KEYWORD: Guideline E; Guideline J; Guideline M

DIGEST: The Judge concluded that the government's case rested entirely on the testimony of witness. In fact, the government had documentary evidence which corroborated the witness's testimony. And set forth the facts alleged by the government. The Judge failed to address inconsistent statements by Applicant

CASENO: 03-23504.a1

DATE: 12/12/2012

DATE: December 12, 2007

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James F. Duffy, Esq., Department Counsel

FOR APPLICANT
Rebecca L. Saitta, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 19, 2005, DOHA issued a statement of reasons advising Applicant of the

basis for that decision–security concerns raised under Guideline E (Personal Conduct), Guideline M (Misuse of Information Technology Systems), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 23, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30

Department Counsel raised the following issues on appeal: whether the Judge erred in concluding that the Government had not met its burden of production; whether certain of the Judge's factual findings were not based on substantial record evidence; and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding error we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant is an information security engineer, employed by a contractor for a federal agency. He previously worked for another contractor; however, he left the contractor's employ in 2002. Much of the Judge's findings consisted of summaries of the testimonies of the Government's witness and of Applicant. Applicant's former supervisor, the program manager for the contractor, testified by telephone that the reason Applicant was fired from the previous contractor was that he had improperly accessed another employee's personal e-mail; had accessed an inappropriate web site depicting "scantily clad women;" had been found playing solitaire on his computer, although the rules forbad such an activity; and that he had twice downloaded unauthorized "hacker" software onto his computer.

Applicant, on the other hand, testified that he had informed government officials of problems with software used by his contractor employer, although the supervisor had wanted him to lie about the situation. He testified that a couple of days after his most recent incident of having advised the government of these software problems, he was asked to pack up his belongings and leave his job. He denied having committed the infractions mentioned by his supervisor. The Judge also found that, in 1996, Applicant was removed from an Army promotion list for having required a female soldier fully to participate in physical training despite a medical profile limiting her physical activity.

B. Discussion

The Appeal Board's review of the Judge's findings of facts 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 findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

As stated above, Department Counsel has challenged certain of the Judge's factual findings. The Board will address these findings in its analysis below.

Whether the Record Supports the Judge's Ultimate Conclusions

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 choices 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 national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.

Once a concern arises regarding an Applicant's security clearance eligibility, 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 establish any appropriate mitigating conditions. *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 arbitrary or capricious, the Board 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel asserts that the Judge erred in concluding that the Government had not met its burden of production as set forth in the Directive. This burden is to present "witnesses and other evidence to establish facts alleged in the SOR that have been controverted."[1] In this case, the SOR alleged, *inter alia*, that Applicant's employment with the government contractor had been terminated because Applicant made inappropriate use of government equipment, visited inappropriate web sites, downloaded unauthorized software onto his computer. The SOR also alleged that Applicant falsified a sworn statement to a Defense Security Service (DSS) investigator by denying the facts alleged above. Applicant denied each allegation of the SOR.

The Judge concluded that Applicant's employment was terminated because he had informed the government agency about deficiencies in software used by his employer. He stated that Applicant's supervisor's testimony to the contrary had not been credible and that the Government's case rested upon the supervisor's testimony. Department Counsel argues that the Government

[1]Directive ¶ E3.1.14.

presented other evidence than the supervisor's testimony to establish its case and that the evidence taken as a whole met the Government's burden of production.

Department Counsel's argument has merit. In addition to the testimony of the supervisor, the Government presented documentary evidence. Government Exhibit (GE) 2, a memorandum from the Facility Security Officer at Applicant's employer to the DSS, stated that Applicant's employment was "involuntarily terminated" due to "inappropriate use of government equipment; visiting inappropriate websites, the loading of unauthorized software on government equipment to include deliberately not following instructions and performance issues." GE 3 is a memo to Applicant from his employer, advising that "[a]fter repeated counseling concerning numerous performance issues, we feel that it is in the best interest of the company to terminate your employment . . ." The memo goes on to explain various aspects of the termination process, such as receipt of final pay, continuation of medical care, etc. Applicant signed the memo, reflecting his having read and understood it. GE 4 is a memo for record (MFR) prepared by a company official describing a meeting between herself, another official, and Applicant. The memo, prepared four days after the meeting, states in pertinent part, "[Applicant] reported to [company headquarters] on Monday morning and [official] and I met with him. [Official] stated that he was being terminated for inappropriate use of government equipment (visiting inappropriate websites and loading unauthorized software on government equipment) and performance issues."

These three documents, taken together, set forth the facts alleged by the Government as underlying Applicant's loss of employment. They are consistent with one another. They are also consistent with the supervisor's testimony. The Judge described these documents as "after the fact exhibits" and stated that only GE 3 was ever shown to Applicant. However, he did not explain why he did not find them to be credible, although they are mutually consistent, were prepared close to the events, and corroborate the supervisor's testimony. Therefore, to the extent that the Judge's analysis of the Government's burden of production rested upon his view that the Government had relied solely upon the testimony of the supervisor, and that the case consisted merely of the supervisor's word against the Applicant's, his analysis is error.

Department Counsel argues that the Judge made unsustainable findings of fact regarding Applicant's supervisor. Specifically, Department Counsel challenges the following: (1) "She [the supervisor] also testified that she counseled Applicant for telling the government manager the truth about the software" and (2) "The fact that the company program manager was upset with Applicant for telling the government the truth belies [sic] the fact that they expected him to cover up a defective product, and when he refused, retaliated." The Board has examined the record and concludes that Department Counsel's argument has merit. The supervisor testified that there were indeed problems with the software they were using and that officials both of the contractor as well as the government agency were aware of these problems. However, she also testified emphatically that she never told Applicant to lie about the software, only having counseled him, at the Government's request, to refrain from raising issues of which the Government was already aware in an apparently offensive or disruptive manner.[2] She testified in great detail as to the reasons underlying Applicant's having

[2]"The only thing I got was a complaint from the Government saying that [Applicant] came in to them and was talking about the problems that they knew existed with the software but he was doing it in a bad-mouthing way." Tr. at 59. Compare the supervisor's testimony that Applicant's termination came about three or four weeks from the date of this counseling with Applicant's testimony, and the Judge's finding, that it occurred only "a couple of days later." Tr.

been fired, the principal one being his repeatedly having placed hacker software on his computer.[3] As stated above, her testimony is generally consistent with GE 2, 3, and 4. It was not seriously discredited by cross-examination. The two challenged statements, therefore, do not reflect a reasonable or plausible interpretation of the supervisor's testimony.[4]

Finally, Department Counsel argues that the Judge's favorable decision was arbitrary, capricious, and contrary to law, particularly that the Judge substituted a credibility determination for record evidence.[5] Applicant's version of events was that he had complained to the government about problems with his employer's software, despite his employer's insistence that he lie about it, and that his refusal to lie underlay his leaving the contractor's employ. At the end of his decision, the Judge stated that he had observed Applicant's demeanor and that "Applicant's explanations are both consistent and sincere and have the solid resonance of truth."[6] An examination of the record, however, reveals apparent inconsistent statements by Applicant which the Judge's decision does not address. For example, in GE 5, a statement by Applicant to a DSS investigator, Applicant stated "I felt my leaving [contractor] was by mutual agreement versus a termination . . .I was unaware that I was terminated . . ." On the other hand, during the hearing he stated that he knew that he was indeed terminated and attributes the apparent contradiction to a problems of semantics: "[m]aybe I misused the English language. I'm not an English major."[7] However, the statements in GE 5 are clear and unambiguous and appear to contradict his testimony and impugn his credibility. The Judge's decision does not attempt to resolve this apparent inconsistency or otherwise explain why it should be considered minimal when compared with the record as a whole.

Neither did the Judge subject Applicant's version of events to a reasoned analysis of other contrary record evidence.[8] Applicant insisted that he did not commit the acts alleged in the SOR, that he believed he had left the contractor by mutual agreement, and that the contractor never told him he was terminated for the reasons set forth in the SOR. However, as stated above, GE 3 is a memo with a signed acknowledgment by Applicant that his employment had been *terminated* due

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at 92; Decision at 5. Compare also the supervisor's account of the facts underlying the software counseling with GE 6, a memorandum from Applicant's commanding officer when Applicant served on active duty with the Army, stating that Applicant had been removed from a promotion list for, *inter alia*, insubordination

[3]Q: What happened regarding the second incident [of placing hacker software on his computer]? A: . . . I again had somebody verify that software was loaded on the system. At that point in time, I brought it to the government's attention and was told immediately . . . to remove him from the contract and get him off the site." Tr. at 36-37.

[4]ISCR Case No. 91-0028 at 7 (App. Bd. Nov. 16, 1992).

[5]*See, e.g.*, ISCR Case No. 05-03472 at 5-6 (App. Bd. Mar. 12, 2007); ISCR Case No. 02-12199 at 6 (App. Bd. Apr. 3, 2006); ISCR Case No. 02-22461 at 12 (App. Bd. Oct. 27, 2005).

[6]Decision at 7-8.

[7]Tr. at 131.

[8]See ISCR Case No. 99-0424 at 11 (App. Bd. Feb. 8, 2001) ("When the record contains evidence that, on its face, clearly detracts from the Judge's findings and conclusions, then the Judge's decision must contain sufficient discussion, analysis or explanation to enable the parties and the Board to discern a rational basis for the findings the Judge made and the conclusions the Judge reached.")

to "numerous performance issues," and GE 4 is a MFR that explicitly states that management informed Applicant of the specific reasons for the termination, those alleged in the SOR. Beyond describing these documents as "after the fact" and noting that GE 2 and 4 were not shown to Applicant, the Judge did not explain why he discounted their credibility as descriptions of the events leading up to Applicant's loss of employment.

Insofar as the Judge obviously concluded that Applicant was fired due to having advised the Government about his employer's defective software, he apparently concluded that the documents in question were prepared after the events they describe in order to mask the employer's true intentions. However, other than Applicant's statement and testimony, there is no evidence to support this view. Applicant's one witness was a fellow parishioner from his church who spoke about Applicant's good character and dedication to the U.S. The Board also notes that, despite the fact that his employer told him in GE 3 that he was being terminated for cause, Applicant testified that he did not challenge that decision, a failure somewhat at odds with the Judge's conclusion that Applicant was fired in retaliation for truth-telling. *See* Tr. at 143. We conclude, therefore, that, in holding for Applicant, the Judge relied too heavily on his interpretation of Applicant's demeanor and did not evaluate Applicant's credibility in light of the record as a whole. In view of the discussion above, we conclude that the record will not sustain the Judge's favorable decision.

Order

The Judge's favorable security clearance decision is REVERSED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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