KEYWORD: Guideline J

DIGEST: The Judge's conclusions fail to explain why a a pattern of arrests that spans twenty years and includes carrying a dangerous weapon, domestic disturbance, assault on a minor, communicating threatening language possession of marijuana, hit and run and DUI is not recent due merely to the elapse of three years since the last offense. Ant evaluation of rehabilitation must take into account the seriousness of the criminal conduct. Favorable decision reversed.

CASENO: 05-00448.a1

DATE: 10/01/2007

DATE: October 1, 2007

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT
Thomas Albin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2006, DOHA issued a statement of reasons 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 February 28, 2007, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge's treatment of the Criminal Conduct Mitigating Conditions is arbitrary and capricious; and whether the Judge's whole person analysis is arbitrary and capricious. Finding error, we reverse.

The Judge made the following pertinent findings of fact: Applicant is an employee of a defense contractor. He has held a security clearance since 1982.

In February 2004 Applicant was arrested for DUI. He declined to submit to a breathalyser. Following conviction, he was required to attend a 15-week alcohol education course.

In November 2000 Applicant was charged with leaving the scene of an accident, his car having struck another car in a parking lot. Ticketed for leaving the scene of an accident and for failure to obey a police officer, he was convicted, pursuant to a plea agreement, of refusing an officer's request to show his license.

In June 1999 Applicant was arrested for walking illegally across a bridge. Upon searching him, the police discovered a marijuana cigarette in Applicant's pocket.

In September 1991, Applicant was arrested and charged with assault and risk of injury to a minor. Applicant had forcibly removed a 13 year old boy from his yard. Applicant was given 12 months probation and required to take an anger management course.

In July 1991, Applicant was charged with "breach of the peace and threatening." This incident involved an altercation with his brother.

In 1986, Applicant was arrested and charged with a domestic disturbance, for which he was required to attend 10 anger management classes.

In 1982, Applicant was arrested and charged with carrying a dangerous weapon (brass knuckles), a felony. He was also charged with breach of the peace. The record does not show the disposition of this case.

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–"such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Department Counsel has not expressly challenged the Judge's findings.

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 choices 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 national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *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* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

In resolving the case for Applicant, the Judge favorably applied Criminal Conduct Mitigating Conditions (CCMC) 1[1] and 6.[2] Department Counsel argues that, concerning CCMC 1, the Judge evaluated Applicant's criminal conduct in a piecemeal fashion, rather than considering it in its totality. Department Counsel argues that Applicant's conduct, when viewed as a whole, is inconsistent with the Judge's conclusion that the conduct was not recent.

Department Counsel's argument has merit. As stated above, a Judge's application of mitigating factors must be conducted in light of the record as a whole. With regard to the recency, "[t]he board has declined to furnish 'bright-line' guidance. The conclusion . . . that conduct of security significance was not recent must be evaluated through careful consideration of the totality of the specific record at hand."[3] Similarly, CCMC 6 "requires more than just some evidence of

[1]Directive ¶ E2.A10.1.3.1. "The criminal behavior was not recent."

[2]Directive ¶ E2.A10.1.3.6. "There is clear evidence of successful rehabilitation."

[3]ISCR Case No. 99-0018 at 4 (App. Bd. Apr. 11, 2000).

rehabilitation. There must be 'clear evidence of successful rehabilitation' considering the record as a whole."[4] A Judge's failure to analyze a case in this way can constitute reversible error.[5]

In the case under review, the Judge stated, "The most recent arrest in 2004 is [Applicant's] only alcohol related incident and he has taken steps to avoid a recurrence. The second most recent arrest in 2000 appears to have been a relatively minor matter resulting in a ticket and a fine. The rest occurred over six years ago. There is clear evidence of rehabilitation from the changes in his conduct and the fact that he has had no difficulties since 2004."[6] The Judge's analysis contains no discussion of the record as a whole, noting only that most of Applicant's misconduct occurred more than six years prior to the close of the record. In so doing, it fails to explain why a pattern of arrests that spans a period of over twenty years and includes carrying a dangerous weapon,[7] domestic disturbance,[8] assault on a minor,[9] communicating threatening language,[10] possession of marijuana,[11]

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[4]ISCR Case No. 01-03695 at 9 (App. Bd. Oct. 16, 2002).

[5]*See, e.g.,* ISCR Case No. 03-27170 at 4-5 (App. Bd. May 5, 2006).

[6]Decision at 4.

[7]Applicant testified that someone had given him the weapon a few months prior to the incident for which he was arrested. "Q: And in this instance, you saw your friend was getting into a fight and so you handed him the brass knuckles? A: Right." Tr. at 53-54.

[8]"Q: What were the circumstances surrounding this arrest? A: I really can't remember that exact, because we fought so much. I don't really remember the exact time that I got arrested for that one . . . Q: You remembered that you were ordered to attend ten anger management classes? A: Right . . . Q: Do you recall that it involved your first ex-wife . . . A: Yes. I know it was my first ex-wife, but I don't know what the exact fight was about or what happened . . . we lived in a trailer park, so screaming and yelling, you can hear it like it's right in your own trailer . . . Q: Do you recall if she was charged with anything at the same time? A . . . She wasn't." Tr. at 40-41.

[9]The incident arose out of an altercation between the victim and Applicant's children. "[Applicant] dragged [victim] by the throat across the road and released his grip on [victim's] throat. [Victim] hit his head and shoulders on a tree trunk . . . [Applicant] picked up [victim's] bicycle and threw it across the road . . ." Exhibit 9 describes the victim's throat has having black and blue bruises. Government Exhibit 9 at 3.

[10]"[Applicant's brother stated] that [Applicant] had come over swearing loudly and very upset . . . that [Applicant] ran from the house and got a crowbar. That [Applicant] hit the outside handrail with the crowbar and continued to swear . . . that [Applicant] came into the house with the crowbar; that the children were in the living room. [Brother] said that he got his shotgun and told [Applicant] to leave. [Brother said] he was in fear for the safety of his children and just wanted [Applicant] out of the house . . . when [Applicant] left the house he hit the handrail again with the crowbar, then threatened [Brother] with the crowbar, saying he would hit him with it. . . if [Brother] did not stop 'saying stuff' about his wife." Government Exhibit 10 at 3.

[11]Applicant testified that an unknown person at a party gave him a marijuana cigarette, which he put in his pocket, intending to take it to his girlfriend. The police stopped him as he was illegally walking across a bridge and discovered the marijuana. Tr. at 33, 67.

hit and run,[12] and DUI[13] is not recent simply due to the elapse of three years between the last offense and the date of the Judge's decision. Indeed, the seven year gap between the assault charge and the marijuana possession militates against a conclusion that Applicant' misconduct is sufficiently attenuated so as to resolve the security concerns which it raises. *See* ISCR Case No. 04-12680 at 3 (App. Bd. May 21, 2007) (A Judge's decision must be reasonable in light of the contrary record evidence.)

Similarly, the absence of a meaningful evidentiary discussion vitiates the Judge's conclusion that Applicant has met his burden of persuasion on rehabilitation. The Judge noted Applicant's attendance at anger management classes and an alcohol rehabilitation program. However, again he did not relate the significance of the seven year gap to the question of Applicant's rehabilitation. Neither does the Judge discuss in sufficient detail the record evidence underlying the offenses, evidence which is inconsistent with his opinion that most of Applicant's misconduct concerns the "exercise of bad judgement."[14] For example, concerning the dangerous weapon charge, Applicant testified that he handed a friend the brass knuckles to assist in a fistfight against a third person. Government Exhibit 10, a police report describing the July 1991 breach of peace, reports that Applicant brandished a crowbar at his brother, threatening him. Applicant testified that at one point he threatened to kill his brother.[15] Government Exhibit 9, another police report, describes an assault on a 13-year old boy, which left bruising. Applicant also testified about the marijuana incident, in which he obtained a joint as a present for his girlfriend, and the DUI charge, in which he refused a policeman's directive to take a breathalyser.

As a matter of common sense, any evaluation of Applicant's rehabilitation must take into account the inherent seriousness of his criminal conduct and explain why the mere passage of three years from the last offense constitutes "clear evidence of successful rehabilitation." The Judge acknowledges that Applicant has had "difficulty with anger management and authority issues."[16] However, his own findings and the record evidence suggest that the latest two incidents both involved refusing the orders of policemen, implying that Applicant's problems with authority are

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[12]"I was in the parking lot of a restaurant and I backed into this car. I tapped this car, and then when I drove off, supposedly there was either an off duty police officer or another police officer, and he said he yelled at me as I was leaving the parking lot. Then down the road the other police pulled me over and said, "You were in an accident in the parking lot and you took off." I said "No, I wasn't. I tapped the back of a car and I left the parking lot." Tr. at 25-26.

[13]"Q: You were out at dinner . . . ? A: Yes. Q: . . . What were you drinking? A: Budweiser. Q: . . . [H]ow many do you believe you had? A: Six, from six at night to midnight . . . Q: . . . Did you have to take a breathalyzer? A: I refused to take a breathalyzer . . . because I didn't understand why I was getting pulled over in the first place. Q: Okay, but he's a police officer. A: Right. Q: So why did you refuse the direction of a police officer? A: Like I said, I just didn't – he wouldn't give me a real reason why he pulled me over." Tr. at 70-71.

[14]Decision at 3.

[15]Tr. at 64.

[16]Decision at 4.

not merely sporadic, as the Judge described them, but ongoing.[17] Given that Applicant's seven year hiatus in criminal conduct was followed by incidents in 1999, 2000, and 2004 which indicate at the very least difficulty with self-control and with submission to legitimate authority, we conclude that Applicant's rehabilitation evidence is "insufficient to rise to the level of 'clear evidence of rehabilitation' required under Mitigating Condition 6."[18]

We have also considered the Judge's whole person analysis. While the Judge properly gave weight to Applicant's attendance at various rehabilitation programs, his difficult childhood, and his changed family circumstances, he minimized the seriousness of Applicant's misconduct, viewing it as a string of relatively isolated instances of poor judgement rather than a pattern of criminal behavior, much of it violent.[19] Additionally, the Judge did not discuss apparent discrepancies between Applicant's versions of the two 1991 incidents and those reflected elsewhere in the record evidence. For example, regarding the July incident, Applicant presents his brother as more of an aggressor than is depicted in the police report.[20] Also, Applicant claims he did not cause the child victim to strike a tree, as Government Exhibit 9 states.[21] After considering the Judge's findings in light of the record as a whole, we conclude that the Judge's favorable decision is arbitrary, capricious, and contrary to law.

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[17]"[Applicant] has had a series of seven charges or arrests from the time he was 18 in 1982 over a 22 year period until 2004 when he was 41. All were separated by at least four years except for two incidents in 1991 and two in 1999 and 2000 . . . Applicant impressed me . . . as a hard-working person whose anger issues had been a material cause of his sporadic problems with the law." Decision at 3, 5.

[18]ISCR Case No. 03-27170 at 5 (App. Bd. May 5, 2006).

[19]*See U.S. v. Bottone,* 365 F. 2d 389, 392 (2d Cir. 1966), cert. denied 385 U.S. 974 (1966) ("The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than the sum of the parts.") *See also Schulz v. Secretary of HEW*, 1987 WL 15314 (DC NJ 1987) (unreported decision), reversing an administrative law judge decision which considered various pieces of medical evidence separately rather than as a whole. "[The ALJ] arrived at [his] judgement through a piecemeal analysis of the medical evidence, considering separately rather than cumulatively the effects of plaintiff's conditions. Thus, the ALJ could not determine the full extent of plaintiff's disability."

[20]Applicant testified that he went to his brother's door, yelling. He stated that he did not enter the house. The brother came to the door and produced a shotgun, at which point Applicant stated that he went to his car to get the crowbar. Tr. at 60-64. Government Exhibit 10 contains a summary of Applicant's statement to the police. "[Applicant] said he had gone into his brother's home, telling him to leave his wife alone, that he's had enough of the rumors. That as he was getting in his pick-up truck, he saw his brother standing in the door of the apartment holding a shotgun, so [Applicant] got out of the pick-up with the crowbar . . ." Compare with the brother's version set forth in Note 10 above.

[21]Tr. at 81. Compare with the victim's account, described in Note 9 above. The Police report states that the victim's account was corroborated by other witnesses. Government Exhibit 9 at 3.

Order

The decision of the Judge granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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