

KEYWORD: Guideline E; Guideline J

DIGEST: The Administrative Judge’s reading of Applicant’s admissions in his response to the SOR is untenable. Applicant’s admission of “A - I” “involving criminal history” is broader than just subparagraph 1.a. and includes subparagraphs 1.b through 1.i. Thus, the Judge’s conclusion that the government had failed to meet its burden of production regarding subparagraphs 1.b. and 1.h. (Applicant’s four year confinement and the application of 10 USC 986) is erroneous. Favorable decision reversed.

CASENO: 05-02039.a1

DATE: 06/06/2007

DATE: June 6, 2007

In Re:)	
)	
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SSN:-----)	ISCR Case No. 05-02039
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Rita C. O’Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On October 27, 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 decision on the written record. On October 6, 2006, after considering the record, Administrative Judge Kathryn Moen Braeman 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 raises the following issues on appeal: whether the Judge erred in concluding that the provisions of 10 U.S.C. 968 do not apply to Applicant’s case; and whether the Judge’s decision that Applicant had mitigated security concerns raised under Guideline E was arbitrary, capricious, and contrary to law. We reverse the decision of the Judge.

Whether the Record Supports the Judge’s Factual Findings

The Judge found that Applicant was sentenced to four years incarceration as a result of a 1974 charge of Armed Robbery. She then found that there is no documentation as to the time served by Applicant under this sentence. The Judge also found that Applicant had other criminal arrests (to include felonies) in 1970, 1980 and 1990.

The SOR alleges in subparagraph 1(b) that Applicant was convicted of armed robbery, a felony, and sentenced to four years confinement. The SOR states that Applicant was “received on February 7, 1974, at the Mississippi Department of Corrections, Parchman, Mississippi, and discharged on July 11, 1975.” The SOR further alleges in subparagraph 1(h) that “[d]ue to the facts alleged in subparagraph 1(b) above, 10 U.S.C. 986¹ disqualifies you from having a security clearance granted or renewed by the Department of Defense.”

In his response to the SOR, Applicant states the following regarding paragraph 1, the Guideline J criminal conduct security concerns: “A - I involving criminal history – I ADMIT.” The Judge found that Applicant’s response meant that he was admitting only the subparagraph 1.a of the SOR. Because there is no further mention of time served by Applicant, the Judge concluded that the government had failed to meet its burden of production regarding the application of 10 U.S.C. 986. See Directive ¶ E3.1.14.

The Appeal Board’s review of the Judge’s findings of fact 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.

¹10 U.S.C. 986 (c), prevents the Department of Defense from granting or renewing a clearance to anyone who “. . .has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.”

On appeal, Department Counsel asserts that Applicant admitted 17 months of actual incarceration in his answer to the SOR and that this admission was sufficient to trigger the application of 10 U.S.C. 986. The Board Agrees, reading Applicant's response as admitting all allegations in paragraph 1 of the SOR regarding his criminal conduct, to include the facts necessary to establish the Smith Act prohibition. The Judge's interpretation of Applicant's answer as including only a response to subparagraph 1.a under Guideline J, to the exclusion of subparagraphs 1.b through 1.i, is untenable given the Applicant's reference to "A - I" and his use of the words "involving criminal history" before stating "I admit." Applicant was clearly referring to more than subparagraph 1.a when making his admission, which relieved Department Counsel of her evidentiary burden on the issue of the length of Applicant's incarceration after his 1973 arrest and conviction for armed robbery. Therefore, we conclude that the Judge erred in her Guideline J analysis.

Whether the Record Supports the Administrative Judge's Conclusions

The Judge's erroneous finding regarding Applicant's answer to the SOR and the applicability of 10 U.S.C. 986 is dispositive of this case.

Order

The Judge's favorable clearance decision is REVERSED.

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

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