KEYWORD: Guideline J; Guideline E

DIGEST: we find no basis for concluding an administrative judge in a security clearance adjudication is bound by a Federal Judge's determination in a sentencing proceeding that an applicant accepted responsibility for his criminal conduct. Applicant's Answer to the SOR and his testimony at the security clearance hearing support the DOHA Judge's conclusion that Applicant minimized his involvement in the conspiracy and has not accepted responsibility for his past criminal conduct. Adverse decision affirmed.

CASENO: 15-08527.a1

DATE: 01/02/2018

DATE: January 2, 2018

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 21, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 25, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings and conclusions are supported by record evidence and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge found against Applicant on a Guideline J and a Guideline E allegation. One allegation asserted that Applicant was named as a party in a civil action brought by an individual in 2005. As a result of that action, he paid a settlement of $1,000,000. The other allegation asserted Applicant pled guilty to conspiracy to restrain trade, a felony, in 2009. The criminal conduct occurred between 2001 and 2002 and involved Applicant orchestrating and supervising a "conspiracy to suppress and eliminate competition by allocating customers, rigging bids, and fixing prices that resulted in government contracts being awarded at inflated prices." Decision at 2. Applicant was sentenced to 18 months in prison, one year of supervised release, and a $100,000 fine. He served about 13 months in confinement. The civil and criminal actions are related. The Judge found in favor of Applicant on a falsification allegation, and that finding has not been raised as an issue on appeal.

Applicant challenges the Judge's findings and conclusions that Applicant minimized his involvement in the conspiracy and that he has not accepted responsibility for his past criminal conduct. Specifically, the Judge concluded, "[c]onsidering the information contained in the extracts of his criminal proceedings, Applicant's efforts to minimize his involvement in the criminal conspiracy he orchestrated are not credible. Moreover, his lack of credibility and his unwillingness to accept responsibility for his past criminal misconduct continue to raise serious questions about his rehabilitation." Decision at 7. In the appeal brief, Applicant provides a lengthy explanation of the U.S. sentencing guidelines and emphasizes that a Federal Judge concluded that Applicant "clearly demonstrates acceptance of responsibility for his offense." Appeal Brief at 9, citing Government Exhibit (GE) 5, Transcript of Sentencing Proceedings. Applicant also argues that the DOHA Judge committed reversible error in construing his counsel's arguments at the criminal sentencing hearing as Applicant's refusal to accept responsibility and compounded an incorrect assessment of Applicant's credibility. Appeal Brief at 10.

We do not find Applicant's arguments persuasive. To the extent that he is arguing that the DOHA Judge must adopt the Federal Judge's "acceptance of responsibility" determination, the

Board rejects that contention.[1] The Federal Judge's determination is important record evidence which the DOHA Judge must consider. However, it merits noting that there are significant differences between an "acceptance of responsibility" determination in a Federal criminal proceeding and one in a security clearance adjudication. Besides being made in different forums, these determinations serve different purposes. An "acceptance of responsibility" determination in a criminal proceedings is made to assess an appropriate punishment. In a security clearance adjudication, such a determination is made to evaluate whether an applicant has reformed and rehabilitated himself, which is then used in concluding if that individual has demonstrated the high degree of reliability, trustworthiness, and good judgment required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 96-0360 at 4-5 (App. Bd. Sep. 25, 1997). *See also*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015)(citing *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir 1960), *aff'd*, 367 U.S. 886(1961)). Moreover, an "acceptance of responsibility" determination in a Federal criminal proceeding is made by applying specific criteria in the sentencing guidelines.[2] In security clearance adjudications, the Directive has no specific provision that uses the phrase "acceptance of responsibility." Instead, such a determination is a general finding or conclusion that is derived from reviewing the record evidence to conclude whether or how much analytical factors addressing rehabilitation may apply.[3] Additionally, as a practical matter, different evidence may be presented to the judges in these different forums to assist in making such a determination, especially considering the different purposes for which the evidence would be submitted in these proceedings. In short, we find no basis for concluding an administrative judge in a security clearance adjudication is bound by a Federal Judge's determination in a sentencing proceeding that an applicant accepted responsibility for his criminal conduct.

Applicant's Answer to the SOR and his testimony at the security clearance hearing support the DOHA Judge's conclusion that Applicant minimized his involvement in the conspiracy and has not accepted responsibility for his past criminal conduct. In his Answer to the SOR, Applicant stated,

> Companies cannot be sent to jail, nor can they - in most peoples' minds - take full responsibility for criminal activity. I, as . . . [an officer] of my company during that

[1] Applicant argues that the Federal Judge in the criminal proceeding "found as a matter of law that [Applicant] *did* accept responsibility for his role in the criminal conspiracy, and accordingly reduced [Applicant's] offense level when calculating the applicable sentencing range under the United States Sentencing Guidelines . . . ." Appeal Brief at 4-5. Applicant also contends that the DOHA Judge's "assessment is contrary to law and patently erroneous when the record is viewed in its totality and under the whole person concept, especially when coupled with the judicial finding by the district court of his acceptance of responsibility for his criminal conduct as a matter of law." Appeal Brief at 13 and 16.

[2] *See*, Federal Sentencing Guidelines Manual § 3E1.1 (Acceptance of Responsibility). Applicant cites this criteria. Appeal Brief at 11.

[3] *See, e.g.*, Directive Encl.2, App. A ¶¶ 2d(6), 2f(2)-(5), 17(d), and 32(d).

> 2001 to 2002 timeframe, accepted criminal responsibility for its actions and the actions of its employees.
>
> Similarly, in the civil lawsuit, I ultimately took responsibility for the company's activities.

Note, Applicant is not accepting responsibility for his conduct but for the conduct of others; arguably he is effectively shifting the blame to others. He testified similarly at his security clearance hearing. For example, his testimony reflects the following:

> [Applicant]: This is a civil count under the antitrust suit, Sherman Act violation. Allegations were that I supervised a person who talked to a competitor and that they rigged the bids. And, I plead guilty to that.[4]
>
> * * *
>
> [Applicant's Counsel]: How do you personally, how did you take responsibility for these two issues?
>
> [Applicant]: I supervised the gentlemen involved.[5]
>
> * * *
>
> [Applicant's Counsel]: Why would you never do this again?
>
> [Applicant]: Well, I didn't want it to happen in the first place. Right? I had asked all the people involved to do it the way that it was set up, so, I, you know, one of the things about antitrust is that you don't even have to know you did something wrong, and you don't have to have the intent to do something wrong to be guilty under antitrust. But I learned that and, you know, that's why I took responsibility. I had never had any intent to do, to break the law.[6]
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> * * *

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[4] Tr. at 36.

[5] Tr. at 43.

[6] Tr. at 44-45. In the appeal brief, Applicant notes that his testimony was a "misunderstanding of Title 15, Section 1, U.S. Code . . . [and Applicant] incorrectly understood that he could be found guilty of [a] criminal violation of Title 15 even if he did not intend to commit a criminal act." Appeal Brief at 15-16. However, compare with GE 3, a "Statement of Fact" signed by Applicant in the criminal proceeding in which he stated he "participated in a conspiracy . . .", "was aware that another [company] executive participated in meetings and engaged in discussions by telephone, facsimile, and electronic mail . . .", and "[d]uring these meetings and discussions, . . . the other [company] executive, agreed to allocate customers and rig bid for contracts . . . ."

> [Judge]: Okay. And what was of that was done that was illegal?
>
> [Applicant]: So, this was done on some cases, and it made it look like it was being done properly. But then the two managers . . . [names omitted] decided this is a lot of work. Let's just, you bid, this, and I bid that and that automatically will decide who gets the job. They were working new bids. . . . [T]hey were not having the joint venture bid. And that's where the violation of the Sherman Act came in.
>
> [Judge]: Okay. Was there any other, anything else that was done that was improper or illegal, other than that what you just described?
>
> [Applicant]: Not while I was there. . . .[7]

Based on our review of the record, we conclude the Judge's findings and conclusions that Applicant has not accepted responsibility for his criminal conduct are based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014). We do not find persuasive Applicant's argument that the Judge's findings and conclusions were improperly based on his counsel's arguments at the criminal sentencing hearing. Additionally, as provided in Directive ¶ E3.1.32.1, we give deference to a Judge's credibility determination and find no reason in the record to do otherwise.

Applicant also argues the Judge failed to consider certain evidence and mis-weighed the evidence. He cites, for example, to the passage of time that has elapsed since his criminal conduct, the factors the Federal Judge considered in sentencing him, the punishment imposed and its impact on him, and his character evidence. His arguments, however, are not sufficient to rebut the presumption that the Judge considered all of the record evidence nor enough to show the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR 15-04856 at 2-3 (App. Bd. Mar. 9, 2017).

Applicant has failed to identify any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

[7] Tr. at 64-65.

Order

The Decision is **AFFIRMED**.

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