Concerning the remaining conduct alleged under Guideline E, the Judge cited to Applicant's having acknowledged his problems with drinking and driving and his having taken steps to alter his behavior, such as AA attendance. He also stated that some of Applicant's criminal arrests or charges were the result of unique circumstances, while other charges were false in that they were either dismissed or never occurred.

Discussion

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 produces evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security

[2]In Applicant Exhibit K, Affidavit, dated October 23, 2013, Applicant's probation officer stated that he responded to the landlord's house. The landlord had reported that Applicant had harassed him. He also stated that Applicant had violated his probation by drinking alcohol the night before and by purchasing a car without the required beathalyzer attachment. The car was subsequently found to have been titled in the landlord's name. A policeman performed an alcohol test on Applicant, which was negative. However, the test was performed around 5:30 or 6:00 pm the day following the alleged alcohol consumption.

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).

In deciding whether the Judge's rulings or conclusions are erroneous, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's favorable findings are not supported by the weight of the evidence. For example, he challenges the Judge's findings that Applicant's omissions from his SCA and during his interview were either not false or were innocent mistakes. We examine a Judge's findings to see if they are supported by substantial record evidence, "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 ¶ E3.1.32.1. When examining an applicant's *mens rea*, the Judge should evaluate the false statement or omission in light of the record as a whole. *See, e.g.,* ISCR Case No. 12-03415 at 3 (App. Bd. Jul. 25, 2014).

We note record evidence that undercuts the challenged findings. Applicant's SCA, Section 13A, Employment Activities, states as follows: "List all of your employment activities, including unemployment and self-employment, beginning with the present and working back 10 years. The entire period must be accounted for without breaks." We conclude that, under the facts of this case, a reasonable person would understand that providing advice or consultation to a company in exchange for monetary compensation would constitute either employment or self-employment within the meaning of Section 13A.[3] Accordingly, we conclude that, to the extent that the Judge found that there was no evidence of employment, he erred.

Moreover, given the clarity of the questions at issue here, the multiple nature of Applicant's falsifications,[4] and his prior conviction for forgery, we conclude that the record does not support a finding that the omissions were honest mistakes. *See* ISCR Case No. 13-12407 at 3-4 (App. Bd.

[3]"Q: [Y]ou were hired on as a consultant, and they gave you money. A: Yes . . . Q: So you deny doing any work for them in 2011, but you admit and acknowledge doing a lot of work for them in 2012. A: Yes." Tr. at 103-106.

[4]*See also* Government Exhibit 2, Security Clearance Application, dated September 30, 2013, at 35-36. "Have you **EVER** been charged with an offense involving alcohol or drugs?" (emphasis in original) Applicant listed the two DWI charges in 2003. He did not list the other previous ones. Government Exhibit 2, Security Screening Questionnaire, dated October 31, 2013, at 8: "Tell me about any interaction or contacts you have had with any court systems or law enforcement authorities in any country to include arrests, detentions, or traffic citations. Candidate Response: I had two DUI arrests a while ago."

Aug. 18, 2014), which cites to the multiple nature of an applicant's false statements as a reason to believe that they were deliberate. *See also* Federal Rule of Evidence 404(b), which provides that evidence of other crimes is relevant on issues of intent, absence of mistake, etc. The Judge's findings about Applicant's omissions to the SCA and during his interview are not sustainable.

Department Counsel's brief cites to evidence that, he argues, undercuts both the Judge's favorable credibility determination and his evaluation of Applicant's case for mitigation. He cites to inconsistent statements that the Judge did not discuss and that undermine his ultimate conclusions. Applicant testified that, after his 2003 DWI, he had been placed on probation and required to abstain from alcohol, which he asserted that he had done. Tr. at 62, 64. The Judge found that Applicant had been abstemious for over twelve years, failing to address an earlier statement, contained in Applicant's answer to the SOR, that he had not consumed alcohol for over five years. Decision at 20. The difference between these two statements is not insignificant, and the Judge failed to explain why he credited one over the other.

Department Counsel points to additional inconsistencies within Applicant's hearing testimony as well as with his SOR answer. In addressing his second assault charge, Applicant emphatically denied that he had ever lived in the city where the offense was alleged to have occurred or even visited it. Tr. at 51.[5] However, when questioned about the forgery, which also was alleged to have occurred in the same city, Applicant admitted to the offense and testified about it, without any cavil as to the location. Tr. at 52. In his answer to the SOR, Applicant admitted this allegation as well, without denying that the had lived in the city in question.[6] As Department Counsel argues, these unresolved inconsistencies should have persuaded the Judge that Applicant has not been forthright in addressing his security-significant conduct. *See, e.g.*, ISCR Case No. 13-00596 at 6 (App. Bd. Jun. 26, 2015). Although we give deference to a Judge's credibility determination (Directive ¶ E3.1.32.1), that deference has limits. In a case such as this one where there is significant contrary evidence, such as Applicant's false and/or inconsistent statements, the Judge should have addressed that evidence squarely, resolving issues in a manner that would persuade a reasonable person why he found Applicant credible. *See, e.g.*, ISCR Case No. 10-03732 at 6, n. 5 (App. Bd. Jun. 14, 2013). The Judge's failure to address this evidence critically undermines his credibility determination. It also impairs his analysis of Applicant's case for mitigation.

Department Counsel challenges the Judge's conclusion that, insofar as some of the charges against Applicant had been dismissed, the underlying conduct never occurred. For example, he cites to the Judge's finding that the 1998 assault charges were dropped a year later after "an investigation[,]" implying that the charges were groundless. Decision at 5. As we have stated

[5]"I never lived in [City, State] . . . I wouldn't even consider going to [City] when I was living there in [State] . . . It was very unsafe area." *Compare* with Government Exhibit 4, FBI Identification Record, at 2, which states that Applicant was arrested twice–for the 1987 assault and again for the 1991 false statement–by a sheriff serving the city in question. It also states that Applicant was convicted of the forgery by the superior court in that city.

[6]The allegation reads as follows: "In March 1991, in [City, State], you were charged with (1) False Statement to Obtain Aid and (2) Forgery. You were convicted of the second charge, ordered to make restitution, and placed on five years' probation." In his answer, he stated, "I accept the charges in 1991."

before, however, charges can be dismissed for any number of reasons that are consistent with guilt. The mere fact that a court dismisses charges does not in and of itself justify a conclusion that an applicant did not commit the conduct in question.[7] *See, e.g.*, ISCR Case No. 11-03025 at 3 (App. Bd. Jan. 6, 2012); ISCR Case No. 08-02299 at 4 (App. Bd. Nov. 12, 2010). Neither does a dismissal of charges necessarily bolster testimony that might reasonably be found lacking in credibility, for example the implication of Applicant's presentation that officials investigated the alleged simple assault for an entire year before purportedly concluding that the event did not occur.[8] As with other aspects of his analysis, the Judge's uncritical acceptance of Applicant's claims of factual innocence failed to address the extent to which a reasonable person could find Applicant's presentation to have been merely self-serving. It also failed to address the extent to which repeated arrests and charges might be attributable less to bad fortune than to Applicant's own conscious and willful behavior. *See, e.g.*, ISCR Case No. 13-00596 at 5-6 (App. Bd. Jun. 26, 2015) (Multiple nature of criminal charges is a reason to doubt an applicant's claims of innocent behavior).

To sum up, the record contains substantial evidence that Applicant was arrested, charged, and/or convicted of numerous offenses, involving (1) violence, actual or threatened, i.e., assault and display of a weapon; (2) moral turpitude, i.e., false statements and forgery; (3) significant alcohol abuse, i.e., DWI; and (4) probation violations. The record also contains substantial evidence of four false statements of material facts by Applicant during the processing of his SCA, as well as evidence of inconsistent statements and other testimony by Applicant that a reasonable person could decline to credit and that the Judge failed to address in any meaningful way. Applicant's uncorroborated claims of innocence or rehabilitation are not sufficient to meet his burden of persuasion under the *Egan* standard. The Judge's decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. *See* ISCR Case No. 03-22861, *supra*.

Order

[7]Department Counsel cites to another portion of Applicant's testimony that he characterizes as unworthy of belief. This testimony concerned the 1998 DWI arrest. Applicant testified that he had been drinking wine ("at least two glasses") at dinner and was later stopped for speeding. Applicant stated that he had spent the night in jail, only learning the next day that he was charged with DWI. Applicant posted bond and, six months later, the charges were dismissed. Department Counsel notes that the Judge's finding appeared to state that Applicant's bond was returned on the day following the offense. In fact, Applicant testified that his bond was returned six months later. Appeal Brief at 5. Applicant stated that he did not know what happened but intimated that the whole arrest was a mistake. He claimed that he was never administered an alcohol test. Department Counsel argues that it was highly unlikely that Applicant really thought he had been put in jail for speeding or that he had not been tested for alcohol consumption. He argues that this testimony provided no reasonable support for a conclusion that the charge was not substantiated. In any event, the Judge's finding that Applicant had operated a vehicle at excessive speed after having consumed at least two alcoholic drinks, and with a prior conviction for DWI, is sufficient to raise a concern under Guideline E that Applicant is lacking in judgment. Under the facts of this case, any dismissal of charges for this event is entitled to minimal weight.

[8]*See* Appeal Brief at 15: "It certainly does not take a year to investigate a simple domestic assault incident. A more reasonable inference to draw from the record as a whole is that the dismissal occurred after a one-year period of pre-judgment probation." Government Exhibit 4, FBI Identification Record, at 2, shows that Applicant was arrested for this offense on January 15, 1998 and that the charges were dismissed on January 27, 1999.

The Decision is **REVERSED**.

Signed: Michal 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