

KEYWORD: Guideline H; Guideline E

DIGEST: The question of whether there is sufficient evidence to support a Judge's factual findings is a matter of law. Applicant's denials and explanations are not conclusive evidence. Rather, Applicant's statements, whether written or in the form of hearing testimony, had to be considered in light of the record evidence as a whole. An Administrative Judge is not required to accept testimony merely because it is unrebutted. 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. Favorable decision reversed.

CASENO: 05-03554.a1

DATE: 08/23/2007

DATE: August 23, 2007

In Re: ----- Applicant for Security Clearance))))))))	ISCR Case No. 05-03554
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nicole Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 23, 2006 DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), and Guideline E (Personal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 9, 2007 Administrative Judge Charles D. Ablard granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

In the SOR, the government alleged that Applicant falsified material facts on a September 28, 2005 interrogatory response by answering “no” to a question asking whether he had ever used illegal drugs, including marijuana. The SOR also alleged that Applicant falsified material facts on an interrogatory response dated November 4, 2005 when the interrogatory asked him to provide an explanation regarding a discrepancy between a medical record dating from August 2004 where Applicant indicated he used marijuana on weekends and his “no” answer to the drug question on the September 28, 2005 interrogatory. The alleged falsification took place when Applicant explained the discrepancy by stating he had never taken illegal drugs and he lied to a staff member at the hospital in September 2005 in order to get individual counseling. In his decision, the Administrative Judge concluded that Applicant had not falsified his responses to these two interrogatory questions.

Department Counsel raised the following issues on appeal: whether the Administrative Judge’s conclusion that Applicant did not intentionally falsify his answers on two interrogatory Responses executed on September 28, 2005 and November 4, 2005 is supported by the record evidence. 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 grieved over the death of his daughter in July 2004; (b) Applicant became severely depressed as a result of her death and had continuing thoughts of suicide; (c) Applicant was admitted to mental hospital on August 5, 2004; (d) the hospital recommended he be transferred to a psychiatric facility some 95 miles away; (e) Applicant’s wife drove him there; (f) on the day of Applicant’s admission, August 6, 2004, he tested positive for marijuana; (g) Applicant was interviewed first by a psychiatrist on August 7, 2004 and two days later by a social worker; (h) the medical report signed by the doctor indicated that Applicant had stated that he “probably” used marijuana on weekends; (I) Applicant made this statement to the social worker during an interview with her in an effort to receive individual counseling and better therapy than he was getting in group sessions; (j) the statement about marijuana use was a misrepresentation made for treatment purposes; (k) during his security clearance investigation in 2005, Applicant was first appraised by the Defense Security Service of the results of the marijuana testing in 2004; (l) initially, Applicant believed the test results had been mixed up with another patient, since he had not used marijuana; (m) Applicant later surmised that the positive test for marijuana resulted from the fact that his wife had smoked 2-4 joints of marijuana in the closed cab of their truck during the 95 mile drive from the mental hospital to the psychiatric facility on August 6, 2004; (n) Applicant had not used marijuana; (o) two interrogatories were taken of Applicant; (p) in the response to the first on September 28, 2005, he denied any use of marijuana; (q) in the second, dated November 4, 2005, he was asked to explain the inconsistency in his earlier interrogatory and

his statement at the hospital admitting to use of marijuana; (r) he answered that his reason for so stating to the hospital was to obtain individual counseling; (s) in the second interrogatory, he again denied use of any illegal drug; (t) Applicant is highly regarded by his company, his supervisor, and by his colleagues who testified on his behalf; (u) none of the witnesses have ever suspected any drug use by Applicant; (v) and, one witness, a friend of Applicant for over 30 years, testified that he is the “most honest person I know” with a “flawless” reputation for honesty.¹

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) the testimony of Applicant as well as the evidence offered by the government is unclear; (ii) no evidence was offered on either side as to the likelihood or possibility that his theory

¹The Judge’s favorable findings and conclusions with regard to Guideline H were not challenged by Department Counsel on appeal. However, it should be noted that the Judge’s findings and conclusions under Guideline H contain inconsistencies which are pertinent to the issues on appeal. In his findings, the Judge states that Applicant has not used marijuana, at least not on the occasion that Applicant theorizes caused his drug test to indicate positive (the Judge makes no finding as to whether Applicant used drugs on other occasions). In his conclusions section, the Judge states that Applicant testified credibly that he was not a user of illegal drugs, then inexplicably concludes that the drug use allegations have been mitigated as an isolated and aberrational event. In her appeal brief, Department Counsel indicates that the decision not to appeal the Judge’s favorable findings and conclusions under Guideline H were based on the Judge’s conclusion that the drug use had been mitigated. Thus, for purposes of this appeal, notwithstanding the decision not to contest the Judge’s ultimate resolution of Guideline H, Department Counsel has not conceded those portions of the Judge’s Decision wherein the Judge states that Applicant did not use marijuana. Indeed, Department Counsel’s appeal of the Judge’s resolution of the Guideline E allegations is obviously predicated on a rejection of the Judge’s finding that Applicant did not use marijuana. The Judge’s conclusion that the drug use allegations under Guideline H were mitigated as an isolated an aberrational event does not coexist logically with the Judge’s implicit conclusion under Guideline E that Applicant never used drugs. The discrepancy is reflective of an arbitrary and capricious analysis on the part of the Judge.

of ingestion of second hand smoke might have been possible; (iii) the mental condition of Applicant during the hospitalization makes it difficult to evaluate his behavior and his reasons for it during his hospitalization; (iv) the government allegations under Guideline E alleged in the SOR are rebutted since the statements cited and attributed to Applicant on his two interrogatory answers were not deliberate falsifications as required by the guideline; (v) Applicant's explanations are credible; (vi) Applicant has a reputation for honesty among his colleagues and friends who testified for him; (vii) while there are certain inconsistencies and questions about accuracy of some of the events and their sequence when he was hospitalized and distraught from the family tragedy, the security concerns have been mitigated by the testimony of Applicant and his witnesses.

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. We review matters of law *de novo*.

On appeal, Department Counsel asserts that the Administrative Judge's conclusion that Applicant did not falsify his responses to the two interrogatories is not supported by the record evidence and is therefore arbitrary, capricious, and contrary to law. Department Counsel's argument has merit.

More specifically, Department Counsel contends: (a) the Judge substituted an implausible credibility determination for record evidence; (b) the Judge's decision dismisses direct and circumstantial evidence of Applicant's intent to falsify his responses to the two sets of interrogatories; and (c) the evidence establishing Applicant's drug use and falsifications is overwhelming when compared to Applicant's self-serving and inconsistent explanations for his conduct. 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).

The Judge's finding and conclusion that Applicant did not deliberately falsify his responses about marijuana use on the interrogatories is based on the Judge's acceptance of Applicant's explanation for his answers. Applicant's denials of any intention to falsify and his explanation for why he answered the interrogatories the way he did are relevant and material evidence. However, Applicant's denials and explanations are not conclusive evidence. Rather, Applicant's statements, whether written or in the form of hearing testimony, had to be considered in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0620 at 2 (App. Bd. June 22, 1999). An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify. *See, e.g.*, DISCR Case No. 90-0770 at 3 (App. Bd. July 16, 1992); *Cf. Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995) ("Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish what he professes not to have intended.")(quoting earlier decision). Even though the Judge's

acceptance of Applicant's explanation is based on his favorable assessment of Applicant's credibility, that does not end the analysis.

The deference owed to an Administrative Judge's credibility determinations (Directive, Additional Procedural Guidance, Item 32.a) does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, ISCR Case No. 97-0356 at 3 (App. Bd. April 21, 1998); ISCR Case No. 95-0178 at 2-3 (App. Bd. Mar. 29, 1996). The record evidence in this case demonstrates the kind of situation the Supreme Court discussed 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."

There is record evidence in this case that strongly undercuts the Judge's favorable credibility determination. The Judge made a finding of fact that Applicant misrepresented the nature of his drug use (supposedly admitting drug use that he never engaged in) to health care providers during intake interviews in August 2004. The Judge's conclusion that Applicant did not falsify answers on his interrogatories is wholly based on the Judge's theory that Applicant engaged in falsehoods to obtain a desired result at an earlier time. The Judge's decision is silent as to how Applicant's history of lying to obtain a desired level of medical treatment is compatible with a favorable credibility assessment. Such a history of falsehoods is powerful evidence that runs counter to any suggestion that Applicant has demonstrated honesty and trustworthiness. Additionally, the Judge's favorable credibility determination does not take into account the fact that Applicant offered two inconsistent explanations as to why the drug test administered by the hospital in 2004 yielded a positive result for the ingestion of marijuana. In his findings of fact, the Judge stated uncritically that Applicant at one point believed the drug test results had been mixed up with those of another patient and later surmised that the positive test for marijuana resulted from the fact that his wife had smoked 2-4 joints of marijuana while they drove in the closed truck cab on August 6, 2004. Once again, the Judge's decision is silent as to how the proffering of inconsistent explanations for a positive drug test is compatible with a favorable credibility assessment. There is nothing in the Judge's decision to suggest that he doubted or rejected either of these conflicting explanations. Indeed, when concluding that Applicant had not falsified his responses to the interrogatories, the Judge stated, "I found his explanations credible."² 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. 00-0713 at 3 (App. Bd. Feb. 15, 2002). The Judge's favorable credibility determination is not sustainable. An overall review of the Judge's decision convinces the Board that his resolution of the issues under Guideline E is largely based upon this credibility determination.

An Administrative Judge is not required to accept testimony merely because it is unrebutted. *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.

²Decision at 5.

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).

The Judge's acceptance of Applicant's explanation for his omissions of marijuana use from the interrogatories cannot be sustained because it does not reflect a reasonable, plausible interpretation of the record evidence as a whole. Applicant's explanation for his omissions is implausible when it is considered in light of the record evidence as a whole.

There are several matters reflected in the record of this case that, viewed in their entirety, undercut the plausibility of Applicant's explanation that he never knowingly or voluntarily used marijuana and therefore never lied about it in his interrogatory responses. They are: (a) the positive drug test itself; (b) Applicant's admissions of marijuana use, made contemporaneously with the positive drug test results, which strongly corroborate those test results; (c) Applicant's inconsistent explanations for why he tested positive; (d) Applicant's insistence at the hearing that he did not tell the doctor who interviewed him on August 7, 2004 about any drug use but only described drug use to a social worker during an interview on August 9, 2004 when the doctor's notes (dictated on August 7 and transcribed on August 8) clearly reflect Applicant's admission of drug use; (e) Applicant's speculative explanation during his hearing testimony that the doctor must have found out about his admissions of drug use after being told about them by the social worker when the chronology and dates of the documents prepared by the doctor and social worker (the social worker's handwritten psychological assessment is dated August 9) make Applicant's hypothesis highly unlikely if not impossible; (f) the complete lack of record evidence as to why Applicant believed he had to lie to hospital personnel about drug use in order to obtain individual counseling; (g) the fact that Applicant did not mention lying about drug use to obtain individual counseling in a February 2004 statement to a government investigator (which dealt with Applicant's 2004 mental health treatment) or in the September 2004 set of interrogatories (which asked Applicant to discuss drug use), but mentioned his admissions about drugs to hospital personnel only after being confronted with those admissions in the November 2004 set of interrogatories; and (h) the fact that Applicant's wife has a history of marijuana use requiring counseling, and the fact that Applicant's wife testified that she was smoking marijuana in the truck during the trip to the psychiatric facility on August 6, 2004 in order to get her husband to relax by giving him a "contact high," a course of behavior that the wife claims Applicant objected to, but which the record evidence indicates Applicant did nothing to stop;³

Department Counsel points out on appeal that the Judge commented in his decision that neither Department Counsel nor Applicant offered evidence at the hearing as to the likelihood or possibility that Applicant's theory of ingesting second-hand marijuana smoke was plausible.

³When discussing the "truck cab" incident during his hearing testimony, Applicant did not indicate that he objected at any time to his wife's smoking of marijuana.

Department Counsel argues that because the Judge ultimately accepted Applicant's position that the positive drug test was a result of the secondary ingestion of marijuana smoke, the Judge's statement about the lack of evidence reveals that the Judge improperly shifted the burden to the government to refute or disprove Applicant's claim. Department Counsel's argument has merit. While the Judge's decision is not a model of clarity on this point, his acceptance of Applicant's explanation after commenting on the lack of objective evidence that would tend either to support or refute Applicant's claim leads logically to the inference that the Judge concluded there was a failure of proof on the part of the government to overcome Applicant's uncorroborated testimony. This was clear error. Where Department Counsel has introduced evidence of a positive drug test coupled with Applicant's prior admissions of willful and voluntary drug use on numerous occasions, Applicant bears the burden of persuasion when attempting to demonstrate that he did not use drugs and that the positive drug test resulted from a single, supposedly involuntary incident.

Department Counsel has met its burden of demonstrating errors that cumulatively warrant reversal.

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

CONCURRING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I concur with my colleagues that the Judge erred in his analysis of this case. The crux of this appeal concerns allegations under Guideline E that Applicant had falsified answers to interrogatories posed to him as part of his security clearance investigation. In one question Applicant was asked "Have you ever used any...Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?" Applicant answered "no" to this question. In another he was asked to explain a statement he had made to a medical facility that he had used marijuana on weekends. Applicant acknowledged making the statement but insisted that it was untrue. He stated had made it to staff

members of the medical facility as part of his effort to get individual counseling for his emotional problems.

The pertinent findings contained in the Judge's decision are as follows: Applicant sought medical treatment for depression following the death of his daughter. Upon admission to the hospital, Applicant stated that "he 'probably' used marijuana on weekends."⁴ Subsequent laboratory analysis of Applicant's urine yielded a positive result for marijuana. The Judge noted that Applicant attributed the urinalysis results to a possible laboratory mistake or to passive inhalation, his wife having smoked marijuana in the car while taking Applicant to the hospital.⁵

In analyzing Applicant's case, the Judge did not identify any Guideline E disqualifying condition which he believed to be raised by the evidence. Rather, he concluded that Applicant's explanations for his admission of drug use and the urinalysis result were credible. Without explicitly saying so, the Judge appears to have concluded that the Government did not meet its burden of production under Directive ¶ E3.1.14. He went on to state, "The testimony of Applicant as well as the evidence offered by the government is unclear. No evidence was offered on either side as to the likelihood or possibility that his theory of ingestion of second hand smoke might have been possible. The mental condition of Applicant during the hospitalization makes it difficult to evaluate his behavior and his reasons for it during his hospitalization."⁶

Of course, if the Government fails to present substantial evidence to support the allegations, there is nothing for an applicant to rebut, explain, extenuate, or mitigate, and, therefore, the case is resolved in the applicant's favor.⁷ In this case, however, the Government presented Applicant's admission of drug use made for the purposes of obtaining medical treatment. Standing alone this sort of evidence is sufficiently reliable that it constitutes an exception to the hearsay rule.⁸ When corroborated by laboratory testing, this admission was more than sufficient to constitute substantial evidence that Applicant's answers to the interrogatories were false, thereby raising appropriate disqualifying conditions and shifting to Applicant the burden of persuasion as to retaining his

⁴Government Exhibit 7 contains an assessment of Applicant's medical history upon his admission to the hospital, prepared by an M.D. and based mostly upon "information obtained from the patient." Under "Personal Habits" the assessment states "He smokes marijuana on the weekend." Later in the same exhibit, in a section entitled "Psychosocial Assessment," prepared by a clinician, is a statement of the extent of Applicant's marijuana use: "1 joint (maybe) per week."

⁵Applicant's wife testified as follows: "I drove us up there...And at the time I was smoking marijuana. I smoked several joints in the truck while we were going up there. And it's a very small confined area, which anyone in there with me would get high too...I thought if I did that it would ease the pain of it all and help relax him." Tr. at 49.

⁶Decision at 5.

⁷See Directive ¶ E3.1.15. See ISCR Case No. 01-10301 at 5 (App. Bd. Dec. 30, 2002) (Under a substantial evidence standard "a Judge's findings must be based on more than a mere scintilla of evidence, but they can be based upon less than a preponderance of the evidence.") (internal citation omitted)

⁸Fed. Rule Evid. 803(4). Excepting such statements from the hearsay rule "is predicated on the notion that people are motivated to tell the truth to a physician who is going to diagnose or treat them, to avoid adverse health consequences." Rothstein, Federal Rules of Evidence (3d Edition) at 553 (2007).

security clearance.⁹ The Judge's failure properly to analyze the Government's evidence is clear error, one effect of which is reflected in the passage quoted above, in which the Judge resolves evidentiary insufficiencies to the detriment of the Government, as if the Government rather than Applicant bore the burden of persuasion.

Given both the implausibility and inconsistency of Applicant's explanations for his admission of drug use and his positive urinalysis, I conclude that he cannot reasonably be said to have met his burden of persuasion that it is clearly consistent with the interests of national security for him to have a security clearance. I would reverse the decision of the Judge.

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

⁹See Directive E2.A5.1.2.3. "Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination..."