KEYWORD: Guideline E

DIGEST: Applicant engaged in three episodes of security significant conduct over a sixteen year period, namely, providing proprietary information to a foreign government and two incidents of falsifying his security clearance applications. Favorable decision reversed.

CASENO: 08-09163.a1

DATE: 12/21/2010

DATE: December 21, 2010

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tovah A. Minster, Esq., Department Counsel

FOR APPLICANT
Brian E. Kavenay, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 24, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision–security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 15, 2010, after the hearing, Administrative Judge Martin H. Mogul granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's analysis and conclusions were arbitrary, capricious, or contrary to law and whether the Judge's whole-person analysis was erroneous. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant, 73 years old, is employed as an engineer by a Defense contractor. He has held a DoD security clearance since around 1960.

In 1983, Applicant considered becoming a resident of Israel. He got in touch with the Israeli consulate in an effort to inquire about employment possibilities. A liaison advised Applicant that he would appreciate any information Applicant could provide about his work. Applicant gave the liaison a proprietary document, which described a "top level research project" in which his then employer was engaged. This document was not classified.

In 1994, Applicant submitted a security clearance application (SCA). This document asked, *inter alia*, whether Applicant had ever had any contact with a foreign government, to include embassies or consulates. Applicant answered "no" to this question, which was false in light of his contact with the Israeli government in 1983.

In 2000, Applicant submitted another SCA. He answered "no" to a similar question. Again, this answer was false.

In 2000, Applicant submitted to a polygraph. He was asked whether he had ever had contact with a representative of a foreign country. Applicant initially denied that he ever had, but he then admitted his contact with the Israeli consulate. He initially denied this contact because he was embarrassed and was concerned as to how a candid reply would have affected his clearance. In 2001 he submitted to another polygraph. During this examination he advised about his contact with the Israeli government. He also advised about this contact on a 2005 SCA.

Applicant enjoys an outstanding reputation among supervisors, co-workers, neighbors, and other acquaintances for the quality of his job performance, his integrity, and his trustworthiness.

Discussion

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).

The Judge concluded that Applicant's conduct raised Personal Conduct Disqualifying Condition (PCDC) 16(a),[1] which is sustainable in light of Applicant's repeated false statements. However, Department Counsel persuasively contends that the Judge erred by not also concluding that the evidence raised PCDC 16(d).[2] This paragraph states, among other things, that an applicant's release of proprietary information can raise Guideline E security concerns, insofar as such conduct evidences untrustworthiness or unreliability. The Judge's findings demonstrate that Applicant released such information to a representative of the Israeli government, in an effort to further his own employment interests at a time in which he was considering moving from the United States to Israel. The Judge erred by not analyzing Applicant's case in light of PCDC 16(d).

[1]Directive, Enclosure 2 ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . ."

[2]"Directive, Enclosure 2 ¶ 16(d): "credible adverse information that is not explicitly covered under any other guideline . . . which . . . supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations . . . This includes but is not limited to consideration of . . . untrustworthy or unreliable behavior to include . . . release of proprietary information[.]"

Department Counsel argues that the Judge erred in his application of Personal Conduct Mitigating Condition (PCMC) 17(c).[3] While the Judge noted that a decade had passed since Applicant's last SCA falsification, Department Counsel persuasively argues that the Judge's discussion did not properly evaluate this passage of time in light of the entirety of the record evidence. The mere passage of time cannot be viewed in isolation and must be evaluated with reference to other facts and circumstances in the case. *See, e.g.*, ISCR Case No. 08-05351 at 7-8 (App. Bd. Mar. 12, 2010). In this case, Applicant engaged in security significant conduct by providing proprietary information to a foreign government. Over a decade later he falsified his SCA concerning this matter and, six years after that, the falsified another SCA. The Judge's decision does not reasonably explain why the mere passage of time (even, as here, when it is ten years) is sufficient to mitigate multiple instances raising security concerns that occurred over an even longer period of time.

Furthermore, as Department Counsel argues, the decision does not reasonably explain why the conduct in question occurred under unique circumstances or why it was minor. While it is true that there is no evidence of Applicant's having compromised other proprietary information, this incident and his subsequent falsifications constitute a series of security significant incidents. The evidence does not support a conclusion that the Guideline E concerns arose from unique circumstances. Rather, they resulted from conscious decisions by Applicant to advance his own interests at the expense of his employer's legitimate desire for the confidentiality of its work product and to keep knowledge of that conduct from the Government. That such behavior has not occurred again is not due to anything inherent in the underlying circumstances but, rather, in Applicant's own choices. Moreover, Applicant's conduct, considered as a whole, cannot be said to be minor, insofar as the Directive itself states that failure to provide truthful answers during the security clearance process is of "special interest" in evaluating an applicant's security worthiness. Directive, Enclosure 2 ¶ 15. Finally, Department Counsel persuasively contends that the Judge did not reasonably address the final clause of PCMC 17(c), which requires a showing that the conduct does not cast doubt on Applicant's reliability, trustworthiness, or good judgment. Accordingly, we conclude that Department Counsel's overarching issue that the Judge erred in his application of the mitigating conditions is persuasive.

Department Counsel argues that the Judge's whole-person analysis does not add anything not already contained in his analysis of PCMC 17(c). This argument has merit, in light of the relatively conclusory nature of the whole-person analysis section of the decision. Accordingly, the whole-person analysis does not provide an additional basis for the Judge's favorable findings.

[3]Directive, Enclosure 2 ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so 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[.]"

For all the reasons set forth above, Department Counsel's argument that the Judge's decision contains significant errors is persuasive.[4] Accordingly, we conclude that the Judge's favorable decision is not sustainable. The record, viewed as a whole, will not support a conclusion that Applicant has met his burden of persuasion as to mitigation, either through application of the mitigating conditions or the whole-person factors. We note that Applicant was not denied a clearance after the 2000 polygraph uncovered his improper release of proprietary information and subsequent falsifications. However, DOHA "is not estopped from making an adverse clearance decision when there were prior favorable adjudications." ISCR Case No. 07-17383 at 2 (App. Bd. Feb. 12, 2009).

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

[4]We note Government Exhibit 3, an affidavit by Applicant prepared in 2008, in which Applicant discusses various aspects of his record as it pertains to his security worthiness. He mentions a polygraph examination in 2001, in which he advised about his interaction with the Israeli government. He states that he passed the exam, which is consistent with the record evidence in his case. However, he does not mention the prior polygraph in 2000, in which he initially denied having had contact with a foreign government. The document prepared in 2008 is not consistent with a conclusion that Applicant has been consistently forthright about his security significant conduct in the years following his 2000 SCA falsification, which further undermines his efforts to demonstrate mitigation under the *Egan* standard.