KEYWORD: Guideline E; Guideline J

DIGEST: Applicant argues that the Judge erred in admitting three Government documents in absence of evidence that Applicant had actually seen them in preparing her form. Under the facts of this case these documents have no probative value, without evidence linking them to Applicant. Department Counsel's descriptions of them to the Judge constitute at most offers of proof, which have no evidentiary value. These documents were inadmissible. Once admitted, it was error for the Judge to have considered them on the substantive questions arising from Applicant's answer to the SCA. The Judge found against Applicant under both Guidelines E and J. The Judge's language demonstrates that, in interpreting the intent underlying Applicant's answer to the SCA, the Judge relied heavily on the three inadmissable documents. Therefore, the Board cannot say with a reasonable degree of certainty that, had she not considered these documents, she would nevertheless have arrived at the same decision. Adverse decision reversed.

CASENO: 02-26033.a2

DATE: 03/11/2009

DATE: March 11, 2009

In Re:	)	
------	)	ISCR Case No. 02-26033
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Thomas M. Abbott, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 24, 2008, after two hearings, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On November 17, 2008, the Board remanded the case to the Judge for further proceedings. Subsequently, on December 11, 2008, the Judge issued a new decision, again denying Applicant a security clearance. Applicant again filed a timely appeal.

Applicant raised the following issues on appeal: whether the Judge erred in relying on three post-hearing documents; whether the Judge erred in concluding that Applicant deliberately falsified her security clearance application (SCA); whether the Judge's credibility determination is not sustainable; and whether the Judge erred in her application of the pertinent mitigating conditions.[1] Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant was born in Taiwan and came to the U.S. as a student. She married in the late 1980s. After beginning employment, she neglected to renew her student visa or to obtain a work visa. She was investigated by the Immigration and Naturalization Service (INS) and became the subject of a deportation hearing, on the theory that her marriage was accomplished as part of a fraudulent effort to obtain U.S. citizenship. She was exonerated and subsequently became a U.S. citizen. In the year following the hearing, she and her husband divorced. She married a second time, which also led to a divorce. In 2001 she completed a SCA.[2] This document inquired as to her "current marital status." Decision at 3. She listed her second marriage, but did not list the first.

B. Discussion

[1]The Judge's favorable findings under SOR subparagraphs 1(a) and 1(c - e) are not at issue in this appeal.

[2]This document was admitted as Government Exhibit (GE) 1.

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 are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

In light of the Board's holding set forth below, detailed examination of the evidentiary sufficiency of the Judge's findings is not necessary.

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).

Applicant argues on appeal that the Judge erred in admitting three Government documents. The documents in question are GE 4, "Electronic Personnel Security Questionnaire SF86 Worksheet;" GE 5, apparently a copy of a blank electronic SF86 (SCA);[3] and GE 6, a reproduction of a computer screen displaying an electronic SCA question concerning an applicant's spouse. Applicant argues that these documents should not have been admitted in absence of evidence that Applicant had actually seen them in preparing her form.

Applicant's argument is persuasive. We note that the question which Applicant is alleged to have falsified is Question 8 of her SCA. The heading for this section is "Your Spouse," and the question itself reads "What is your current marital status?" Applicant answered "Divorced," and, as stated above, listed only her second marriage. The Government presented, at a re-opened hearing, the three documents listed above. GE 4 is a questionnaire, purportedly to have been used by applicants in preparing to fill out SCAs at the time in which Applicant completed hers. This questionnaire inquires about former spouses. The Department Counsel admitted to the Judge he could not certify that Applicant had ever used, or had even seen, this document or one like it. "Whether she had access to the worksheet or not the government is not going to tell you she did because we have nothing saying that that was what must have happened." Tr. II at 8. Given this pronouncement by Department Counsel, this document lacks probative value on the question of Applicant's knowledge and intent in filling out her SCA.

GE 5 is a photocopy, apparently consisting of a number of questions as they would appear to an applicant sitting at his or her computer filling out an electronic SCA. Department Counsel stated that this "is the version that was in place" when Applicant completed hers. Tr. II at 8. This document inquires about an applicant's "current marital status," providing options such as "Never Married," "Married," "Divorced," etc. It also provides a space for an applicant to identify "Former Spouse(s)." GE 5 at 23. While this document appears to inquire about former spouses in the plural, and, therefore, would tend to contradict Applicant's claim that she did not know she had to list her first marriage, as with GE 4 there is no evidence demonstrating that Applicant had ever seen it or was aware of it. Indeed, GE 5 does not appear on its face to be totally consistent with GE 1, Applicant's SCA, in that GE 5 inquires about spouses in "Section 13/15," whereas Applicant's SCA addresses this subject at Question 8. Without evidence to demonstrate, or to permit a reasonable inference, that Applicant ever saw the questions displayed in GE 5, or was aware of them, the document has no probative value. Finally, GE 6 is a printout of a computer "popup" screen purportedly demonstrating what an applicant would see on his or her computer in answering the question at issue in this case. As with the previous two exhibits, this one inquires about previous marriages, but, again, there is no evidence that Applicant ever saw it or was aware of it. Indeed, the printout bears the name and a social security number of some person other than Applicant's former spouses, and it may actually have been derived from another applicant's file. Therefore, this

[3]Department Counsel described it as "not the actual copy that [Applicant] herself did but as the actual complete version of . . . [the form] she would have done during the time when she filled out a security clearance questionnaire." Tr. II at 5.

document as well lacks probative value on the question of Applicant's knowledge and intent in filling out her SCA.

Under the facts of this case these documents have no probative value, in the absence of evidence linking them to Applicant.[4] Department Counsel's descriptions of them to the Judge constitute at most offers of proof, which have no evidentiary value. *See, e. g.*, *United States v. Bagley*, 722 F.2d 482 at 489 (9th Cir. 1985) ("A mere offer of proof by the defendant that he is not the owner or possessor of a car does not establish the fact of ownership or possession.") Accordingly, these documents were inadmissible. Once admitted, it was error for the Judge to have considered them on the substantive questions arising from Applicant's answer to Question 8 of her SCA.

In view of this conclusion, the Board must address whether the error was harmful. We note the following, drawn from the Analysis portion of the Decision: [W]ith respect to Applicant's security clearance application . . . The instructions that accompany the security clearance application, the security clearance worksheet, and a sample computer screen shot of the actual E(QUIP) document all indicate that the Applicant was consistently asked to list all former spouses. (See Government Post-Hearing Exhibits 4, 5, and 6). She did not." Accordingly, the Judge found against Applicant under both Guidelines E and J. The quoted language demonstrates that, in interpreting the intent underlying Applicant's answer to Question 8 of her SCA, the Judge relied heavily on the three challenged documents. Therefore, the Board cannot say with a reasonable degree of certainty that, had she not considered these documents, she would nevertheless have arrived at the same decision. *See, e. g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007) ("[E]ven if these two challenged observations had not been included in the Judge's decision, it is not reasonably likely that the outcome of the case would be different.") The Judge's error, therefore, was harmful. In view of this conclusion, the Board need not address the other issues raised by Applicant. Accordingly, we reverse the decision of the Judge.

Order

The Judge's adverse security clearance decision is REVERSED.

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

[4]Of course, proffered documents not admitted, or given no weight, are still to be placed to the case file and properly annotated.

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

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