KEYWORD: Guideline E; Guideline J

DIGEST: Expungement of an offense does not relieve an applicant of the responsibility to provide truthful answers, with the only exception pertaining to the Federal Controlled Substances Act. Furthermore the Federal government is not bound by state law concerning the expungement of state criminal convictions. The Federal Rules of Evidence serve only as a guide and may be relaxed by the Judge. There is a strong presumption against granting a security clearance. Adverse decision affirmed.

CASENO: 04-12678.a1

DATE: 05/07/2007

DATE: May 7, 2007

In Re:	)	
	)	
---------	)	ISCR Case No. 04-12678
SSN: ------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Ray T. Blank, Esq., Department Counsel

FOR APPLICANT
Jerry L. Tanenbaum, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 26, 2005, DOHA issued a statement of reasons 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 12, 2006, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge erred in admitting documentary evidence that pertained to an offense expunged under state law and which was hearsay; whether the Judge erred by not mitigating the security concerns raised in the SOR; and whether the Judge's whole person analysis fails to comply with the requirements of Directive ¶ E2.2.1. Finding no error, we affirm.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant has held a security clearance since 1991 without a security incident. He has an excellent work record and he performs volunteer work for the United Way and the American Cancer Society. He also serves as a tutor at a local school.

Applicant went to a grocery store in 2000 and purchased over $100 worth of groceries. Security guards stopped him on suspicion of not paying for an item. Applicant had a strong odor of alcohol about him. When Applicant refused to cooperate by providing the guards with personal information and by refusing to turn over the item in question, a tube of anti-fungal cream, the guards called the police. Upon the arrival of the police, Applicant turned over the cream. He was arrested for shoplifting and searched. The police discovered in Applicant's pants pocket a package of cheese for which he had not paid.

Subsequently, Applicant made known to his attorney, the prosecutor, and the judge that he was concerned about the effect the incident would have on his clearance. He was permitted to plead guilty to a lesser included offense and pay a small fine. His attorney, the prosecutor, and the judge assured him that the knowledge about his case would not go beyond the local jurisdiction. Additionally, in January 2006, Applicant had the conviction expunged from his record.

In filling out his security clearance application, Applicant answered "no" to Question 26. This question asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of, any offense not otherwise reported on the application form. The question states that Applicant was to answer the question even if the conviction had been sealed or otherwise stricken from the record. The only exception was for certain convictions under the Federal Controlled Substances Act.[1]

[1]Question 26 reads in pertinent part: "The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

On July 15, 2004, a Defense Security Service (DSS) agent questioned Applicant about the underlying incident. Applicant "said [the item] may have been left in his cart and not scanned, but he wasn't sure." Applicant stated that he assumed the incident would not be uncovered due to the expungement and also stated that his attorney had advised him "that after 36 months the proceeding would be removed from his record."

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.

Applicant has not challenged the Judge's findings. Therefore, they are not at issue in this case.

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. 581, 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.

Applicant contends that it was error for the Judge to admit and consider certain documents, specifically an FBI identification record pertaining to Applicant; a DSS report of investigation summarizing the investigating agent's interview with Applicant; and the police record pertaining to Applicant's shoplifting incident. Applicant argues that these documents were "hearsay witness statements that have been expunged" from his record and, therefore, the Judge should not have admitted them.

The Board does not agree with Applicant's position. Expungement of an offense does not relieve Applicant of the responsibility to provide truthful answers. The only exception pertains to the Federal Controlled Substances Act, which is not the case here. Applicant's argument is further weakened by the fact that the court which ordered the expungement was a state court. *See* ISCR Case No. 03-22563 at 4 (App. Bd. Mar. 8, 2006) ("[T]he federal government is not bound by state law concerning the expungement of state criminal convictions . . . [and] can require a person

applying for a . . . security clearance to disclose information about his criminal record even if it has been expunged.")(internal citations omitted).

Neither did the documents' hearsay character impair their admissibility in this instance. The documents had reasonable indicia of reliability–two of the documents were official records that had been prepared for purposes other than litigation at DOHA; the other document was an official record memorializing an agent's observations and the Applicant's admissions. In DOHA proceedings, the Federal Rules of Evidence service only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal) in order to permit the development of a full and complete record by the parties. Directive E3.1.19. By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury. *See, e.g.*, ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb. 8, 2007). Given the record in this case, the Judge did not err in admitting the documents into evidence. Furthermore, the weight which he assigned to the documents was not arbitrary, capricious, nor contrary to law. *See, e.g.*, ISCR Case No. 98-0619 at 7-8 (App. Bd. Sep. 10, 1999).

Concerning the remaining issues on appeal, we note that "there is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert den* 499 U.S. 905 (1991). Once 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* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

We have examined the Judge's analysis of the mitigating conditions that might apply in Applicant's case. Given his findings, we conclude that his analysis of them is not arbitrary, capricious, or contrary to law. Likewise the Judge's whole person analysis is sustainable. He took into account record evidence favorable to Applicant, such as the fact that he apparently received some inadequate advice from his counsel and from other court officials regarding the legal implications of an expungement order. The Judge's findings of fact demonstrate that he also took into account Applicant's work record and charitable activities.

However, the Judge noted the fact that Question 26 is clear on its face, and Applicant, an educated man, had no reason to believe that he was excused from answering it truthfully. The Judge went on to say, "Even at the hearing, he was still trying to suggest that the incident was so minor it did not warrant reporting" in support of his conclusion that Applicant has not fully accepted responsibility for his actions. Decision at 4. Considering the Judge's decision in light of the record as a whole, we conclude that his whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). Accordingly, we conclude that the Judge's decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed; Jean E. Smallin
Jean E. Smallin
Administrative Judge
Chairman, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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