KEYWORD: Guideline E; Guideline F; Guideline B; Guideline L

DIGEST: Applicant failed to mitigate security concerns arising from his Egyptian relatives, his suspension from the practice of law, and his false statements on the SCA. Judge erred in concluding that State Supreme Court action upholding the suspension was not a civil court action for purposes of the SCA. Adverse decision affirmed.

CASENO: 09-02708.a1

DATE: 08/24/2010

DATE: August 24, 2010

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Tarek H. Zohdy, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 18, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct), Guideline F (Financial Considerations), Guideline B (Foreign Influence), and Guideline L (Outside Activities) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 22, 2010, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact were erroneous; whether the Judge failed to consider record evidence favorable to Applicant; whether the Judge's whole-person analysis was in error; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Department Counsel raises the following issue on cross appeal: whether the Judge erred in concluding that Applicant was not required to list a State Supreme Court case to which he was a party on his security clearance applications (SCA).[1] Consistent with the following discussion, we affirm the Judge's ultimate decision. Regarding the cross-appeal, we reverse the Judge's favorable finding concerning Applicant's omission on his 2006 SCA.

Facts

The Judge made the following pertinent findings of fact: Applicant is a linguist employed by a Defense contractor. He was born, raised, and educated in Egypt, where he received degrees in law and police science. In the 1970s and 1980s, Applicant was employed by an agency of the Egyptian government. He held a high-level Egyptian security clearance.

Applicant first traveled to the U.S. in the late 1970s, staying with an Egyptian-born uncle. The uncle is a professor at a U.S. university who, early in life, had been a member of a terrorist organization. He became a U.S. citizen in the 1960s.

Applicant met his wife in Egypt, and they immigrated to the U.S. in the mid-1980s. They became U.S. citizens approximately 10 years later. They have three adult children who are citizens and residents of the U.S. Applicant has three siblings who are citizens and residents of Egypt. At one time, one of them had been a professor at an Egyptian university. Another sibling was killed by sniper fire while in another Middle Eastern country.

Applicant's wife has three siblings, one of whom is a citizen and resident of Egypt. She speaks with this sibling approximately twice a month. Applicant's wife has traveled to Egypt several times, to visit relatives and sightsee. Applicant also visited Egypt in the mid-1990s and three times in the early-2000s. He did not list the visits in the 2000s on his security clearance applications, although he was required to do so. One of these visits was for the purpose of renouncing his interest in his mother's will. He was to inherit between $50,000 and $60,000. He did not corroborate his claim to have renounced his interest.

In the early 2000s, the IRS obtained a lien against Applicant and his spouse for unpaid federal taxes. He subsequently paid the taxes and the lien was removed. However, in his 2004 SCA, he answered "no" to a question inquiring if he had had tax liens within the previous 7 years.

In the early 1990s Applicant was admitted to the practice of law in a U.S. State. He held himself out as licensed to practice law in Egypt, although he stopped representing clients in that country in the mid-2000s. He also maintained a "legal business cooperation agreement" with a

[1]The Judge's favorable findings under Guidelines F and L are not at issue either in Applicant's appeal or in Department Counsel's cross-appeal.

former law professor in Egypt. Decision at 7.

In the mid-1990s, Applicant was involved in two complex class action lawsuits in U.S. federal courts. A court sanctioned Applicant for violating court orders, filing frivolous claims, and lying to the court. As a consequence of this misconduct, he was disqualified from practicing before federal courts.

In the late 1990s, Applicant's State Bar Disciplinary Board looked into the misconduct referenced above. The Board substantiated that Applicant had committed the following ethical infractions: lack of professional competence, misleading the courts with non-meritorious claims, lack of candor (false statements under oath), obstructing litigation, disrupting a tribunal, and conduct prejudicial to the administration of justice. The Board suspended Applicant from practicing law for three years, with one year suspended. In January 2005, the State Supreme Court affirmed the Board's decision.

In November 2004 and again in June 2006, Applicant completed SCAs, both of which inquired whether, within the previous seven years, he had been a party to any public record civil court action. Applicant answered "no" on both SCAs.

Applicant was granted a security clearance in 2004, which was later withdrawn. There is no evidence that he had compromised classified information.

Egypt has an excellent relationship with the U.S. and receives substantial U.S. foreign aid. However, terrorist groups carry out attacks in Egypt, targeting U.S. interests. "Terrorist groups conduct intelligence activities as effectively as state intelligence services." Decision at 11. Extremist activities in certain areas of Egypt have created instability and public disorder. Additionally, Egypt has a poor human rights record.

Discussion

Applicant's Appeal

Applicant contends that the Judge erred in some of his findings of fact. For example, he states that his sibling had never been a professor at a Egyptian university; that his inheritance was actually $8,000 rather than $50,000 to $60,000; and that there is no evidence that his 2004 security clearance was withdrawn. We have examined Applicant's contentions in light of the record as a whole. The Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. To the extent that the Judge's findings may contain errors, the errors are not likely to have affected the outcome of the case.[2]

[2]We have found no record evidence establishing that Applicant's sibling had been a professor. Government Exhibit (GE) 8, Memo with Attachments, states that a review of Applicant's background disclosed reasons to deny him access to Sensitive Compartmented Information (SCI). However, prior to resolution of this matter, his nomination for SCI was withdrawn. It also states that Applicant had been granted a security clearance in December 2005. GE 10, Letter from Applicant to DIA Director, at 4, states that his security clearance had been "pulled." The Judge's finding as to the dollar amount of Applicant's inheritance is supported by GE 8.

Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

Applicant contends that the Judge failed to consider all of the record evidence. He argues that the Judge did not consider the entirety of GE 8. Also he cites record evidence that none of his Egyptian siblings work for the government, that one of his siblings was killed by a sniper, and that he testified that he had no reason to have lied on his SCAs. The thrust of Applicant's argument is that the Judge ignored these pieces of evidence. Furthermore, he contends that his two SCAs, admitted as GE 5 and 7, were each missing about 25 pages and that in GE 8, favorable evidence was inexplicably redacted.

A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 09-05830 at 2 (App. Bd. Jun. 25, 2010). Applicant's apparent disagreement with the weight which the Judge assigned the evidence, for example his testimony that he did not falsify the SCAs, is not sufficient to rebut the presumption. The SCAs appear to be complete, although neither of them contain the standard form whereby an applicant waives his privacy interests in his medical records, etc. However, these waivers were not at issue in the hearing, so their absence is without significance. There is no reason to believe that the SCAs contain 25 additional pages not included in the record. Furthermore, the redactions in GE 8 appear to have been for the purpose of protecting privacy interests. There is no reason to believe that the redactions were in contravention of the law or that the information would have exculpated Applicant. In any event, as Department Counsel noted in a post-hearing memorandum, Applicant did not object to this document when it was proffered into evidence, waiving any error he might otherwise have raised concerning it.

Applicant points to some of the Judge's statements which appear to be inconsistent with his adverse decision, such as his giving partial application to certain mitigating conditions. However, when read in context, these statements appear simply to be the Judge's acknowledgment of favorable aspects of Applicant's record. The Judge's decision, read as a whole, provides a reasonable basis for his conclusion that the favorable record evidence was not sufficient to mitigate the security concerns alleged in the SOR and is supported by the record evidence. The sentences to which Applicant alludes do not undermine the Judge's adverse decision.

Applicant requests that the Board exercise *de novo* review over his appeal. However, we do not have authority to review a case *de novo*. *See* Directive ¶ E3.1.32 concerning the extent of our power of review. *See also* ISCR Case No. 08-10204 at 3 (App. Bd. Jun. 21, 2010).

We have considered Applicant's brief in light of the record as a whole. Considering the nature and extent of Applicant's foreign contacts, his suspension from the State Bar and the circumstances underlying the suspension, and his false statements about his tax lien and foreign travel, the Judge's adverse decision is sustainable. "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).

Department Counsel Cross Appeal

Question 40 on both the 2004 and 2006 SCAs asked the following: "In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?" GE 5 at 11; GE 7 at 11. Applicant answered "no" to this question on both SCAs. SOR ¶ 1(b) alleged that, in answering as he did on the 2004 SCA, Applicant intentionally failed to disclose the attorney disciplinary action which led to his suspension by the State Supreme Court. SOR ¶ 1(d) alleged that, on his 2006 SCA, Applicant had intentionally failed to disclose the State Supreme Court case.

The Judge found in Applicant's favor on these two allegations. He found that the proceedings in question were "administrative in nature" rather than civil court actions. Accordingly, he concluded that Applicant was not required to list them. In effect, the Judge concluded that these two allegations did not demonstrate security concerns.

Department Counsel argues that the Judge's conclusions regarding these two allegations are in error, insofar as Applicant was a party in a court proceeding adjudicating the Disciplinary Board's recommendation that he be suspended from the practice of law. Department Counsel notes that the case was heard in the highest court of the state and was published in the West Regional Reporter. Accordingly, Department Counsel argues that Applicant was required to list this proceeding on his SCAs.

We have considered Department Counsel's argument in light of the record as a whole. The record demonstrates that the Disciplinary Board issued its decision in September 2004. Applicant completed his SCA in November 2004. The State Supreme Court decision was handed down in January 2005. Applicant completed his next SCA in June 2006. It is not clear when Applicant appealed the Disciplinary Board's decision to the State Supreme Court. Although there is reason to suppose that he did so prior to completing his 2004 SCA, the record contains no evidence to that effect. As it stands, the record demonstrates only that, as of the date Applicant completed his 2004 SCA, Applicant had been recommended for sanctions by his State Bar Association, which was purely administrative in nature rather than judicial. Accordingly, the Judge did not err in ruling as he did on SOR ¶ 1(b).

However, we reach a different conclusion as to SOR ¶ 1(d). When Applicant completed his 2006 SCA, the State Supreme Court had issued its decision almost 18 months prior. That decision is styled "In Re: [Applicant]," and it refers to him throughout as "respondent" *See, e.g.*, GE 6, State Supreme Court Opinion, at 1. The opinion clearly resolves a matter–Applicant's fitness to practice law–through the exercise of the State Supreme Court's judicial authority.[3] Furthermore, the nature of the matter in controversy is civil as opposed to criminal. Therefore, this is a "civil court action" within the meaning of Question 40 of the SCA, and, insofar as Applicant was the respondent whose legally protected interests in practicing law were at stake, he was a party to it. We conclude that the Judge erred in his finding that Applicant was not required to list this case on his 2006 SCA. The

[3]The Court states that, in resolving Applicant's case, it was exercising original jurisdiction under the State Constitution. Referring to its responsibilities in Bar disciplinary matters, it stated "we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence." The Court docketed the case for oral argument. GE 6 at 9. Taken together, these actions serve a judicial, rather than administrative, function.

record contains substantial evidence that Applicant's omission was deliberate, satisfying the requirements of two Guideline E disqualifying conditions.[4] This matter should have been evaluated in the context of Applicant's burden of persuasion as to mitigation. On this last point, the record viewed as a whole does not support a conclusion that Applicant has met this burden. *See* Directive, Enclosure 2 ¶ 17 for the Guideline E mitigating conditions.

Although we have found error, we conclude that the error is harmless. In light of the Judge's sustainable adverse formal findings discussed above, the erroneous formal finding regarding SOR ¶ 1(d) did not affect the outcome of the case. *See* ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

Consistent with the above, the Judge's adverse formal findings under Guidelines E and B of the SOR are affirmed. The Judge's favorable formal finding under SOR ¶ 1(d) is reversed.

Order

The Judge's adverse security clearance decision 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

[4]Directive, Enclosure 2 ¶ 16(a): "deliberate omission . . . of relevant facts from any personnel security questionnaire[.]" Directive, Enclosure 2 ¶ 16(b): "deliberately providing false or misleading information concerning relevant facts to an . . . investigator . . . or other official government representative[.]"