

KEYWORD: Guideline E; Guideline J

DIGEST: It is foreseeable that an applicant who fails to answer SCA questions according to their reasonable and accepted meanings may well fail to disclose other significant matters that should be brought to the attention of the Government, which is a requirement of those who have access to classified information. In addition, the Judge did not address inconsistent statements that Applicant made regarding his failure to have disclosed his mental health counseling. Although an applicant might decline to answer a question that he believes to be inculpatory, the Constitutional privilege against self-incrimination does not excuse or justify making objectively false statements to the Government. Favorable decision reversed.

CASENO: 15-08163.a1

DATE: 10/25/2017

DATE: October 25, 2017

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In Re:)	
-----)	ISCR Case No. 15-08163
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Adrienne Driskill, Esq., Department Counsel

FOR APPLICANT

Skyler Samp, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 10, 2016, DoD issued a statement of reasons (SOR) 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 19, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross 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 favorable decision ran contrary to the weight of the record evidence and whether the Judge's whole-person analysis was erroneous. The Judge's favorable findings under Guideline J are not at issue in this appeal. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is seeking to retain his security clearance. The record shows that he suffers from Crohn's disease, resulting in multiple hospitalizations. Fatigue is a symptom of this condition, and it has had a major impact on Applicant's life and work habits. Applicant takes prescribed pain killers in order to alleviate the symptoms of his illness. In late 2014, a psychiatrist examined him and concluded that he also suffers from Asperger's Syndrome, a developmental disorder.

In 2008, Applicant worked at a casino. He cashed a check, which turned out to be fraudulent. This appears to have been an honest mistake and has no current security significance. In 2012, Applicant was cited for a "red light camera" violation. Decision at 3. This incident also lacks security significance.

From 2011 to 2013, Applicant worked at a law office. He denied that he was reprimanded for sleeping at work, although he concedes that his employers talked about this matter with him. He believes that these incidents are related to his Crohn's disease. He resigned from this job because he found better employment, not because of sleeping on duty.

In 2013, Applicant was arrested for possession of a narcotic/controlled substance and for being under the influence of a controlled substance. At the time, he had been taking pain killers. He later pled guilty to reckless driving, a lesser included offense, and the court sentenced him to three years probation, a fine, and attendance at a first-offender's alcohol program as well as at a MADD impact panel. Applicant remained on probation as of the close of the record. He has changed his driving habits as a consequence of this incident.

At the time of this arrest, Applicant worked for a Defense contractor. He stated in his security clearance application (SCA) that he received a warning from his employer about this offense. He resigned from employment, not because of this matter but because he thought he had received an offer of better employment. His hopes for a new job did not come to pass, but his effort to rescind his letter of resignation was not successful.

In August 2013, the police detained Applicant for possibly driving under the influence of alcohol or drugs following a minor automobile accident. A blood test showed that he had not been drinking, so Applicant was released and no charges were filed. Because available reports state that this was "Detention only," the Judge found that Applicant had not been arrested or charged.

During a few months in 2014, Applicant worked for a law firm. His employment was terminated because he was monitoring other employees' emails. He testified that he believed that such conduct was part of his job, although others in the corporation thought otherwise. From late

2014 until early 2015, Applicant worked for a Defense contractor. He had medical problems, which entailed a week's hospitalization. He also passed out on the job several times, due to his various illnesses. His employer believed that he was sleeping on the job, and Applicant left the company through mutual agreement.

In completing his SCA in June 2015, Applicant answered "no" to a question about whether he "had consulted a mental health professional regarding an emotional or mental health condition." In fact, he had consulted a counselor on about five occasions in 2013 and he saw a psychiatrist from June 2014 to early 2015, due to depression and anxiety. He denied that this was a false answer, because the SCA stated that such consultation did not have to be disclosed if it were for "grief not related to violence by" Applicant. He defined grief as "a loss of anything, anything significant, such as freedom or death of a spouse. Any sort of job or situation can put a person into grief." Decision at 5.

In the same SCA, Applicant disclosed in detail the facts about the May 2013 DUI. However, he did not disclose the second alleged DUI, on the ground that he believed it to be "an improper arrest." Decision at 5. He also answered "no" to a question about whether he had ever been charged with an offense involving alcohol.

The Judge's Analysis

The Judge noted Applicant's diagnoses of Crohn's disease and Asperger's Syndrome, which he concluded were directly related to the two SOR allegations concerning sleeping on duty. He stated that Applicant's discharge from the law office in 2014 appeared to have resulted from policy confusion or conflict inside the company. "His conduct was not, on its face, wrongful." Decision at 8. He also reiterated his finding that Applicant was not arrested during the later alleged DUI incident. He stated that Applicant had good reason for not believing that he had been arrested, so that his failure to disclose this incident was not deliberate. He also stated that Applicant had a good-faith belief that he was receiving grief counseling, due to his definition of the term "grief."

Discussion

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's favorable findings run contrary to the greater weight of the record evidence. In presenting her arguments, she challenges the Judge's findings that Applicant had not deliberately omitted material information from his SCA. In evaluating whether an applicant's omissions are deliberate, a Judge should evaluate the allegations in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

We find Department Counsel's arguments to be persuasive. We note, first of all, the language of the question regarding mental health counseling, which reads as follows:

In the last seven years, have you consulted with a health care professional regarding an emotional or mental health condition . . . Answer "No" if the counseling was for any of the following reasons and was not court-ordered: strictly marital, family, grief not related to violence by you[.] Government Exhibit (GE) 1, SCA, at 33-34.

The reasonable meaning of this question is to exclude counseling due to marital problems unrelated to domestic abuse or due to the loss of loved ones. The Judge himself acknowledged as much in his questioning of Applicant.

You do realize that normally grief, in the normal definition, involves a loss, such as a loss of a spouse, parent, child, things like that, right? Under normal circumstances, that's normally what "grief" is defined as. Tr. at 65.

The Judge concluded that Applicant had a good-faith belief that grief could include depression due to a job loss, in light of his personal history. He did not explain why this was so, even in light of that history. That is, he did not address the extent to which Applicant's definition could be viewed as merely self-serving rather than an honestly-held belief. Moreover, Applicant's testimony that grief includes one's reaction to "any sort of job or situation" (*Id.*) is unreasonable. Such an interpretation could render the question itself a nullity, enabling applicants to avoid the purpose of the question and withhold material information necessary for an informed adjudication, as is the case here. It is foreseeable that an applicant who fails to answer SCA questions according to their reasonable and accepted meanings may well fail to disclose other significant matters that should be brought to the attention of the Government, which is a requirement of those who have access to classified information. *See, e.g.*, ISCR Case No. 13-01281 at 3 (App. Bd. Aug. 4, 2014) (An applicant must be willing to self-report significant information pertinent to his or her clearance).

In addition, the Judge did not address inconsistent statements that Applicant made regarding his failure to have disclosed his mental health counseling. During his security clearance interview, Applicant stated that he did not list his counseling sessions in 2013 because he thought he was only supposed to disclose contact with medical doctors, which the provider in question was not. Regarding the mental health treatment in 2014 and 2015, he stated that at the time he "was living in fear of police and needed someone to talk to." GE 4, 2015 Interview Summary, at 7. These answers make no reference to anything that could reasonably be characterized as grief and are

significantly inconsistent with Applicant's testimony at the hearing. Inconsistent statements can impugn an applicant's credibility, and the Judge's failure to have addressed these inconsistencies significantly undercuts his favorable resolution of the allegation in question. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017).

The Judge found that Applicant had not deliberately withheld material information from his SCA about the August 2013 DUI incident.¹ He concluded that Applicant reasonably did not believe that he had been arrested, despite his hearing testimony that described the incident as an arrest² and despite his having characterized it that way during his clearance interview, albeit as a "false" one. GE 4 at 8. Applicant made other statements that conflicted with a belief that he had not been arrested, testifying that he did not admit the August 2013 incident due to concern over self-incrimination. This is in and of itself a reason to believe that his omission of this incident was deliberate, showing that Applicant gave the matter some thought and made a conscious decision that it would serve his interests to deny that the arrest occurred.³ Although an applicant might decline to answer a question that he believes to be inculpatory, the Constitutional privilege against self-incrimination does not excuse or justify making objectively false statements to the Government. *See* ISCR Case No. 93-1108 at 3 (App. Bd. Oct. 6, 1995).

Accordingly, the record contains substantial evidence that Applicant was arrested for DUI, that he had a motive to shield the arrest from discovery by those adjudicating his SCA, and that he provided the false denial after some measure of reflection. Contrary to Applicant's assertions and the Judge's conclusions, there is substantial evidence that Applicant deliberately did not disclose the August 2013 incident. Viewed in conjunction with his denial of mental health counseling, the evidence viewed as a whole undermines the Judge's finding that Applicant's SCA omissions were done in good-faith. Indeed, the multiple nature of Applicant's false statements could give rise to a reasonable belief that they were deliberate. *See, e.g.*, ISCR Case No. 13-12407 at 3-4 (App. Bd. Aug. 18, 2014). At the least, these omissions suggest a significant lack of the candor expected of those who have access to classified information.

Department Counsel points to other aspects of the record that contravene the Judge's findings and conclusions. For example, she notes inconsistent statements about Applicant's May 2013 arrest

¹In his clearance interview, and during his testimony, Applicant stated that this incident resulted from his having been in an automobile accident. He advised his clearance investigator that his car had hit another one, and a stranger came forward accusing Applicant of weaving in and out of traffic, believing that he was under the influence of a "substance." This stranger demanded that Applicant hand over the keys to his car. Applicant did not deny that he had been driving erratically but attributed his conduct to having been tired. Tr at 49; GE 4, 2015 Interview Summary, at 8. We note also that Applicant told the interviewer that in February 2014 the police cited him for having made a U-turn at a DUI checkpoint, which was illegal. Applicant paid a fine in excess of \$300. *Id.*

²"[Applicant]: [U]ltimately the police came and arrested me[.]" Tr. at 49. "[Judge]: You were arrested, right? [Applicant]: Correct." Tr. at 70. *See also* GE 5, NCIC Criminal History Record. The entry for this incident lists an "Arrest Date," "Arrest Case Number," and "Arresting Agency" for one count of DUI. Applicant stated that he spent two days in jail. GE 4, 2015 Interview Summary, at 8.

³"[Judge]: So why didn't you tell us you were arrested? [Applicant]: Well, I was not sure if I should have put that down, due to the Fifth Amendment, self-incrimination . . . [I]t was not meant to deceive . . . [I] was in conflict with what I felt was the Fifth Amendment." Tr. at 70-71.

for drug possession, etc. At the hearing, Applicant stated that the narcotic pills in question had been his own but were contained in his girlfriend's pill bottle, insofar as they frequently recycled their medication containers. Tr. at 79. However, elsewhere he stated that the pills themselves were his girlfriend's and that he must have picked up her bottle by mistake. See GE 7, Incident History. Department Counsel also cites to the Judge's finding that Applicant left his job after the May 2013 arrest due to an offer of better employment, failing to discuss Applicant's own admission in his SCA that, in fact, it had been a "forced resignation." GE 1at 17. As Department Counsel argues, failure to have addressed these inconsistencies impairs the Judge's overall favorable conclusions.

Department Counsel challenges the Judge's conclusion that Applicant was discharged from the second law firm through no fault of his own but, rather, due to policy confusion about his access to email traffic. Department Counsel's challenge is persuasive. Contrary to the Judge's analysis, it is not surprising that employees of a law firm, *i.e.*, lawyers, would object to a lay employee monitoring communications that may well have contained client confidences that the firm was ethically bound to protect.⁴ For the Judge to have accepted at face value Applicant's uncorroborated claim that he was fired simply for doing his job was a failure to examine the record in light of the evidence as a whole, as well as a failure to apply the Directive's requirement that DOHA decisions be founded upon common sense.⁵ Directive, Encl. 2, App. A ¶ 2(c).

In addition, although Applicant stated that he was fired from his casino job due to having innocently cashed a fraudulent check, we note his admission that his employer had previously suspended him for two or three days for having given a customer an additional \$200 in cash. GE 2, 2009 Interview Summary, at 1. He also admitted to an interviewer that his supervisor at the casino had twice counseled him for procedural errors while working as a cage cashier. GE 3, 2013 Interview Summary, at 1. The Judge did not note these prior incidents, although they detract from Applicant's claim that this job termination was due solely to an accusation of which he was blameless. While it is conceivable that a person could experience an unfair job termination, when one occurs after repeated counselings for misconduct and/or for poor performance, it undermines claims that the termination was mistaken or unfounded. The Judge did not address this aspect of the case, which detracts from his overall decision.

In summary, the record contains evidence as well as the Judge's findings that show that Applicant twice left positions of employment due to accusations of sleeping on the job; that he was arrested for possession of a controlled substance and for being under the influence of a controlled substance; that he was later charged with DUI, arising from the same incident, resulting in a plea of guilty to reckless driving; that he was fired from two jobs due to allegations of misconduct; and that he provided answers in his SCA that were materially false. Taken together, this evidence describes conduct occurring over a course of years that detracts significantly from Applicant's

⁴ "[Attorney]: [W]hat was the nature of this complaint? [Applicant]: Well, they . . . saw that I had been in people's [email] boxes . . . they were like, 'Well, no. You can't monitor these guys' [emails], because there's stuff in here that's confidential.'" Tr. at 56.

⁵ AE C contains character references from Applicant's colleagues. One of these colleagues worked with him at the law firm. This person lauds Applicant's job performance and professional skill but says nothing about purported policy confusion regarding Applicant's access to employee emails.

judgment and reliability. This is particularly true of the false statements. *See* Directive, Encl. 2, App. A ¶ 15 for the requirement that refusal to provide truthful answers during the security clearance process “will normally result in an unfavorable clearance action[.]” The Judge’s uncritical acceptance of Applicant’s claims of innocence fails to address Applicant’s security-significant conduct as a cumulative whole. *See, e.g.*, ISCR Case No. 12-04813 at 4 (App. Bd. Jul. 31, 2015) (A Judge must assess the totality of an applicant’s conduct and circumstances, not just consider them in a piecemeal manner). In light of the foregoing, the Judge’s favorable decision does not consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, the decision is not sustainable.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael 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