KEYWORD: Guideline F; Guideline E

DIGEST: The Judge made no attempt to reconcile how an intelligent person could represent he was not arrested during an incident when he was tasered, handcuffed (Government Exhibit (GE) 7 at 3 and 5), given the opportunity to go to jail or get help (Tr. At 81-82), chose to get help, and was transported to the hospital for evaluation. In making his credibility assessment, the Judge did not discuss three other apparent instances in which Applicant did not disclose required information on his SCA. While the Board gives deference to a Judge's credibility determinations, that deference is not without limits. Adverse decision reversed.

CASENO: 14-05005.a1

DATE: 09/15/2017

DATE: September 15, 2017

In Re:	)	
----------	)	ISCR Case No. 14-05005
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Anthony J. Kuhn, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 25, 2015, DoD 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 May 31, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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's decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He is a high school graduate with some college credits. From about 2004 to 2011, he served in the military, which included a deployment to Iraq from December 2006 to May 2007. He was an abuser of over-the-counter (OTC) cough and cold medicine. His descriptions of his use of such medicines are inconsistent. He claimed he started using cough medicine in 2007 upon his return from Iraq, but there is documentary evidence that he started as a 19-year-old enlisted member in 2004 to relieve anxiety and stress and assist with sleep. In 2004, he was admitted to an emergency room for evaluation and treatment. His urine specimen tested positive for phencyclidine (PCP) that a physician believed was due to his cold medication consumption.

Applicant was dealing with Post-Traumatic Stress Disorder (PTSD) after returning from his deployment, but that condition was not diagnosed until much later.[1] Upon his return from Iraq, he again started self-medicating with cough and cold medicines. In 2010, he was recommended for a 28-day residential substance abuse treatment program after self-identifying his substance abuse. He successfully completed that treatment. When he returned to duty, he was confronted with stressors and resumed using cough medicine to deal with his issues. He called a suicide hotline in 2011, received non-judicial punishment, and was separated from the military with a general discharge under honorable conditions for drug rehabilitation failure. While there is evidence he slipped after his treatment, there is no evidence he failed the treatment program.

In early May 2012, Applicant stole OTC cold medicine from a drug store after rolling his vehicle in an accident. He was questioned by the police and charged with receiving stolen property (a misdemeanor) and reckless operation (a violation). He was convicted of those offenses and fined. Another charge related to the accident was dismissed. Police and court records do not support the portion of an SOR allegation that he was placed on probation for six months.

On May 22, 2012, Applicant's girlfriend (now his wife) reported to police that Applicant attempted to kill himself by wrapping a seatbelt around his neck. She stopped the car and cut the seatbelt. Applicant keep walking away as a police officer attempted to speak with him because he did not realize the individual was a police officer. Applicant resisted when the police officer grabbed him, another police officer arrived, a struggle ensued, Applicant was tasered, and his girlfriend signed an involuntary emergency admission petition. Applicant was taken to a hospital for a suicide watch and evaluation. He was issued a summons for resisting arrest. The charge was placed on file without a finding conditioned on his good behavior for one year. The judge informed

[1] Applicant's PTSD was initially identified in late 2011 and treatment commenced in 2013.

him that as long as he maintained good behavior the incident would be removed from his record as if it never occurred.

In early 2014, Applicant completed a security clearance application (SCA) in which he responded "No" to the question that asked if he had been arrested by any police officer or law enforcement official in the past seven years. In doing so, he failed to report his arrest on May 22, 2012. He did not think he had to report that incident because he did not think he was arrested and the judge told him the records would be purged after one year of good behavior.

During an interview with an investigator in April 2014, Applicant's memory of the May 22, 2012 incident differs substantially from the police record. He acknowledged several parts of the incident, including being tasered, but disputes that he knew the other individual was a police officer, that he was arrested, that he was taken to the police station, or that he had been charged. He denied intending to provide false information. Because his girlfriend only saw police officers in uniform, it was unclear whether the arresting office was in plain clothes. His condition at the time of this incident made it difficult for him to understand and recall facts. He did not think the incident had to be reported because the judge told him it would be purged from his record.

In responding to DOHA interrogatories in December 2014, Applicant stated that he stopped using the OTC cough and cold medicine in approximately August 2011 and his "clean date" is September 1, 2011. He denied deliberately providing false information by providing that wrong date. He acknowledges that he last abused OTC cough and cold medicine in September 2012 and that he intends to remain drug free. The SOR allegation that Applicant falsified facts in his response to interrogatories by stating his last abuse of such medicine occurred on January 9, 2011, is unsubstantiated. The information regarding that particular date (January 9, 2011) was furnished by Applicant in correcting information in his subject interview and was not an answer to the interrogatory.

Applicant was rated high in his recent performance review. His managers and coworkers characterize him as dependable, trustworthy, reliable, honest, hardworking, and truthful.[2]

The Judge's Analysis

In his SCA and background interview, Applicant denied he was arrested during the May 22, 2012 incident. He denied intending to falsify his responses and answered the questions with a mindset that he had not been arrested because the judge informed him the record would be purged. He now concedes he made a mistake. He is an intelligent, talented, and experienced individual and his explanation should be afforded some weight. He relied on the judge in deciding how to respond to the questions. Regarding the alleged falsifications, the pertinent disqualifying conditions have not been established.

Applicant's military discharge and abuse of OTC cough and cold medicine established

[2] Applicant testified that he did not disclose his cough and cold medicine abuse or his two arrests to his character references. Tr. at 132-133.

disqualifying conditions. Those events occurred five to ten years ago before his PTSD was either diagnosed or treated. Because he is now being treated and he has taken positive steps to eliminate his vulnerability, his substance abuse is unlikely to recur. Applicant's actions no longer cast doubt on his reliability, trustworthiness, and good judgment because there is a clear indication of reform and rehabilitation. In his whole-person analysis, the Judge concluded the mitigating evidence was more substantial than the evidence to the contrary.

Discussion

Department Counsel argues that the record in this case does not support the Judge's favorable clearance decision. Specifically, he notes that the Judge failed to address important aspects of the case and the decision runs contrary to the weight of the record evidence. He also asserts the Judge analyzed the evidence in a piecemeal manner and made an erroneous favorable credibility assessment. We find that Department Counsel's arguments have merit.

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 national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 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.

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 erroneous, we 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. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel contends the Judge erred in accepting as credible Applicant's

explanations for the alleged falsifications.[3] The SOR alleged three falsifications. They asserted that Applicant falsified his responses in his SCA, during his background interview, and in his DOHA interrogatories.[4] The allegations involving the SCA and background interview both dealt with his failure to disclose that he was arrested on May 22, 2012.[5] In responding to the Section 22 (Police Record) questions in his SCA, Applicant denied having been arrested by any law enforcement official or having been charged with any crime in the last seven years. In his background interview, he stated that he was never arrested during the May 22, 2012, incident, but acknowledged the police tasered him, then just questioned him at a shopping center about his argument with his girlfriend, and let him go. He also made no mention of being transported to the hospital for treatment and evaluation during that incident. At the hearing, Applicant conceded that he was, in fact, arrested on that occasion. Decision at 13 and Tr. at 126 and 143.

In finding in favor of Applicant on the falsification allegations involving the May 22, 2012 incident, the Judge noted that "Applicant is an intelligent, talented, and experienced individual." Decision at 13. The Judge, however, made no attempt to reconcile how an intelligent person could represent he was not arrested during that incident when he was tasered, handcuffed (Government Exhibit (GE) 7 at 3 and 5), given the opportunity to go to jail or get help (Tr. at 81-82), chose to get help, and was transported to the hospital for evaluation. In concluding that Applicant's SCA and background interview responses were the result of a misunderstanding on his part, the Judge relied on Applicant's explanation that he thought "the incident never existed" (Decision at 13) because the criminal court judge informed him that the records of the incident would be purged after one year of good behavior. In the Appeal Brief, Department Counsel points out that Applicant presented no evidence that his arrest record was ever expunged and the Judge reached his conclusion without any discussion or consideration of the instructions in Section 22 of the SCA that an applicant has to report information regardless if a record in his or her case has been expunged. Applicant testified that he completed his SCA over multiple days. Tr. at 117 and 123. Given that the plain language of the instructions in Section 22 is clear and that the Judge concluded Applicant was an intelligent individual, the Judge's failure to explain why Applicant did not comply with those instructions under these circumstances was an error.

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[3] To establish a falsification, it is not enough merely to demonstrate that an applicant's answers were not true. To raise security concerns under Guideline E, the answers must be deliberately false. In analyzing an applicant's intent, a Judge must consider the applicant's answers in light of the record as a whole. *See, e.g.*, ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012).

[4] The SOR alleged, and Department Counsel asserts on appeal, that Applicant falsified his response to interrogatories by stating he has not used OTC cough and cold medicine since January 9, 2011. In the interrogatories, Applicant wrote in one place that he "Stopped using 1/9/2011. I have not used since" and in another place wrote "I use 1 Sep 2011 as an official 'clean date' for meetings and when I see a [counselor]." At the hearing, Applicant testified that September 1, 2012, is his "clean date." From our review of the record, it appears Applicant meant September 1, 2011, when he wrote 1/9/2011, but the drafter of the SOR interpreted that date as January 9, 2011. Moreover, it appears Applicant merely made an error in the year when he wrote 2011, instead of 2012, in his responses to the interrogatories. *See*, Tr. at126-127 and 130. Since the difference in dates appears to be a simple oversight, we find no error in the Judge's finding in favor of Applicant on the falsification allegation involving Applicant's response to the interrogatories.

[5] The falsification allegation involving the background interview also asserts that Applicant failed to disclose that he was taken to the hospital for an involuntary emergency admission.

In making his credibility assessment, the Judge did not discuss three other apparent instances in which Applicant did not disclose required information on his SCA. First, Applicant was arrested for receiving stolen property on May 11, 2012. Contrary to his plea, he was found guilty of that misdemeanor offense and fined in August 2012.[6] GE 6 and 11. In responding to pertinent questions in his 2014 SCA, he failed to disclose either his arrest or conviction for receiving stolen property. At the hearing, Department Counsel questioned him about his failure to report that offense. Tr. at 125-126. Even though the trials for the receiving stolen property charge and the resisting arrest charge were held on different dates in courts in different judicial circuits (GE 11 and 14), Applicant testified that the criminal court judge "said as long as I stayed out of trouble for one year, everything was basically a non-happened. It was going to be basically not in my record." Tr. at 125. Unlike the court record for the resisting arrest charge that reflects "Complaint placed on file without finding" (GE 14), the court record for the receiving stolen property specifically reflects a guilty finding was entered against him. GE 11. There is simply no basis in the record for Applicant to have concluded that these two criminal proceedings were connected. Second, Department Counsel questioned Applicant about his failure to disclose his participation in the 28-day substance abuse treatment program in response to the SCA question in Section 23 that asked if he "**EVER** voluntarily received counseling or treatment as a result of your use of a drug or controlled substance." GE 1 at 30. Even though he was addicted to cough and cold medicine (SOR Answer and Tr. at 116) and was separated from military service for drug rehabilitation failure, Applicant testified that he did not understand the SCA question because OTC cough and cold medicine did not seem like a drug to him. Tr. at 119-121. Third, Applicant failed to disclose that he was hospitalized after his suicide gesture and resisting arrest incident on May 22, 2012, when he responded to the SCA question in Section 21 that asked if he "consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition" in the past seven years. GE 1 at 28. Although these SCA non-disclosures were not alleged in the SOR, they were matters that could have been appropriately considered in making a credibility assessment. *See, e.g.*, ISCR Case No. 03-02327 at 4 (App. Bd. Oct. 26, 2006). Further, under Federal Rule of Evidence 404(b), these non-disclosures could also be relevant in establishing motive, intent, plan, absence of mistake or accident in determining whether the alleged non-disclosures were deliberate. *See e.g.*, ISCR Case No. 10-03732 at 6 (App. Bd. Jun. 14, 2013).

Additionally, the record contains some apparently inconsistent statements that undercut Applicant's credibility that the Judge did not adequately address. For example, in his background interview, Applicant told the investigator that he did not realize a police officer was trying to stop him during the May 22, 2012 incident because the police officer was dressed in plain clothes. GE 3 at 8. However, his wife testified that she did not see any plain-clothed police officers during that incident. Tr. at 69. After his wife's testimony, Applicant testified it was possible that the police officers that approached him on that occasion were in uniform. Tr. at 82. Additionally, as the Judge noted, Applicant testified he started abusing OTC cough and cold medicine after returning from Iraq (Tr. at 82), while documents showed his abuse may have started years earlier when he tested positive for PCP. GE 10. However, the Judge's decision does not sufficiently address Applicant's inconsistencies, either by resolving or explaining them, or by demonstrating that they are relatively insignificant. This undermines his favorable assessment of Applicant's credibility.

[6] The fine was suspended for one year on the condition of no further convictions. GE 11 at 2.

Most importantly, Applicant essentially testified that he lied to the investigator during the background interview. At the hearing, Applicant testified as follows:

> [Department Counsel]: . . . You were interviewed in April 2014. You sat down with an investigator to go over your security clearance application. Is that right? . . .
>
> [Applicant]: Well, the questions he was pointing out, that's correct.
>
> [Department Counsel]: Okay. And so when you were discussing with him your cough medicine abuse that -- you told the investigator in that interview that you hadn't used since you left the [military] in 2011. Is that correct?
>
> [Applicant]: Yes, sir.
>
> [Department Counsel]: Okay. And I'm not putting words in your mouth. At the time, did you know that information was incorrect when you told it to the agent?
>
> [Applicant]: Yes, I did.
>
> [Department Counsel]: Okay. Why then did you provide what you knew was incorrect information to the agent during that interview?
>
> [Applicant]: Provide originally in the paper or provide the answer, yes, I knew that answer was wrong, but I said yes anyway?
>
> [Department Counsel]: During the actual interview, why did you provide what you knew was incorrect information?
>
> [Applicant]: Because since I already put certain information down on a piece of paper,[7] why would I say it again separately? I was sticking with what I wrote down.[8]

Despite such a key revelation for assessing a witness' credibility, the Judge did not address in the decision Applicant's admission of knowingly providing false information to the investigator during the background interview.

While the Board gives deference to a Judge's credibility determinations, that deference is not without limits. Where, as here, the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, an admitted submission of false information during an interview, etc) the Judge should address those aspects of the record explicitly, explaining why he or she finds an applicant's version of events to be worthy of belief. Failure to do so suggests that the Judge has merely substituted a favorable impression of Applicant's demeanor for record evidence. *See, e. g.*, ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). *See also, Fieldcrest*

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[7] Applicant later clarified he was talking about the SCA.

[8] Tr. at 128-129.

Cannon, Inc. v. N. L. R. B., 97 F.3rd. 65, at 69-70 (4th Cir. 1996) for the proposition that a Judge's credibility determinations can be rejected if they are unreasonable, contradict other findings of fact, are based on an inadequate reason, or on no reason at all. In this case, Applicant's statements during the background interview were unreasonable on their face and were contradicted by other findings of fact. Of note, Applicant did not merely omit matters about his arrest on May 22, 2012, because he believed his criminal record was expunged. He also expressly denied being arrested and substituted false information – *e.g.*, that the police let him go after questioning – to avoid disclosing the truth. Even if Applicant had an honest belief that he did not have to disclose the arrest, such a belief does not justify him providing false information to the investigator about the incident. In other words, an expungement cannot reasonably be considered a license to lie. Considering the record as a whole, the Judge's decision that Applicant did not deliberately falsify his responses in his SCA and during his background interview by failing to disclose his arrest on May 22, 2012, is not sustainable on this record.

Department Counsel also contends that the Judge's mitigation and whole-person analyses were conducted in a piecemeal manner. The Judge concluded that Applicant's military discharge and his abuse of OTC medicine occurred five to ten years ago before his PTSD was either diagnosed or treated. However, the Judge's decision on these matters is undercut by his failure to consider record evidence, discussed above, concerning the deliberate nature of Applicant's false statements on his SCA and during his background interview. Such evidence undermines his conclusions that Applicant's conduct is not recent and unlikely to recur or that he has reformed and rehabilitated himself. This failure buttresses Department Counsel's argument that the Judge substituted a favorable estimation of Applicant's demeanor for record evidence and that he did not evaluate the evidence in light of the record as a whole. The record, viewed in its entirety, does not support a conclusion that Applicant has met his burden of persuasion under the *Egan* standard.

The errors outlined above are not harmless, in that, had they not been made, the result of the case would likely have been different. The Judge's decision does not consider relevant factors and offers an explanation for the decision that runs contrary to the weight of the record evidence. The Board concludes that the Judge's decision is not sustainable in light of the record as a whole.

Order

The Decision is **REVERSED**.

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

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board