

KEYWORD: Guideline J; Guideline E; Guideline F

DIGEST: Applicant elected to have his case decided on the written record. Thus, the Judge's credibility determination is not entitled to the same deference on appeal that it would receive in the context of a hearing. Applicant had two prior felony convictions for perjury and multiple convictions relating to larceny by check. The Judge did not give sufficient weight to the extent to which those crimes of moral turpitude undermined Applicant's credibility and his assertions that his failure to disclose multiple matters of obvious security concern was not deliberate. As to Applicant's falsifications, the Judge failed consider an important aspect of the case, failed to articulate a satisfactory explanation for her favorable conclusion, and offered an explanation that ran contrary to the record evidence as a whole. The Smith Amendment-related provision set forth at Guideline J AG ¶ 32(e) does not apply in Applicant's case. However, because of the Board's holding as to Applicant's deliberate falsification of his SCA, as set forth above, the Judge's overall adverse decision under Guideline J is sustainable on independent, alternative grounds. The government was only responsible for presenting evidence to establish the facts alleged in the SOR that had been controverted. Applicant was responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts proved by the government, and had the ultimate burden of persuasion as to obtaining a favorable clearance decision. Once it has met its initial burden of production, the burden of persuasion never shifts to the government. Adverse decision affirmed.

CASENO: 07-13890.a1

DATE: 01/27/2009

DATE: January 27, 2009

In Re:)
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Applicant for Security Clearance)
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ISCR Case No. 07-13890

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 23, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). The SOR was subsequently amended to add security concerns under Guideline F. Applicant requested that the case be decided on the written record. On October 24, 2008, after considering the record, Administrative Judge Mary E. Henry denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel timely cross-appealed pursuant to the aforesaid Directive provisions.

The following issues are raised by the appeal and cross-appeal: whether the Judge’s favorable decision under Guideline E is sustainable; whether the Judge’s unfavorable decision under Guideline J is sustainable; and whether the Judge’s favorable decision under Guideline F is sustainable.

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 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.

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).

(1) Department Counsel argues that the Judge's favorable decision under Guideline E should be reversed and that the Judge's unfavorable decision under Guideline J should be affirmed because the Judge erred in concluding that Applicant had not deliberately falsified his security clearance application. The Board finds this argument persuasive.

Applicant executed a security clearance application (SCA) on June 19, 2007. In response to Question 23, which asked whether he "had ever been charged with or convicted of any felony offense," Applicant disclosed only a 1987 felony conviction for habitual traffic offender. He did not disclose ten other felony offenses which had occurred between 1986 and 1994, including two separate perjury convictions in 1989 and 1990. In response to Question 27, which asked whether Applicant had any unpaid judgments in the past seven years, Applicant stated "no" and failed to disclose a 2002 unpaid judgement.

When Applicant was questioned by a government investigator as to why he failed to disclose all of his felony charges and convictions, Applicant stated he listed only the one felony habitual offender driving charge "because of feeling that all the charges were related, including the perjury charge and therefor did not feel it was necessary to list the additional charges." This explanation was inconsistent with another statement to the investigator, that his perjury conviction was related to a previous bad check conviction. Moreover, his first perjury conviction came two years after his 1987 habitual offender offense. Applicant did not offer any further explanation as to the omission of his multiple felony offenses in his two answers or his reply to the government's file of relevant material. Applicant asserted that he did not disclose his 2002 judgement because he thought it had been paid. However, the evidence indicated that it was still owing.

Applicant elected to have his case decided on the written record. As a result, the Judge did not have an opportunity to question Applicant about his omissions and observe his demeanor. In such circumstances, the Judge's favorable credibility determination as to Applicant's explanations for his omissions are not entitled to the same deference on appeal that it would receive had it been made in the context of a hearing. *See, e.g.,* ISCR Case No. 04-04302 at 3-4 (App. Bd. Jun. 30, 2005).

In this case, Applicant had two prior felony convictions for perjury, as well as multiple convictions relating to larceny by check.¹ In reaching her decision, the Judge did not give sufficient weight to the extent to which those crimes of moral turpitude undermined Applicant's credibility and his assertions that his failure to disclose multiple matters of obvious security concern was not deliberate. As to the issue of Applicant's deliberate falsifications, the Judge failed consider an

¹In addition to his ten felony offenses, Applicant had five misdemeanor arrests for larceny by check or bad check, two of which resulted in convictions, and one conviction for the misdemeanor offense of failure to return rental property.

important aspect of the case, failed to articulate a satisfactory explanation for her favorable conclusion, and offered an explanation that ran contrary to the record evidence as a whole. Because Applicant's falsification of the SCA is not otherwise mitigated, the Judge's favorable decision under Guideline E is not sustainable.

(2) Applicant argues that the Judge's adverse decision under Guideline J should be reversed because his criminal conduct is not recent, and that he has demonstrated sufficient rehabilitation to mitigate the government's security concerns. The Board does not find Applicant's argument to be persuasive.

In her decision, the Judge found against Applicant as to Guideline J stating: "under Guideline J AG ¶ 32(e), his felony convictions preclude him from holding a clearance unless a waiver is granted." Decision at 11. This specific finding as to AG ¶ 32(e) was an error.

The requirements set forth in Guideline J AG ¶ 32(e) reflect legislation, the Smith Amendment (10 U.S.C. § 986), which is no longer in effect. It was repealed on January 28, 2008 by the Bond Amendment (Sec. 3002 to 50 U.S.C. § 435b). The Bond Amendment continues the requirement for disqualification for persons who were sentenced to and served imprisonment for more than a year unless the individual receives a waiver for merit. However, this disqualification now only applies to prohibit favorable clearance adjudications that would provide access to Special Access Programs (SAP), Restricted Data (RD), or other information commonly referred to as Sensitive Compartmented Information (SCI) for covered individuals. The statutory modification ended the former Smith Amendment's applicability as to adjudications of "collateral" security clearances. The SOR in Applicant's case was issued on June 23, 2008, subsequent to the enactment of the Bond Amendment. It was also issued after the Under Secretary of Defense's Interim Guidance for the implementation of the Bond Amendment. Accordingly, the Smith Amendment-related provision set forth at Guideline J AG ¶ 32(e) does not apply in Applicant's case. *See, e.g.*, ISCR Case No. 07-11963 at 5-6 (A.J. Aug. 20, 2008)(Decision containing a detailed explanation as to Directive modifications necessary as a result of the Bond Amendment). However, because of the Board's holding as to Applicant's deliberate falsification of his SCA, as set forth above, the Judge's overall adverse decision under Guideline J is sustainable on independent, alternative grounds. Therefore, on the facts of this case, the Judge's error in applying AG ¶ 32(e) is harmless.

(3) Finally, Department Counsel argues that the Judge erred by not treating the state court judgments² against Applicant, that were submitted by the government in their FORM, as *prime facie* evidence to establish SOR paragraphs 3(b), (c) and (f). The Judge discounted those judgments based on Applicant's failure to list the underlying debts in his bankruptcy proceeding, her own discussion, without citation to the record, of the possibility that the debts could have been paid but never reported, and her otherwise erroneous finding that none of the judgments were in the credit reports. Department Counsel's argument on this issue has merit. The government was only responsible for

²See Government Exhibits 9-13.

presenting evidence to establish the facts alleged in the SOR that had been controverted.³ Applicant was responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts proved by the government, and had the ultimate burden of persuasion as to obtaining a favorable clearance decision.⁴ “Once it has met its initial burden of production, the burden of persuasion . . . never shifts to the government.” ISCR Case No. 06-26613 at 5 (A.J. Jul. 31, 2007). For similar reasons as stated above, the Judge’s error is harmless in light of her ultimate decision.

Order

The ultimate decision of the Judge denying Applicant a security clearance is **AFFIRMED**.

Signed: Michael Y Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

³Directive ¶ E3.1.14.

⁴*Id.* at ¶ E3.1.15.

Signed: William S. Fields _____

William S. Fields

Administrative Judge

Member, Appeal Board