

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant was convicted of a felony after a guilty plea. Collateral estoppel applies. Thus, the Judge's conclusion that Applicant lacked criminal intent was error. Favorable decision reversed.

CASENO: 11-06937.a1

DATE: 01/10/2013

DATE: January 10, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-06937
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 4, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 13, 2012, after the hearing, Administrative Judge Darlene D. Lokey Anderson 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 issue on appeal: whether the Judge substituted a favorable credibility determination for record evidence. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following findings pertinent to the issue raised on appeal. Applicant is a logistics planner for a Defense contractor. He holds a bachelor’s degree in management.

Applicant served on active duty with the Air Force from 1972 to 1977 and then as either a Federal civil servant or contractor. He worked overseas from 1984 to 2003 and for three years thereafter in the U.S. He retired but was later hired by his current employer.

In the 2000s, Applicant experienced financial problems resulting from his decision to invest in real estate. He purchased real property with the intention of renting it out, but he was not successful in this undertaking. When he tried to sell the property he could not find a buyer. The housing market crash of 2006 left him owing more on two houses than the houses were worth. He fell behind on his expenses, including credit card bills, etc. Applicant filed for Chapter 7 bankruptcy protection and was discharged in bankruptcy in 2009.

While working overseas, Applicant would place his income into his overseas bank account, in the currency of the host nation. When he returned to the U.S., he transferred his foreign currency account to his U.S. bank account, in increments of \$10,000 in order to avoid complying with Federal documentation requirements. He testified that he was told by the bank manager to do this. Applicant was indicted under a statute that forbade structuring financial transactions to avoid reporting requirements.¹ He pled guilty and received two years debarment, one year of probation, and \$3,000 restitution. He has complied with all sentencing conditions.

In the Analysis, the Judge noted that Applicant had resolved his financial problems through the bankruptcy action. She stated that Applicant was uninformed and naive when he violated the

¹Department Counsel’s brief cites to 31 U.S.C. § 5324, which prohibits structuring transactions to evade reporting requirements. Subsection (c) provides that “[n]o person shall, for the purpose of evading reporting requirements of section 5316 . . . (1) fail to file a report required by [the statute].” § 5316 specifies the contents of reports required to be filed when a person “transports, is about to transport, or has transported, monetary instruments of more than \$10,000 at one time[.]” § 5324 carries a maximum penalty of five years in prison and a fine.

U.S. bank laws. She stated that it does not appear that he had any criminal intent. She stated that, while he structured the financial transactions so as to avoid reporting requirements, he did not realize the magnitude of his actions. She concluded that Applicant had learned his lesson and has avoided subsequent criminal conduct.

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). “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b). 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 erred in concluding that Applicant lacked criminal intent. He contends that this conclusion is not supported by the evidence. We find this argument persuasive. It is uncontroverted that Applicant was convicted of a felony, having pled guilty to the offense in question. Indeed, in his response to the SOR, he admitted the allegation that he had pled guilty. Moreover, he discussed the plea in his security clearance interview and at the hearing.

Although at the hearing he claimed that he did not intend wrongdoing, a plea of guilty is an admission not only of the facts underlying the offense but of the crime itself. *See, e.g., United States v. Broce*, 488 U.S. 653, 570 (1989). Therefore, by his plea, Applicant admitted that he had structured his monetary transactions as he did for the purpose of evading the requisite reporting requirements, as the statute specifies and as the Judge herself acknowledged in the Analysis. The doctrine of collateral estoppel applies in DOHA hearings. Although there are exceptions, none is pertinent in this case. Under the doctrine, Applicant is not permitted to contend that he did not engage in the criminal acts of which he was convicted. *See, e.g., ISCR Case No. 04-05712 at 7 (App. Bd. Oct. 31, 2006); ISCR Case No. 95-0817 (App. Bd. Feb. 21, 1997).*

Questions of collateral estoppel aside, a defendant's admission in open court, made with the advice and assistance of counsel, is powerful evidence of the matter asserted. Moreover, it was inconsistent of the Judge to state that Applicant acted for purposes that satisfied the *mens rea* explicitly described in the statute and yet to conclude that he lacked a *mens rea*. This inconsistency buttresses Department Counsel's argument that the Judge substituted a favorable impression of Applicant's demeanor for record evidence. *See, e.g., ISCR Case No. 07-18324 at 7 (App. Bd. Mar. 11, 2011).*

The Judge's decision is not sustainable, given the extent to which it rests upon Applicant's claim that he did not possess criminal intent when he committed the offenses of which he was convicted. As such the decision fails to articulate a satisfactory explanation for one of its principal conclusions, fails to consider an important aspect of the case, and runs counter to the weight of the record evidence.

Order

The Judge's decision is **REVERSED**.

Signed: Michael Y. Ra'anan

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

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

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