

KEYWORD: Guideline E

DIGEST: Although the Judge’s credibility determinations are flawed in part, her material findings as to Applicant’s conduct of security concern are ultimately sustainable. To the extent that the Judge’s statement suggests that Applicant’s are categorically less worthy of belief than government witnesses (even before considering other factors and evidence) it is error. There is no rule in DOHA which would render Applicants as a class less worthy of belief simply because of their status. Adverse decision affirmed.

CASENO: 03-08231.a1

DATE: 10/09/2007

DATE: October 9, 2007

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In Re:)	
)	
-----)	ISCR Case No. 03-08231
)	
Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT

Lisa A. Prager, Esq., Joshua A. Holzer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 15, 2005, DOHA issued a statement of reasons 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 March 29, 2007, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance.¹ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; whether the Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

Applicant contends that he did not deliberately falsify his security clearance application by failing to disclose a public record civil court action for fraud against the United States Government in which he was named as a party. In support of this contention, he argues that the omission of the information in question was due to a misunderstanding on his part, and he subsequently provided the correct information. He also argues that his testimony as to the events at issue was credible and the version offered by the government's agents was flawed. Applicant's arguments in this regard do not demonstrate harmful error on the part of the Judge.

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)). Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. Close cases should be resolved in favor of national security, rather than in favor of the Applicant. *See, e.g.* DISCR Case No. 93-1390 at 8 (App. Bd. Jan. 27, 1995).

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the 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). A Judge's credibility determinations are entitled to deference on appeal. *See, e.g.*, ISCR Case No. 03-05072 at 5 (App. Bd. July 14, 2005). Although such determinations are not immune from review, the party challenging them has a heavy burden. *See* ISCR Case No. 04-00225 at 2 (App. Bd. Nov. 9, 2006).

Although the Judge's credibility determinations are flawed in part, her material findings as to Applicant's conduct of security concern are ultimately sustainable. The judge made two problematic statements regarding her credibility determinations. First, as a threshold factor in her credibility determination of Applicant, the Judge states in her decision, "Applicant was seeking to retain a security clearance he had held for 30 years, and this motive weighs against him in my credibility determination. The DSS special agent was a government employee doing his job, and in that capacity he knew there is a significant penalty for providing false information." The Judge was

¹The Judge found in favor of the Applicant with respect to SOR paragraph 1.a. That favorable finding is not at issue on appeal.

entitled to believe either witness (Applicant or the DSS agent) in whole or in part. She was also entitled to evaluate the credibility of each witness with reference to all evidence relevant to credibility, including possible motives for not being honest. However, the Judge's threshold statement highlighting Applicant's diminished credibility as a result of his seeking to retain his security clearance sweeps too broadly. All DOHA Applicants are seeking to obtain or retain security clearances. To the extent that the Judge's statement suggests that Applicants are categorically less worthy of belief than government witnesses (even before considering other factors and evidence in the case that relate to credibility), it is error. There is no rule in DOHA proceedings which supports a general proposition the effect of which is to render Applicants, as a class, less worthy of belief simply because of their status as Applicants.

Second, part of the Judge's adverse credibility determination of Applicant is based on her conclusion that a second DSS investigative agent offered credible testimony that was at odds with Applicant's testimony. The Judge also concluded that there were errors and inaccuracies in the testimony of this second agent (who became involved in the case after the DSS agent referenced in the preceding paragraph). The Judge ultimately concluded that the errors and inaccuracies did not materially affect the second agent's credibility, and she went on in a footnote to state, "[a]s a general proposition, misconduct by a DSS investigator that does not detract from his or her credibility does not justify a clearance for the applicant being interviewed." Here, the Judge's comments about the lack of effect upon credibility of inaccuracies in the second agent's testimony are erroneous. Clearly, the inaccuracies in the testimony of the second agent do detract from the Judge's favorable credibility determination of that witness.²

Notwithstanding these errors, The Administrative Judge adverse credibility determination of Applicant, which is entitled to deference on appeal because of the Judge's unique opportunity to observe Applicant's demeanor, is ultimately sustainable in that it relies in large part on factual findings and conclusions that are supported by substantial record evidence. These factors include: (I) Applicant's failure to provide pertinent information regarding a fraud lawsuit, to which he was once a party, on his security clearance application; (ii) the prior allegations of fraud brought by the U.S. government (in a civil lawsuit) that involved Applicant and his company, the disposition of which left the issue of Applicant's culpability unresolved; (iii) the plausibility of a motive to conceal the fact of the lawsuit on Applicant's part (arising from the fact that the issue of his culpability remained unresolved, notwithstanding the fact that he, personally, had been dropped as a party to the litigation); (iv) the strength of the first DSS agent's testimony, parts of which were corroborated by Applicant's own testimony; (v) Applicant's extensive educational background; and (vi) Applicant's considerable familiarity with the security clearance application process. Ultimately, there is an adequate basis for the Judge's adverse credibility determination of Applicant, and the errors described in the preceding paragraphs are harmless.

The Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omission was

²The Judge's use of the term "misconduct" in the footnote reference to the second agent's testimony is puzzling. There is no evidence in the record that suggests the inaccuracies in the agent's testimony were the result of any sort of misconduct. Of course, even innocent errors may have a negative impact upon credibility.

deliberate and intentional. On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006). The security concern raised by Applicant's falsification was not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004).

In the alternative, Applicant contends that the Judge should have found that the security concerns raised by Applicant's falsification had been mitigated, as a matter of law, under the Guideline E mitigating conditions and the Directive's whole person factors. In support of this contention, Applicant argues that his falsification was an isolated incident; it was not recent; it was not likely to recur; it would not render him vulnerable to pressure or coercion; he had subsequently provided the correct information; the information regarding the civil lawsuit against him for fraud against the government was not pertinent to a determination of judgment, trustworthiness, or reliability; and its security significance is outweighed by his otherwise unblemished 30 year history. Again, Applicant's arguments do not demonstrate error on the part of the Judge.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in favor of the Applicant with respect to the other SOR allegation. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. The Board does not review a case *de novo*. Applicant offers a rational alternative interpretation of the record evidence. But that alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The Judge has articulated a rational explanation for her unfavorable determination under the disqualifying and mitigating factors and the whole-person concept, and there is sufficient record evidence to support that determination—given the standard that required the Judge to err on the side of national security. *See, e.g.*, DISCR Case No. 93-1390 at 8 (App. Bd. Jan. 27, 1995). Based on the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline E sustainable.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Separate Opinion of Member William S. Fields

After reviewing the record, I conclude that the Judge's material findings as to Applicant's conduct of security concern are based upon a permissible interpretation of the record evidence. They are supported by substantial evidence and are not arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 05-11175 at 2 (App. Bd. Jun. 15, 2007); ISCR Case No. 04-08806 at 2 (App. Bd. May 8, 2007). Accordingly, the Judge's adverse clearance decision can be affirmed.

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board