

KEYWORD: Guideline K; Guideline E

DIGEST: The Judge’s decision failed to consider important aspects of the case and improperly relied on a credibility assessment in place of record evidence. The decision ran contrary to the weight of the record evidence. Favorable decision reversed.

CASE NO: 14-05794.a1

DATE: 07/07/2016

DATE: July 7, 2016

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 14-05794
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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 April 20, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information), Guideline F (Financial Considerations), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 9, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge

Darlene D. Lokey Anderson 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 decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 53-year-old employee of a defense contractor. He is a high school graduate, is divorced, and has children. For the past 31 years, he has worked for the same employer and has held a security clearance. He has received numerous awards and positive performance appraisals throughout his employment; however, he received a less than favorable performance appraisal in 2014.

In 2005, Applicant was issued a written warning/reprimand for using an unapproved cellular device in a secured area. This incident occurred when Applicant was conducting a tour for military and company dignitaries. The vehicle that he was driving developed mechanical problems, and he used a company-provided communications device in the walkie-talkie mode to request a replacement vehicle. An investigation determined that no compromise of security occurred as a result of this incident.

In 2007, Applicant was issued a first warning notice and corrective action plan for using an unapproved cellular device in a secured area. This incident occurred while Applicant was conducting a tour of the secured area. He used his cell phone in the walkie-talkie mode to try to contact company personnel to obtain an item to show the individuals on the tour. The corrective action plan required him to complete a special access program briefing and a specialized briefing on the use of restricted equipment. No security compromise occurred during this incident. Applicant stated he did not have any knowledge of this incident and claimed he was not disciplined for any misconduct that year.

In 2013, Applicant's company issued an adverse incident report that reflected he abused his position as a courier of classified material by claiming to have classified material in a tractor trailer during a company-mandated vehicle search at a gate. The tractor trailer was transporting only an empty crate. When exiting the facility, a gate guard requested paperwork. Applicant, who was a passenger in the tractor trailer, claimed the paperwork contained classified references and, without knowing if the guards were properly cleared, refused to show them the paperwork. Applicant got out of the tractor trailer and attempted to call company personnel, but could not reach them. The guard became upset with Applicant demanding the paperwork, but eventually opened the gate and let the tractor trailer proceed.

Applicant adamantly disagrees with the alleged 2013 security violation, but accepts responsibility for his actions. He admitted that he talked loudly to the guard as the diesel engine was running during that incident and stated he did not intend to intimidate the guard. In retrospect, he believed that guard may have misunderstood his comments about not being able to show them the paperwork. He believed this matter was blown out of proportion because his ex-fiancee who worked for the company's security officer was disgruntled about their breakup. He claimed that she

told him three or four times that she would do whatever she could to see his security clearance was revoked. The summary report of the incident reflected that the security manager recommend Applicant's courier authorization be revoked and he be reeducated on personal conduct standards. The driver of the tractor trailer believes the situation was a joke, but also stated that his and Applicant's voices were elevated due to engine noise.

During his marriage, Applicant incurred debts he could not pay. About the time that he and his wife were going through a divorce, they filed Chapter 7 bankruptcy based on the advice of an attorney and had their debts discharged in 1997. Applicant admitted the two debts alleged in the SOR, including a federal tax lien for over \$44,000 that was entered against him in September 2012. He explained that, although he filed his tax returns on time, he became indebted to the Internal Revenue Service (IRS) for tax years 2010-2012 because he did not have sufficient payroll withholdings to cover his taxes. In 2011, he changed his withholdings, but they still remained insufficient to cover his taxes. He again had a tax withholding deficient in 2012.

In 2014, Applicant hired a company to help him resolve his delinquent back taxes. The company submitted several proposals to settle the tax debt. The most recent proposal was a structured payment plan for almost \$29,000. Applicant planned to borrow money from his 401(k) account to pay off the debt. He has also made payroll adjustments to ensure he would receive refunds instead of owing taxes. He further indicated his house was recently sold, and he applied \$10,000 of the proceeds toward his back taxes. The final escrow statement from the sale of the house shows a payment to the IRS of about \$6,600. He submitted a Certificate of Discharge of Property from Federal Tax Lien issued in August 2015. From the record, it was unclear whether Applicant's proposed settlement plan was adopted, whether he was making payments under the plan, or whether he borrowed the balance owed to pay the entire tax debt. In any case, he plans to immediately resolve this matter.

Applicant paid the other alleged debt, a cell phone bill of \$150. He completed financial credit counseling and understands he must not overextend himself financially in the future. He plans to follow a household budget to avoid future problems. He has about \$900 a month in discretionary income.

The Judge's Analysis

The Judge found that Applicant violated company security rules and regulations in 2005, 2007, and 2013 but did not intentionally commit those violations in bad faith. The Judge described the 2013 incident as a misunderstanding and mis-communication between Applicant and the guard and concluded the 2005 and 2013 incidents were relatively minor under the circumstances, but there was no excuse of his conduct in 2007, which was clearly prohibited. He has not committed any security violations since 2013. His prior security violations were an aberration that will not likely recur.

Applicant has hired a company to assist him with his tax issues. Since 2014, he has been working diligently to pay or settle his debts. He is in the process of settling his large federal tax debt with money he is borrowing from his 401(k) account and plans to resolve that debt immediately. "In the event that he does not resolve this debt, his security clearance will be in immediate

jeopardy.” Decision at 11. He submitted compelling evidence showing he has acted responsibly. He has shown financial rehabilitation and good-faith in repaying his financial obligations.

Discussion

Department Counsel argues that the record in this case does not support the Judge’s favorable mitigation analysis. Specifically, he notes that the Judge failed to address important aspects of the case and her decision runs contrary to the weight of the record evidence. He also asserts she made an erroneous favorable credibility assessment. We find that Department Counsel’s arguments have merit.

A Judge is required to “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 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). “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). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

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. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge’s rulings or conclusions are erroneous, we 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, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel contends the Judge erred in accepting as credible Applicant’s version of the 2013 security incident without addressing record evidence that undercuts his account of those events. Department Counsel pointed out the Judge recited at length Applicant’s description of that incident, which focused on his claim that the paperwork for the trip contained classified references that he could not show the security officers without knowing their security clearance levels, and did not adequately address the company’s adverse information report (AIR) and incident report that paint a much different picture of the incident. The AIR reflected that, although Applicant had no

classified material in the tractor trailer, he claimed he had classified material in it and used his position as a courier to circumvent company policies by not having the vehicle searched. Government's Exhibit (GE) 3 at 1. The incident report revealed that the driver of the tractor trailer stated Applicant "was visibly agitated and 'copped' an attitude towards the . . . [s]ecurity officers after he was asked politely to open the rear cargo doors." *Id.* at 4. The incident report also reflected that Applicant denied telling the security officers that the shipment was classified, denied telling the officers they were not allowed to search the vehicle, and denied getting angry with the officers during the incident. The incident report concluded:

Based on this investigation, interviews and statements received, [Applicant] violated . . . "Standards of Personal Conduct. Section H"; [he] was aware he was not carrying a classified shipment and completely disregarded the [security] officer's orders and instructions to search his company owed vehicle. [He] refused to open the rear cargo doors. [He] failed to perform to . . . "Professional and Ethical Conduct" when he refused to provide the necessary information (paperwork) for the [security] officers. *From the interviews and witness reports, it was clear that [Applicant] made numerous false statements. Specifically when referring to the discussion with Officer [X], whether their vehicle was carrying a classified shipment and what his role was in the discussion/refusal to open the vehicle doors for inspection. (Emphasis added).*¹

In her decision, the Judge did not address the company's finding about Applicant making numerous false statements during the investigation.² While the Board gives deference to a Judge's credibility determinations, that deference is not without limits. Where the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, etc) the Judge should address that aspect of the record explicitly, explaining why he or she finds an applicant's version of events to be worthy of belief. As in this case, failure to do so suggests that the Judge has merely substituted a favorable impression of Applicant's demeanor for record evidence. *See, e.g.,* ISCR Case No. 10-09035 at 6 (App. Bd. Jun. 10, 2014). Furthermore, as Department Counsel notes, the Judge's failure to address in detail the company's investigation is inconsistent with prior Board rulings. *See, e.g.,* ISCR Case No. 10-07070 at 8 (App. Bd. Apr. 19, 2012)("[B]ecause of the unique position of employers as actual administrators of classified programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contradicted without a cogent explanation.").

Additionally, the record does not support the Judge's conclusion that the 2013 security violation was a misunderstanding and miscommunication between Applicant and the guards and was relatively minor under the circumstances. Security violations "strike at the heart of the

¹ GE 3 at 4.

² The Judge also apparently accepted Applicant's explanation that the 2013 security incident was blown out of proportion as an attempt by his ex-fiancee to get back at him for their "bad break-up" five years earlier, but did not address Applicant's threat to the company that, "if disciplined, he will tell everything he knows about what goes on at the dock." GE 3 at 5.

industrial security program.” Once it is established that an applicant has committed security violations, he or she has a “very heavy burden” of persuasion as to mitigation. Accordingly, a Judge must give any claims of reform or rehabilitation “strict scrutiny.” *See, e.g.*, ISCR Case No. 00-0030 at 9 (App. Bd. Sep. 20, 2001). Applicant adamantly disagrees with the 2013 security violation and testified he was treated unfairly during that incident. Transcript (Tr.) at 63. He has yet to accept responsibility for that incident and has failed to meet his heavy burden to mitigate the security concerns arising from that incident.

Department Counsel also contends that, while much of the Judge’s mitigation analysis of the tax lien is predicated upon Applicant’s partial satisfaction of that obligation, her decision did not adequately address the reasons why he failed to satisfy his tax obligations in a timely manner for years. In this regard, Department Counsel argues the Judge failed to assess the overriding issues of Applicant’s lack of judgment and established history of an unwillingness to comply with requirements. For example, Applicant’s 2009 Federal income tax return revealed he had an adjusted gross income of about \$146,000 and a tax liability of over \$23,000, but only had about \$1,200 of taxes withheld from his pay, which resulted in a tax deficiency of approximately \$21,000. This same pattern continued for 2010-2012.³ Between 2009-2012, Applicant earned about \$500,000, but paid comparatively little in payroll tax withholdings and did not have the resources to pay the deficiency when he filed his tax returns. An IRS document reflected that his tax deficiency was over \$74,000 in August 2015. Applicant’s Exhibit X. By repeatedly failing to fulfill his obligation to pay his taxes in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).⁴

Department Counsel also noted that Applicant has failed to provide proof that the IRS has accepted his proposed offer in compromise in the amount of \$25,000 submitted in November 2014. Under that proposal, Applicant was to pay first an application fee of about \$180, then \$50 per month for 22 months, and finally a balloon payment of over \$23,000. The vast majority of the proposed offer in compromise remained outstanding at the time of the hearing. Department Counsel underscored that Applicant merely provided 12 “checkbook carbons” of payments made under that proposal and pointed out he could not borrow money from his 401(k) account to make a payment on the proposed offer until he repaid an existing loan from that account. Tr. at 116. Furthermore, Department Counsel argues the timing of the resolution of Applicant’s tax filing problems is relevant in determining the extent to which he has demonstrated mitigation. *See e.g.*, ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). His offer in compromise was submitted in November or December 2014 well after the IRS issued a tax lien in September 2012 and after he submitted his

³ In 2010, Applicant’s adjusted gross income was about \$119,000, his tax liability was about \$16,000, and his payroll withholdings were zero, which left him owing more than \$16,000 to the IRS. In 2011, his adjusted gross income was almost \$117,000, his tax liability was about \$14,000, and his payroll withholdings were about \$5,700, which left him owing about \$8,000 to the IRS. In 2012, his adjusted gross income was about \$122,000, his tax liability was about \$17,000, and his payroll withholdings were almost \$5,800, which left him owing almost \$12,000 to the IRS. His tax withholdings were corrected in 2013 and he qualified for a refund of about \$800. Department Counsel, however, noted Applicant did not provide his 2014 tax return as further proof of rehabilitation.

⁴ GE 5 reflected that Applicant previously had a \$13,000 tax deficiency because he failed to have adequate payroll tax withholding between 1993 and 1997.

security clearance application in February 2013. His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets.

We conclude that the Judge's decision failed to consider important aspects of the case and improperly relied on a credibility assessment in place of record evidence. The decision ran contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board