

KEYWORD: Guideline J; Guideline E

DIGEST: A Judge's acceptance of an applicant's explanation for his or her conduct must be based on a reasonable interpretation of the record as a whole. The record evidence in this case undercuts both the Judge's favorable credibility determination and his conclusions regarding the circumstances of Applicant's responses. Favorable decision reversed.

CASENO: 05-02401.a1

DATE: 07/10/2007

DATE: JULY 10, 2007

In Re:)	
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SSN: -----)	ISCR Case No. 05-02401
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 25, 2005, DOHA 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) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992,

as amended) (Directive). Applicant requested a hearing. On November 17, 2006, Administrative Judge Philip S. Howe granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's conclusion that Applicant did not intentionally falsify his answers to two questions on a security clearance application and did not intentionally provide false information on a written statement is supported by the record evidence and whether the Judge failed to address Applicant's criminal charge of knowingly making false statements under Guideline E.¹ We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following factual findings: (a) Applicant was arrested in 1995 for second degree rape (no force), a felony; (b) the female involved, who was underage, later explained what happened and that the sex was consensual, and the charges against Applicant were eventually dismissed; (c) in August 2002, Applicant's attorney filed a motion to expunge this record; (d) Applicant assumed the charges were no longer on his record because they were dismissed and he had petitioned the local court to expunge his record; (e) Applicant was arrested in 1997 on charges of second degree robbery, a felony; (f) Applicant was in the vicinity of some of his friends who attacked a man and robbed him; (g) Applicant got into his car and left the scene when someone yelled the police were coming; (h) Applicant was questioned by the police that night because he was recognized by the victim as being in the vicinity; (i) Applicant was arrested two months later and placed in jail; (j) while in jail, he was recognized by the robbery victim, who was there on other charges; (k) the victim then told the authorities that Applicant was a witness and not a perpetrator; (l) Applicant was later released and the charges were dismissed on the motion of the prosecutor; (m) Applicant filed a motion to expunge this arrest record on an unknown date; (n) In April 2003, Applicant was served with a warrant charging him with making false statements about his income on an application to obtain unemployment insurance; (o) Applicant had found an interim part-time job during a period where he was collecting unemployment benefits but he did not inform the unemployment insurance office, which would have reduced his unemployment benefits had it known; (p) in June 2003, Applicant pled guilty to a reduced charge of theft by deception; (q) Applicant received a suspended jail sentence, was ordered to pay costs and restitution, and was placed on probation; (r) Applicant thought the charges would be expunged when he completed the probation in 2005; (s) Applicant received an income tax refund from the IRS in 2002; (t) he spent the money, only to receive a letter from the IRS six months later asking for its return because he owed back child support; (u) on January 5, 2004, Applicant gave a written statement to a government investigator about the IRS check and states he was charged with theft by deception because he could not repay the money; (v) Applicant's statement mentions a \$300.00 per month repayment agreement that, in fact, existed for the unemployment restitution, not the IRS repayment; (w) Applicant never went to court for the IRS claim for repayment; (x) while he was with the government investigator, Applicant did not mention the unemployment insurance payments he received and did not relate those payments to the theft by deception charges, claiming he was confused about the two situations;

¹The Judge's favorable findings with regard to Guideline J were not challenged on appeal.

(y) Applicant completed a security clearance application on September 5, 2003; (z) on it, he disclosed his theft by deception arrest in 2003 in answer to Question 26 (any arrest, charges, or convictions not listed elsewhere on the SCA); (aa) Question 21 of the SCA asked if Applicant had ever been charged with or convicted of any felony offenses; (bb) Applicant answered “no” because the 1995 and 1997 charges were dismissed and he was never convicted; (cc) Applicant claims he does not know the difference between charges and convictions and he thought Question 21 meant in the conjunctive (“and”) and not the disjunctive (“or”) and referred to convictions of those offenses; and (dd) Applicant knew that he had not been convicted of the 1995 and 1997 charges.

B. Discussion

The Appeal Board’s review of the Administrative Judge’s findings of fact is limited to determining if they are supported by substantial record 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, 620-21 (1966). In evaluating the Administrative Judge’s findings, we are required to give deference to the Administrative Judge’s credibility determinations. Directive ¶ E3.1.32.1.

The Administrative Judge’s resolution of the issue of whether Applicant engaged in deliberate falsification, although it could easily be analyzed as a finding of fact, is couched in terms of the Judge’s conclusions. No other findings of fact are challenged on appeal. Therefore, the appeal issue in this case can be resolved with reference to the Judge’s conclusions, which are described in the following paragraph.

Whether the Record Supports the Administrative Judge’s Ultimate Conclusions

The Judge reached the following conclusions regarding the alleged falsifications by Applicant: (i) based on the evidence, including testimony that is credible, there was no knowing and willful falsification by Applicant of his SCA and the statement to the government investigator; (ii) it is obvious from Applicant’s testimony at the hearing and from the contents of his written statement to the investigator that he was confused about the information sought by Question 21 of the SCA, and was further confused in his statement about his conviction in 2003 and the IRS repayment (i.e. he was confused about what offense he was convicted of in 2003); (iii) he misread Question 21 so he thought he would be disclosing and admitting he was convicted of the felonies in 1995 and 1997 when those were not the actual facts; (iv) Applicant’s explanation and even his current display of confusion on this issue is convincing and credible; (v) with that obvious confusion and lack of understanding of Question 21’s meaning, he could not have knowingly and willfully made a false statement; and (vi) Applicant’s lack of sophistication is taken into account in deciding he was not acting or lying about the reasons he gave for failing to make the fullest disclosure.

An Administrative 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)). The Appeal Board may reverse the Administrative 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

On appeal, Department Counsel asserts that the Administrative Judge's conclusion that Applicant did not falsify his September 5, 2003 security clearance application and his conclusion that Applicant did not falsify his January 5, 2004 statement to a government investigator are arbitrary, capricious and contrary to law. Department Counsel's argument has merit.

More specifically, Department Counsel contends: (a) the Judge's conclusion that Applicant did not engage in deliberate falsification is based, in part, on a favorable credibility determination that is not sustainable; (b) the Judge's decision does not articulate a satisfactory explanation for its conclusions that Applicant did not falsify; and (c) the Judge's ultimate favorable conclusion is not sustainable in light of the evidence to the contrary. These arguments are persuasive.

It is well established in industrial security clearance cases that the question of whether there is sufficient evidence to support a Judge's factual findings is a matter of law, not one of fact. *See, e.g.*, ISCR Case No. 94-0964 at 3 (App. Bd. July 3, 1996). The deference afforded a trier of fact is not absolute. *See, e.g.*, ISCR Case No. 95-0178 at 2-4 (App. Bd. Mar. 29, 1996). Moreover, although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive ¶ E3.1.32.1), that deference does not immunize credibility determinations from review. *See, e.g.*, ISCR Case No. 99-0710 at 4 (App. Bd. Mar. 19, 2001). As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985): "[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the courts of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Department Counsel persuasively argues that the Judge accepted the Applicant's hearing testimony concerning the issue of falsification uncritically. The Judge's decision is lacking in any kind of in-depth analysis of Applicant's representations concerning his state of mind at the time he responded to the government's inquiries, or whether those explanations are plausible in light of the totality of the record evidence. The decision contains little more than the rote adoption of Applicant's explanations coupled with the Judge's pronouncement that Applicant is credible.

An Administrative Judge is not required to accept testimony merely because it is un rebutted. *See, e.g.*, ISCR Case No. 99-0005 at 3 (App. Bd. Apr. 19, 2000). Indeed, it would be arbitrary and capricious for a Judge to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other record evidence. *See, e.g.*, ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001). Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the Applicant's demeanor when the applicant testifies.

Furthermore, a Judge's acceptance of an applicant's explanation for his or her conduct must be based on a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0710 at 4 (App. Bd. Mar. 19, 2001); ISCR Case No. 99-0194 at 3 (App. Bd. Feb. 29, 2000). In determining whether there is sufficient record evidence to support a Judge's findings, the Board will consider not just whether there is record evidence consistent with the Judge's findings, but will also consider whether there is evidence that detracts from the Judge's findings. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. *See, e.g.*, ISCR Case No. 99-0205 at 2 (Oct. 19, 2000).

There is record evidence in this case that strongly undercuts both the Judge's favorable credibility determination of Applicant and the Judge's conclusion that Applicant responded to the government's inquiries the way he did because of confusion and a lack of sophistication. These components of the case will be discussed in turn.

The Judge's favorable credibility determination is fundamentally flawed inasmuch as it ignores an important aspect of the case. It is undisputed that Applicant was convicted in 2003 on a charge of theft by deception stemming from his making false statements to obtain unemployment insurance benefits to which he was not entitled. The Judge made no finding of fact that Applicant suffered from any lack of understanding when he engaged in this attempt to defraud government authorities. The relevance of such a prior conviction to a subsequent determination of Applicant's credibility is obvious. However, the Judge does not include any discussion of this conviction in the context of determining Applicant's credibility. Inasmuch as the 2003 conviction is powerful evidence that reflects on whether Applicant has a history of honesty and trustworthiness, the Judge's failure to address it in the context of assessing Applicant's credibility was clear error.

Moreover, Applicant's denials of an intent to falsify do not stand up well to close scrutiny. The Judge accepted without comment Applicant's claim that, regarding the 1995 and 1997 incidents, he did not understand the difference between a charge and a conviction for purposes of answering Question 21 of his security clearance application. However, Applicant's hearing testimony belies this explanation. He knew the charges against him once existed and he knew he had never been convicted of the offenses. Thus, logically, he would have to recognize the difference between the two. Additionally, Applicant seemed to understand the distinction between "charges" and "convictions" in his answer to the SOR.² Thus, there is significant record evidence that detracts from the Judge's conclusion that Applicant did not understand the distinction between the two terms.

The Judge also accepted without comment Applicant's explanation that he misread Question 21 and thought it referred to whether he had ever "been charged with and convicted of" any felony offense, as opposed to the actual language of the question which asked whether he had ever "been charged with or convicted of" any felony offense. Question 21 contains plain language and clearly contemplated the recording of felony charges, regardless of future disposition. By focusing only on Applicant's claim that he had misunderstood what is objectively an unambiguous question, the Judge failed to provide a rational explanation as to why Applicant had no intent to falsify when he answered the question incorrectly. Moreover, Applicant's claim that he misread Question 21 is inconsistent with his claim that he does not know the difference between charges and convictions. A review of the decision below indicates that the Judge accepted both of Applicant's explanations.

²Applicant's answer to the SOR, wherein he is explaining his "no" answer to Question 21 of the security clearance application, reads in part: "The answer to that question is yes and no yes I was charged and no I was not convicted."

No deference is owed to a favorable credibility determination that results in acceptance of an applicant's explanations that are inconsistent and incompatible. *See, e.g.*, ISCR Case No. 00-0713at 3 (App. Bd. Feb. 15, 2002). The Judge's conclusion that Applicant did not falsify the security clearance application is unsustainable because it does not reflect a reasonable interpretation of the record evidence as a whole, including evidence that runs contrary to the Judge's finding. See Directive, Additional Procedural Guidance, Item E3.1.32.1.

Regarding Applicant's January 5, 2004 sworn statement, in which he erroneously attributed his 2003 criminal conviction of theft by deception to his failure to make payments on an IRS tax refund dispute, Department Counsel persuasively argues that Applicant's claim of confusion between the IRS matter and his conviction for fraudulently attempting to obtain unemployment compensation benefits is not reasonably supported by the record evidence. The undisputed record evidence indicates that: (a) Applicant received a uniform citation that clearly detailed the charge as knowingly making false statements for unemployment benefits; (b) the charge initiated in state court; (c) Applicant was sentenced in state court to two years probation until mid-2005, was ordered not to move out of state, and was required to pay the state \$1,045 in restitution; (d) Applicant was still on probation for his state conviction at the time he executed his statement; (e) Applicant gave his signed, sworn statement only six months after he pled guilty to theft by deception; and (f) Applicant testified at the hearing that, prior to executing his security clearance application and prior to providing the 2005 statement to the government, he knew that the theft by deception conviction was for fraudulently receiving unemployment benefits. This evidence, along with the commonsense notion that a state court conviction is not something that can be readily confused with a federal tax matter not in litigation runs contrary to the Judge's conclusions concerning Applicant's state of mind when he executed the statement.

In summary, the Judge failed to consider or analyze record evidence that detracted from his conclusions about Applicant's state of mind, he substituted a favorable credibility determination for record evidence, and he engaged in a piecemeal analysis of Applicant's responses to the government.³ The Board concludes that the Judge's decision is not based on the record evidence as a whole or on a reasonable evaluation of Applicant's explanations regarding his responses to the government.

Department Counsel raises a separate appeal issue concerning the Judge's failure to analyze Applicant's 2003 conviction for theft by deception under Guideline E. While the Judge states why he concluded that Applicant did not falsify his answers to the government under Guideline E, he does not explain why the theft by deception conviction was either mitigated or would not raise a security concern under Guideline E. Such an omission would ordinarily warrant a remand for correction of error. However, inasmuch as the Board has determined in this case that the Judge's overall favorable security clearance decision is not sustainable, remand is not necessary.

Department Counsel has demonstrated several errors below, that, taken cumulatively, warrant reversal.

³Applicant's explanations regarding the omissions on his security clearance application were not evaluated by the Judge with reference to Applicant's explanation for the incorrect information in his statement to the government investigator, and *vice versa*. In addition, neither of these matters were evaluated with reference to Applicant's 2003 conviction for a crime involving dishonesty.

Order

The judgment of the Administrative Judge granting Applicant a clearance 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