

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 7, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 27, 2008, Administrative Judge Kathryn M. Braeman granted Applicant’s request for a security clearance. Department Counsel submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable clearance decision under Guidelines E and J is arbitrary, capricious, or contrary to law.

Whether the Record Supports the Administrative Judge’s Factual Findings

A. Facts

The Administrative Judge made the following relevant findings as to the Guideline E and J allegations:

Applicant is 30 years old and has been a research analyst for a defense contractor since November 2004. He completed a Security Clearance Application (SCA) to obtain a clearance in November 2004. Previously he worked as a linguist for other contractors and for the military. He has a total of eleven years service to the U.S.

Applicant served in the U.S. military from 1996 to 2001, and was granted a clearance in 1997. He worked as a linguist for a Department of Defense (DoD) agency on special assignment from 2001 to 2003, and was honorably discharged in 2003. His awards included a commendation for “exceptionally meritorious achievement as an integral member” of an advance party, a Good Conduct Medal for the period 1996 to 1999, a Military Excellence Award in 2000, and a Certificate of Appreciation in 2001. He has maintained a clearance in his defense contractor job since 2003.

Applicant received four Article 15s while in the military, but they were never part of his Official Military Personal File (OMPF). He did not list them on his SCA because he was told they did not need to be listed. He disclosed them during a polygraph examination in order to give “all the information” he had. His last Article 15 occurred in 1999.

Applicant was convicted of seven speeding or traffic infractions between 1999 and 2005. The three offenses that occurred in 2005 constituted a violation of his probation as to a 2004 offense.

During a polygraph examination for a job at another DoD agency, Applicant admitted that in 2005 he had switched price tags at a department store on four occasions. He was never arrested for those incidents.

Multiple character references who had known Applicant for a lengthy period of time attested to Applicant's loyalty to the U.S. and/or his excellent job performance.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial 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. "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 finding 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.

In this case, the appeal issue relates to the Judge's conclusions.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

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). 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. We review matters of law *de novo*.

Once a concern arises regarding an Applicant's security clearance eligibility, 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 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 the 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).

Department Counsel argues that the Judge's favorable clearance decision is arbitrary, capricious and contrary to law because it does not consider relevant factors, does not articulate a satisfactory explanation for its material conclusions, and fails to consider important aspects of the case. The Board finds Department Counsel's arguments persuasive.

The Judge found that the government had met its burden under the Guideline E and J disqualifying conditions, and that the security concerns were not mitigated under any specific mitigating conditions. However, she then went on to favorably apply the whole person concept, pointing generally to Applicant's good employment and service record, and his expression of remorse. The Judge's decision in that regard was limited to several sentences. It contained no discussion of the evidence in the context of the whole person factors and offered no analysis. Decision at 14 and 15.

Moreover, the Judge's favorable application of the whole person concept was predicated in large measure on her conclusion that the four Article 15s, seven traffic infractions, and four theft-type offenses, which had occurred between 1997 and 2005, were "minor" incidents, that were "out of character." *Id* at 5, 14 and 19. Given the record in this case, that conclusion is not sustainable. The Judge's analysis of the numerous acts of misconduct in this record failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each category of incidents separately, the Judge failed to consider the significance of the "evidence as a whole" and Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). Under the whole person concept, a Judge must consider the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g., ISCR Case No. 98-0350* at 3 (App. Bd. Mar. 31, 1999). The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirements of ¶ E2.2 of the Directive.

Accordingly, with respect to the Guideline E and J allegations, Department Counsel has met his burden of establishing that the Judge failed to consider an important aspect of the case and failed to articulate a satisfactory explanation for her conclusions. Her overall favorable decision under those Guidelines is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael D. Hipple
Michael D. Hipple

Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board