

KEYWORD: Guideline E

DIGEST: We give deference to a Judge's credibility determinations. However, there are limits to this deference. Where the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect 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 a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. Favorable decision reversed.

CASENO: 15-07539.a1

DATE: 10/18/2018

DATE: October 18, 2018

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

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Andrea Corrales, Department Counsel

**FOR APPLICANT**

Tod. D. Stephens, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 5, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 25, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 favorable decision is unsupported by the weight of the record evidence. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant served in the military as an intelligence officer, retiring in 2009. He has worked for his current employer since 2010 and has held a clearance throughout his military and civilian careers. In 2013, his clearance was suspended. Applicant’s SOR alleges that, in 2011, he underwent a DoD polygraph examination during which he manipulated his physiology. The SOR contains one other allegation, that Applicant deliberately provided false and misleading information in an interview with a DoD representative in 2013.

Applicant denied that he had manipulated his physiology during the 2011 polygraph examination. He stated that he was nervous and tried to control his breathing by breathing normally. He denied ever admitting that he had engaged in that alleged conduct. Applicant’s contention is the opposite of what is contained in a 2014 memorandum by another Government agency. However, the Judge found that Applicant was credible in stating that he merely followed the examiner’s instructions concerning his breathing. “I found Applicant’s testimony and demeanor more credible than the summary clearance decision of 2013 from the other agency.”<sup>1</sup> Decision at 2.

Applicant failed a 2009 polygraph for another agency due to a question about whether he had ever committed a serious crime. After extensive questioning, Applicant acknowledged that he did not have a permit to carry a concealed handgun and had been doing so for several years. The agency initially denied Applicant’s SCI access, but this action was reversed on appeal based on Applicant’s having obtained the proper permits.

Applicant admitted that he provided false and misleading information during a DoD polygraph examination in 2013. During the interview, he initially did not truthfully answer a question about having visited a polygraph website because he was embarrassed and concerned about his security clearance. He admitted that, contrary to his initial answers, he looked through a stack of documents about taking polygraphs and that he purchased materials from a website. At the

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<sup>1</sup>The other Government agency revoked Applicant’s access to sensitive compartmented information (SCI). *See, e.g.*, Memorandum for Record, dated November 6, 2013, contained in Government Exhibit (GE) 3.

hearing, he expressed remorse, stating that he had gone to various websites and had done background research after his wife shared some materials with him following his 2009 polygraph failure. “After repeated denials, he stated that he purchased this material from a website stating that he did not remember doing that or thinking that it was [irrelevant] in 2013.”<sup>2</sup> Decision at 3.

Applicant acknowledged his behavior and lapse in judgment by not being forthcoming concerning viewing and purchasing material from a website. He admitted his conduct to his pastor, employer, and supervisors. His character witnesses praised his career and dedication. In 2010, Applicant was referred for a psychological evaluation after his initial clearance denial. The evaluation report observed that Applicant had disclosed the information about his handgun violation and that he has never had any other non-compliance issues during his military or civilian career. The evaluation report concluded that Applicant is reliable.

### **The Judge’s Analysis**

The Judge stated that Applicant had provided credible evidence that he did not manipulate his physiology in 2011. Therefore, she resolved that allegation in his favor. Although she found that he had deliberately provided false information during the 2013 polygraph examination, she stated that he corrected his mistake and provided full and frank answers. She stated that he made a prompt, good-faith effort to correct his falsifications and that he is sincerely remorseful about his misconduct. She stated that sufficient time has passed since this incident to establish mitigation, and she noted his favorable character evidence. She also concluded that Applicant had taken responsibility for his actions.

### **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 national security eligibility will be resolved in favor of the national security.” Directive, Enclosure 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 (9<sup>th</sup> 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

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<sup>2</sup>These repeated denials occurred during the 2013 polygraph, not at the hearing.

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 (App. Bd. Aug. 28, 2015).

Department Counsel challenges the Judge’s finding that Applicant did not manipulate his physiology during a 2011 polygraph examination. She argues that the Judge, in effect, substituted a credibility determination for record evidence. We examine Judge’s findings of fact to see if they are based upon substantial evidence, that is, “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. *See* ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018). We give deference to a Judge’s credibility determinations. However, there are limits to this deference. Where the record contains a basis to question an applicant’s credibility (inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect 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 a Judge has merely substituted a favorable impression of an applicant’s demeanor for record evidence. *See, e.g.*, ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018); ISCR Case No. 15-05565 at 4-5 (App. Bd. Aug. 2, 2017).

As Department Counsel notes, the Judge found Applicant’s denials of wrongdoing to be more credible than the clearance decision statement included among the Government’s exhibits. This decision statement, dated July 2014, revoking Applicant’s access to SCI, contains a summary of Applicant’s answers during his 2013 polygraph examination, during which he purportedly admitted to having altered his breathing in order to pass a polygraph in 2011. The decision statement avers that Applicant told his interviewers that, after the 2009 polygraph that he failed, he came home frustrated and angry. He stated that his wife gave him a stack of documents regarding polygraph examinations, but he denied looking at them. After further questioning, he admitted that he did look at them, stating that the documents provided information about polygraph examinations. Applicant initially denied actually employing any countermeasure during the 2011 polygraph. However, after additional questioning, Applicant admitted that not only did he read the material that his wife gave him but that both of them had purchased the material from a website that offered instruction on how to beat a polygraph. After even further questioning, Applicant admitted that he had, in fact, conducted his own research following his 2009 polygraph failure. The decision statement then avers that Applicant admitted that, during the 2011 polygraph, he changed his breathing during the exam in hopes of receiving a favorable result. He stated that he had intentionally withheld this information during initial questioning because he was afraid that he would lose his clearance and his job. 2014 Decision Statement, included in GE 3.

The challenged finding would seem to imply that the inculpatory evidence on this matter consists strictly of the 2014 decision statement, which the Judge found wanting. In fact, the decision statement appears to have been based upon the report of the 2013 interview in which Applicant made the inculpatory admissions. This report is also included in GE 3. The report is dated November 6, 2013, which is the same date as the interview. The report contains the same information that is referenced in the decision statement, save that it is much more detailed. The report states that Applicant initially denied any wrongdoing but, after extensive questioning, finally admitted matters identical to those summarized in the decision statement. Among other things, the report states that, after Applicant denied having looked at the documents that his wife gave him, he was then administered a second polygraph examination,<sup>3</sup> after which he admitted that he had looked through them. After repeated questioning, Applicant admitted that he and his wife had paid between \$40 and \$60 for information on beating a polygraph. After even more questioning, he admitted that he had conducted research into defeating a polygraph and, in 2011, had intentionally manipulated his physiology during the exam.

As Department Counsel argues, the Judge did not discuss why she found the factual summary contained in the 2014 decision statement to be lacking credibility. As noted, it was based upon the 2013 interview report, which was produced on the same day as the interview that it described, and, therefore, was less likely to have been impaired by faulty memories of those who generated it. This report is detailed, internally consistent, and contains nothing on its face that would lead one to question the motives of those who prepared it. Indeed, there is nothing in the record that would suggest a motive for DoD examiners to falsify Applicant's statements during the 2013 interview, the contrast between the report and Applicant's denials of wrongdoing being too stark to have resulted from mere misunderstanding of his answers. As we have stated elsewhere, Government officials are entitled to a presumption of regularity and good faith in the discharge of their official responsibilities, and Applicant has provided nothing of substance to rebut that presumption.<sup>4</sup> *See, e.g.*, ISCR Case No. 14-02347 at 4 (App. Bd. Aug. 28, 2015).

In addition, the report, and consequently the decision statement, are corroborated in significant ways. Applicant admitted that the report correctly described his shifting statements about

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<sup>3</sup>The actual polygraph results are not disclosed in the record and, in any event, are not proper matters for our consideration. Statements made in response to questioning during a polygraph examination are admissible, although the results of the exam itself are not. *See, e.g.*, ISCR Case No. 02-31428 at 4 (App. Bd. Jan. 20, 2006), internal citations omitted.

<sup>4</sup>Applicant testified that, although his interviewer was initially friendly, at some point he became confrontational and accusatory. Applicant testified that the interviewer seemed as if he were trying to obtain a desired response. Tr. at 81. There is nothing in the record about this other than Applicant's own testimony. The Judge did not discuss this aspect of Applicant's testimony, although we note that it does not suggest a motive for the interviewer to have prepared a report that intentionally distorted Applicant's answers.

his acquisition and consideration of website information concerning defeating a polygraph.<sup>5</sup> It is also corroborated by a decision statement in 2010 regarding his having failed initially to disclose his handgun violation during the 2009 polygraph. This document states that Applicant “withheld this information initially out of fear of being perceived in a negative light.” GE 3. Therefore, it describes conduct by Applicant during a polygraph interview which is remarkably similar to that which he was reported to have displayed in 2013—initially lying about security significant conduct, only to admit it after extensive questioning. Moreover, we note that Applicant appealed the result of the 2014 decision statement that his access to SCI be revoked. However, in November 2014, the appeal authority upheld this revocation. Although the contents of Applicant’s appeal are not contained in the record, that an official reviewed the evidence and upheld the SCI denial is a reason to believe in the reliability of the information contained in the 2014 decision statement and the underlying report. Finally, we note record evidence and the Judge’s findings showing that Applicant made numerous inconsistent statements during the course of the 2013 interview. Inconsistent statements can impugn an witness’s credibility. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017).

None of this was addressed by the Judge’s decision, which undermines the credibility determination upon which the challenged finding is based. As it stands, we find persuasive Department Counsel’s argument that the Judge merely substituted a favorable impression of Applicant’s demeanor for record evidence. Contrary to the Judge’s analysis, the record contains substantial evidence that Applicant actually made the statements attributed to him in the report and the decision statement. These statements are such that a reasonable person would not likely have made them unless he or she believed them to be true. *See, e.g.*, ISCR Case No. 11-03452 at 5 (App. Bd. Jun. 6, 2012). *See also* ISCR Case No. 07-18324 at 5-6 (App. Bd. Mar. 11, 2011) regarding the enhanced credibility of statements against interest. The challenged finding that Applicant did not manipulate his physiology during the 2011 polygraph examination is not sustainable.

Department Counsel also challenges the Judge’s mitigation analysis regarding Applicant’s admitted deliberate false statements during the 2013 polygraph interview. Contrary to the Judge’s conclusion, there is nothing in the record to show that Applicant voluntarily disclosed his security

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<sup>5</sup>Applicant corroborated another part of the report and 2014 decision statement. In the report, he advised the interviewers that, the night before his polygraph, he received a phone call from someone who identified herself as a news reporter. This person stated to Applicant that she knew where he worked and that he had a Top Secret clearance. This person reportedly stated to Applicant that his name was on an FBI list of persons who had bought online documents concerning polygraphs. He told the interviewers that the phone call lasted ten to fifteen minutes. Applicant stated that he did not advise the interviewer of this phone call during the pretest interview because he did not think that it was relevant. At the hearing, Applicant testified about this phone call, providing essentially the same information that was contained in the decision statement. He stated that this phone call made him nervous and anxious in approaching his November 2013 polygraph. He stated that, on the next duty day (presumably following the polygraph) he notified his facility security officer of this call. Tr. at 53. The Judge made no findings about this rather bizarre incident and it did not factor into her analysis. However, it provides another instance in which Applicant failed to disclose to his polygraph interviewers information that was germane to the polygraph examination, that is an event that made him unduly anxious on the day of the test.

significant conduct before having been confronted with the facts.<sup>6</sup> Indeed, the record shows that Applicant admitted his conduct only after multiple polygraph examinations and after repeated questioning. The Judge’s own findings do not support her favorable mitigation analysis regarding multiple false statements during the course of a national security eligibility interview, which in and of itself supports an adverse decision.<sup>7</sup> The Directive is clear that refusal to provide full, frank, and truthful answers to lawful questions of investigators and other officials representatives in connection with a personnel security determination “will normally result in an unfavorable” result. Directive, Encl. 2, App. A ¶ 15(b). Moreover, Applicant’s efforts constitute a failure of cooperation with the security clearance process, which also normally will result in an unfavorable clearance decision. *Id.* at ¶15a. *See also*, ISCR Case No. 11-03452 at 5 (App. Bd. Jun. 6, 2012). After considering Department Counsel’s arguments in light of the entirety of the record, we conclude that the Judge’s favorable decision failed to address important aspects of the record and ran contrary to the weight of the record evidence. Accordingly, the Judge’s favorable security clearance determination is not sustainable.

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<sup>6</sup>Directive, Encl. 2, App. A ¶ 17(a): “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts[.]”

<sup>7</sup>The Judge found: first, Applicant committed a serious crime (weapons offense) from 2004 until about 2010; second, Applicant failed a polygraph regarding the question of whether he had committed a serious crime; third, he visited web-sites about manipulating polygraphs; fourth, he lied about visiting the web-sites in an interview in 2013; fifth, he purchased material on polygraph manipulation; and sixth, he lied about purchasing such material in an interview in 2013.

**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