

KEYWORD: Guideline E; Guideline F

DIGEST: The Judge overlooked significant evidence in concluding that Applicant did not falsify his time sheets While a Judge's credibility determinations are entitled to deference, such a determination does not relieve the Judge of the obligation to decide how much weight can properly be give to an applicant's testimony in light of the record evidence as a whole. There is no prohibition in the Directive against considering security-related conduct merely because a previous employer chose not to pursue it in a particular forum. Favorable decision reversed.

CASENO: 07-15281.a1

DATE: 06/16/2009

DATE: June 16, 2009

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In Re:)	
)	
-----)	ISCR Case No. 07-15281
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 6, 2008, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant Counsel requested a hearing. On February 27, 2009, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge’s finding that Applicant did not falsify his time sheets is arbitrary, capricious, and contrary to the record evidence; whether the Judge’s application of Personal Conduct Mitigating Conditions 17(c), (d), and (e) is unsupported by the record evidence; and whether the Judge’s application of those mitigating conditions and her whole-person analysis are unsustainable because they fail to consider a significant aspect of the case.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent factual findings: Applicant served on active duty in the U.S. Navy for over six years and then served in the reserves for over twenty years. After Applicant left active duty, he began working for the Navy as a civilian employee and later for a Defense contractor. Applicant was working on several projects at a time, including some of a highly secret nature. It was Applicant’s understanding that he could not reveal to his supervisors the work he did on those projects or the amount of time he spent away from the office due to his work on them. Investigations were conducted on the accuracy of Applicant’s time and attendance records and his use of his government credit card. The investigations revealed discrepancies on Applicant’s time sheets. At the time in question, Applicant completed his time sheet at the end of the week and did not keep daily records of his time spent in his office or away working on other projects. Applicant acknowledged that he did not maintain accurate records and may have included time spent at the gym as work time. Investigations also revealed that Applicant had used his government credit card for personal expenses and for military reserve travel, although he only claimed reimbursement for the items properly charged on the card. In March 2003, after the investigations, Applicant’s agency issued a notice of his proposed removal. Instead, Applicant reached an agreement with the government under which he agreed to reimburse the government in the amount of \$3,827.70 for the excess work time he had claimed, and was allowed to resign. Applicant later began working for a Department of Defense contractor. Applicant submitted 14 letters of recommendation attesting to his work skills and ethics.

B. Discussion

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 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 (1966). In evaluating the Judge’s findings, we defer to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel’s appeal concerns the conclusions the Judge drew from the factual findings. In arguing the issues on appeal, Department Counsel contends that the Judge’s decision does not take into account significant contrary record evidence. The Board will address that contention below.

Whether the Record Supports the 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.

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 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 finding that Applicant had not falsified his time sheets was arbitrary, capricious, and contrary to the record evidence. Department Counsel's argument has merit. There is substantial record evidence of the following:

Applicant was required to submit time sheets showing how many hours he worked each workday. Investigations into Applicant's time sheets revealed discrepancies between the number of hours Applicant claimed and the hours recorded by the electronic badging system of his agency. One investigation was performed by Applicant's supervisor and covered approximately three months in 2002. The time period was later expanded when Applicant refused to cooperate with the investigation. Later Applicant claimed that the badging system was inaccurate and that he was attending classified meetings. The badging system was tested and found to be accurate, and Applicant provided no evidence (including travel records) of his attendance at meetings away from his primary worksite. Applicant's supervisor found that Applicant had claimed military leave on his time sheets, but had provided no paperwork to justify it. The supervisor determined that Applicant had claimed 157.21 hours which he had not worked.¹

The security director investigated the time sheet discrepancies as well. He found no substantiation for Applicant's explanations of the discrepancies. The security director found three instances when Applicant claimed to be at work when electronic records showed that Applicant was at the gym. The security director found that 218.26 hours were unaccounted for.

Applicant's agency department head reviewed the supervisor's report and a response by Applicant. In his response, Applicant provided several explanations for the discrepancies—*e.g.*, that he was working on secret projects the existence of which he could not divulge to his supervisor, that he was on annual leave, that he was claiming hours to make up for uncompensated overtime hours he had already worked, that the electronic badging system was inaccurate, or that he was performing reserve military duty. The department head found Applicant's explanations to be incredible and /or unsubstantiated. The supervisor and department head found that Applicant's conduct diminished his trustworthiness, and the department head proposed Applicant's removal from government service.

As Department Counsel points out, the Judge overlooked significant evidence in concluding that Applicant did not falsify his time sheets. There is substantial evidence that the three government officials who were involved in investigating Applicant's conduct found Applicant's explanations for the discrepancies on his time sheets to be incredible and/or unsubstantiated. The Judge found

¹Government Exhibit 15 has a document in which Applicant's supervisor determined that 96 of the 137 purchases on Applicant's government credit card were for unauthorized personal expenses when Applicant was not on official government travel.

Applicant's uncorroborated testimony to be credible and accepted it at face value. While a Judge's credibility determinations are entitled to deference, such a determination does not relieve the Judge of the obligation to decide how much weight can properly be given to an applicant's testimony in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 03-02486 at 7 (App. Bd. Aug. 31, 2004), *citing Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). The record as a whole does not support the Judge's conclusions regarding Applicant's recording of his time and attendance while in government service.

Department Counsel contends that the Judge's application of Personal Conduct Mitigating Conditions 17(c)², (d)³, and (e)⁴ is unsupported by record evidence and fails to consider a critical aspect of the case. Department Counsel's contention has merit. The Judge referred to portions of Applicant's testimony and found that portions of Personal Conduct Mitigating Conditions 17 (c), (d), and (e) partially apply in Applicant's case. The fact that there is some mitigating evidence does not compel the Judge to grant a security clearance. As the trier of fact, the Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. In deciding whether the Judge has weighed the evidence in a reasonable manner, the Board considers whether the Judge exercised common sense and sound judgment and made findings of fact and reached conclusions that reflect a reasonable, plausible interpretation of the record evidence as a whole, taking into account whether there is record evidence that runs contrary to the Judge's findings and conclusions. *See, e.g.*, ISCR Case No. 02-02892 at 4 (App. Bd. Jun. 28, 2004)⁵. In discussing mitigation as to Applicant's time and attendance sheets, the Judge mentions only one of the explanations Applicant gave for the discrepancies and accepts that explanation. The record indicates that another of Applicant's explanations for discrepancies on his time sheets was that he was on military leave. Applicant was asked during the investigation process to provide documentation for his military leave. Applicant provided evidence only of inactive duty training, for which military leave is not authorized. When the record was held open after the hearing for him to provide documentation of his reserve duty, he failed to do so. Moreover, the record evidence indicates that responsible government officials found Applicant's explanations to be incredible or unsubstantiated and his conduct to have diminished his trustworthiness to the extent that the agency proposed to remove him from his job, although he was eventually allowed to resign.

²Directive, Personal Mitigating Condition 17(c): "the offense is so minor, or so much time has passed, or the behavior is to infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

³Directive, Personal Mitigating Condition 17(d): "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

⁴Directive, Personal mitigating Condition 17(e): "the individual has taken steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

⁵The Judge's decision contains a lengthy footnote discussing her appraisal of limitations on the Board's review authority. Decision at 7-8. It is well-settled that the Board reviews decisions from the Hearing Office, as opposed to the other way around. *See* Directive, Enclosure 3, and ISCR Case No. 07-13696 at 3 (App. Bd. Feb. 9, 2009).

Department Counsel understands the Judge’s decision as saying that she is prohibited from considering conduct that was not “charged” against Applicant by his previous employer. To the extent that such a reading is what the Judge intended, then Department Counsel is correct that the Judge erred. There is no prohibition in the Directive against considering security-related conduct merely because a previous employer chose not to pursue it in a particular forum.

Department Counsel also argues that the Judge’s whole-person analysis is unsustainable because it fails to consider a critical aspect of the case. Department Counsel’s argument has merit. Department Counsel points to the Judge’s conclusion that the discrepancies on Applicant’s time sheets were “the result of carelessness.” Decision at 12. Department Counsel contends that the Judge failed to consider crucial record evidence to the contrary. In discussing the issues of falsification and mitigation above, the Board concluded that the Judge committed harmful error in accepting Applicant’s explanations of his conduct at face value rather than weighing Applicant’s testimony in light of the record evidence as a whole. The same conclusion is applicable to the Judge’s whole-person analysis. The Judge’s favorable security clearance decision is not sustainable.

Order

The Judge’s decision granting Applicant a security clearance is REVERSED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board