

KEYWORD: Guideline I

DIGEST: The Judge’s conclusion that the record raises unresolved questions and doubts about Applicant’s eligibility and suitability for a security clearance is sustainable. Applicant’s assertions that DOHA did not properly inform her of procedures after the clinical psychologist submitted her report were unfounded. Adverse decision affirmed.

CASE NO: 08-08721.a1

DATE: 10/20/2011

DATE: October 20, 2011

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In Re:)	
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-----)	ISCR Case No. 08-08721
)	
Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 1, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions)

of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On July 29, 2011, after the hearing, Administrative Judge Claude R. Heiny denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 54 years old. In September 2005, Applicant informed her company's security office that she believed she was being stalked 24 hours a day, seven days a week by persons unknown. In December 2005 she went to the police, because she was being stalked in various locations. Neither company officials nor the police department told Applicant they were unable to substantiate her concerns. She never returned to the police and she never talked further with company officials after relating her initial concerns. On various other occasions between 2005 and 2010, Applicant states that she was followed home or to other locations by vehicles, that other vehicles stalked her or drove aggressively toward her on the highways. After one incident where the police did not perceive a problem, Applicant stated that she did not feel she was being taken seriously and that no one believed her suspicions. In 2007, Applicant filed a hostile environment complaint with her company's ethics office. She reported several incidents with three men whom she claimed were behaving in a hostile manner toward her. An investigation determined there was no problem with the men.

In July 2010, Applicant was evaluated by a clinical psychologist. Tests and an interview were conducted. The evaluation included the observation that Applicant denied any unusual thinking except the feeling that she was being followed. The psychologist also reported that Applicant engaged in a lengthy discussion about various individuals following her for a number of years in a number of situations. Applicant could not be dissuaded by any logical arguments to the contrary. The diagnostic impression was 294.9 Cognitive Disorder Not Otherwise Specified (NOS), and 297.1 Delusional Disorder NOS. A Global Assessment of Functioning was rated "50" which indicates serious impairment in social, occupational, or school functioning. The psychologist concluded that Applicant's neuropsychological status appeared impaired, and that her delusions could be quite severe at times and appeared to account for some flaws in her thinking and interaction with others. The psychologist stated that "unfortunately, it is not known at this time whether her judgment and reliability in the future can be ascertained or fully determined without further medical and neuropsychological evaluation."

The evaluation recommended Applicant see a neurologist. She did so in November 2010. She had an MRI which revealed no problems. She told the neurologist her physician had recommended she see a neurologist. She never gave the neurologist a copy of the psychologist's findings and recommendations. She saw the neurologist again the day before the hearing. Applicant stated the neurologist could give a full report. Applicant was given two weeks to provide any additional information, to include a report of the neurologist's findings. No information was received. Applicant never considered obtaining a second opinion as to her mental state. Although concerned about the psychologist's letter, Applicant did not have a problem with the recommendation.

The Judge reached the following conclusions: Since at least 2005, Applicant believes she has been stalked 24 hours a day, seven days a week by persons unknown. She could not be dissuaded by any logical arguments to the contrary. The clinical psychologist found Applicant's neuropsychological status was impaired, and it is unknown whether Applicant's future judgment and reliability could be ascertained or fully be determined without further medical and neuropsychological evaluation. Even though she was aware the clinical psychologist believed she was delusional, she never considered obtaining a second opinion as to her mental state. Applicant meets none of the mitigating factors. There is no favorable prognosis. There is no recent opinion that the condition is under control, is cured, is in remission or has a low probability of recurrence. There is no indication the condition was temporary and that it has been resolved. The record raises unresolved questions and doubts about Applicant's eligibility and suitability for a security clearance.

Applicant asserts that the Judge committed numerous factual errors, and also takes issue with some of the written statements made by the clinical psychologist that were entered into evidence. Applicant argues that the Judge used past-tense terms "suffered from" and "had" when referring to her condition, thus indicating that it was a one-time, past event and not a current cause for concern. Applicant also states that she "expected more consideration to be given [by the Judge] for the whole-person concept." Applicant also raised a matter of procedure. She indicated that she was not properly informed of the procedures, or what was expected of her, after her receipt of the clinical psychologist's report. Applicant's assertions do not establish error on the part of the Judge.

Applicant claims the Judge erred in making numerous detailed findings of fact. Many of Applicant's claims in this area are difficult to understand and she does not relate how the errors are prejudicial to her case. There is no presumption of error below. The burden is on the appealing party to establish harmful error on the part of the Judge. To the extent that the Board cannot understand Applicant's assertions of fact-finding error, or cannot determine how the errors undercut the Judge's conclusions in the case, the Applicant has not met her burden. In those instances where the Board can ascertain the claims of fact-finding error and the alleged consequences of those claims, we note that most of the assertions of error involve minor date discrepancies and minute details surrounding various episodes of perceived stalking, perceived hostility, and interactions between Applicant and the clinical psychologist. After a review of the record and the Judge's decision, the Board concludes that any factual errors made by the Judge were harmless in nature.

Applicant contests the factual accuracy of assertions made in several of the documents admitted into evidence, primarily the clinical psychologist's report. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Here, Applicant is merely repeating arguments concerning the nature of the evidence that were made below, rather than making claims of error on the part of the Judge.

Applicant notes that the Judge used the past tense in several instances when referring to her diagnosed condition ("had" as opposed to "has" and "suffered from" as opposed to "suffers from"). She claims this supports her assertion that the condition was a one-time, past event that is no longer of security significance. The Board does not review sentences or passages in a Judge's decision in

isolation, but rather will look to the whole of the Judge's decision to determine the meaning of a particular portion of that decision. *See, e.g.*, ISCR Case No. 02-33144 at 6 (App. Bd. Sep. 7, 2004). After a review of the Judge's whole decision, it is clear that the Judge found that Applicant's condition is ongoing and there are no current prospects for addressing it. These findings are reasonably supported by the record evidence. Applicant has not established error.

Applicant states that she "expected more" from the Judge's whole-person analysis, but does not elaborate. After a review of the Judge's decision, the Board is satisfied that he gave appropriate consideration to the various "whole-person" factors and the framework for analysis contained therein.

Applicant raises some arguments relating to procedure, stating that DOHA did not properly inform her of procedures or what was expected of her after the clinical psychologist submitted her report, and that she expected "something different" from DOHA—although she does not clearly indicate what. Although not a model of clarity, other comments by Applicant in this portion of her brief seem to indicate that she is commenting on a lack of direction on the part of DOHA regarding what to do medically after the submission of the psychologist's report. DOHA adjudicates security clearance eligibility. Notwithstanding the fact that the clinical psychologist conducted her evaluation of Applicant's mental condition at the request of the Department of Defense, DOHA would not be in a position to get involved in any post-report medical treatment of Applicant, nor could it properly comment upon, or interject itself into, the ongoing treatment or recommendations of medical personnel. Thus, DOHA breached no duty to Applicant regarding instructions as to her ongoing medical care. Applicant has not established that her due process rights were violated.¹

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of the mitigating factors listed under Guideline I, and indicated why the mitigating conditions did not apply. Critical to the Judge's ultimate determination in this case was his conclusions that, at the time of the hearing, nothing meaningful was being done to address Applicant's diagnosed condition. This led to the Judge's conclusion that there were significant doubts about her eligibility and suitability for a security clearance. These conclusions are reasonably supported by the record evidence.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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

¹As pointed out by Department Counsel, Applicant was appropriately provided with specific, post-examination recommendations from the DOD clinical psychologist that were medically based. Also, the Judge left the record open for two weeks post-hearing to allow Applicant to submit purported matters in mitigation from a neurologist she was seeing at the recommendation of the clinical psychologist. No additional matters were submitted by Applicant.

national security.’’ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

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