

KEYWORD: Guideline J; Guideline H; Guideline E

DIGEST: Given the totality of the record evidence, it was not reasonable for the Judge to conclude that Applicant's criminal conduct was not recent. Applicant's continued status of probations significantly undercut the Judge's application of criminal conduct mitigating condition 6. A whole-person analysis is intended to be a commonsense evaluation of an applicant's conduct and circumstances as a whole. There is insufficient objective evidence to support the Judge's finding that Applicant demonstrated anguish over his answer and contrition for having answered in the negative. Favorable decision reversed.

CASENO: 05-07893.a1

DATE: 10/01/2007

DATE: October 1, 2007

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 05-07983
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 10, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), 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 October 31, 2006, after the hearing, Administrative Judge Arthur E. Marshall, Jr. 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 Judge’s finding that there was no indication that alcohol abstinence was part of Applicant’s probation was unsupported by the record evidence; whether the Judge’s application of Criminal Conduct Mitigating Conditions 1¹ and 6² was arbitrary and capricious; and whether the Judge’s whole-person analysis was arbitrary and capricious because it engaged in piecemeal analysis and failed to consider significant record evidence. For the following reasons, the Board reverses the Judge’s favorable security clearance decision.

Whether the Record Supports the Judge’s Factual Findings

The Judge made the following pertinent findings of fact:

Applicant was 53 years of age at the time of the hearing. He began using marijuana at the age of 15, following major family crises. Applicant joined the U.S. Air Force in 1972 and continued using marijuana. Although Applicant’s drug use was discovered, he was granted a security clearance, which was later revoked because of the drug use, and still later restored because he promised to refrain from drugs. Applicant left the Air Force in 1981, but returned in 1983. Within a year, he tested positive for drugs and attended a drug program. Applicant left the Air Force with a general discharge.

Applicant had reduced his marijuana use to about once a month in the late 1990s, but then used it to manage nausea during a year of chemotherapy following a diagnosis of Hepatitis C in 1998. As a result of the chemotherapy, Applicant underwent psychological treatment which included detoxification from all drugs. When Applicant returned home after treatment, his wife and son continued to drink alcohol and smoke marijuana at home. Applicant began smoking marijuana again, and by 2001 he was using cocaine.

Due to an altercation between Applicant and his son in September 2001, the police were called. The police discovered drugs and drug paraphernalia in Applicant’s apartment. Applicant was charged with possession of marijuana (a misdemeanor) and cocaine (a felony). Applicant pled guilty and was sentenced to 12 months probation for possession of marijuana and six years probation for possession of cocaine. Applicant was also ordered to complete 80 hours of community service and a drug evaluation or treatment program. Applicant completed a three-month drug and alcohol evaluation program and attended Narcotics Anonymous (NA) at the same time. He began attending

¹“The criminal conduct was not recent;” Directive ¶ E2.A10.1.3.1.

²“There is clear evidence of successful rehabilitation;” Directive ¶ E2.A10.1.3.6.

Alcoholics Anonymous (AA) and continued to do so as of the time of the hearing. The alcohol portion of the program was a choice Applicant made on his own which was unrelated to the drug charges. Applicant continues to drink beer, but is aware of the effect that alcohol abuse would have on his health in light of his Hepatitis C.

On Applicant's security clearance application, in response to a question as to whether he had abused illegal drugs since the age of 16 or in the last seven years, whichever is shorter, Applicant answered "no." In response to a question as to whether use of alcohol had led him to seek alcohol-related treatment or counseling in the last seven years, Applicant answered "no." The first answer was false, and Applicant testified that he gave a false answer because he was afraid that the truth would affect his job. At the hearing he demonstrated anguish over his answer and contrition for having answered the question in the negative. Concerning the second answer, Applicant indicated that he believed his alcohol treatment and counseling was related to his drug abuse, not to his use of alcohol.

Applicant has not used illegal drugs since shortly before his December 2, 2002 court date. He has become estranged from his wife, son, and others who do not share his drug-free lifestyle. Applicant has made other lifestyle changes that have bolstered his efforts to remain drug-free, and he intends to remain that way.

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.

Department Counsel argues that the Judge's factual finding that "[t]here is no indication that alcohol abstinence was a part of his probation" is unsupported by the record evidence. While the Judge's statement that there is no indication that there is evidence of an abstinence requirement is not correct, the Board nevertheless will not rule that the Judge was required, on the evidence in this record, to find that abstinence was a condition of Applicant's probation. Clearly, the one finding identified by Department Counsel is factually flawed in that there is *some* evidence in this record that arguably suggests that abstinence from alcohol was a condition of Applicant's probation. However, when reviewing a Judge's decision, the Board does not consider individual sentences in isolation from the rest of the decision; rather, the Board considers the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 at 4 (App. Bd. Apr. 4, 2003). The Judge made other findings on the issue in addition to the one cited by Department Counsel. In a footnote that addresses the issue of abstinence, the Judge cited to Applicant's hearing testimony and stated, "Applicant is unsure whether alcohol abstinence was part of the court or county

probation requirements.”³ Thus, the Judge acknowledges the presence of ambiguous evidence on the abstinence issue. The Judge’s finding regarding Applicant’s testimony is sustainable. There are also aspects of the documentary record that hint at a probation requirement, but fall short of establishing the fact to the point of requiring the Judge to make an affirmative finding regarding it. Applicant’s Probation Case Notes (Government Exhibit 4) indicate that Applicant was given an alcohol test and that he tested positive. The notes also contain a report of a narrative from Applicant to his caseworker wherein he stated he “wanted a drink bad” and admitted to drinking 6 beers on a specific date. Applicant also indicated his desire to “talk to someone” and get into treatment. The caseworker noted that she was advised to send Applicant to the parole office where someone would talk to him and get him started in treatment. The only other references to alcohol in the notes involved the mention of Applicant’s subsequent attendance at AA meetings. Nowhere in the notes is abstinence from alcohol listed as a condition of probation and nowhere in the notes is Applicant’s admitted drinking characterized as a violation of his probation. Likewise, on a Case Detail Sheet (Government Exhibit 3), which describes in some detail the disposition of Applicant’s case, including terms of probation, abstinence from alcohol is not indicated either as a general or special condition of probation. Given this record evidence, in conjunction with Applicant’s equivocal hearing testimony, the Board rules that the Judge’s finding that Applicant was not required to abstain from alcohol as a condition of his probation reflects a reasonable interpretation of the record evidence and is sustainable.

Whether the Record Supports the Judge’s Ultimate Conclusions

The Judge concluded that Department Counsel established its case regarding Guideline J, but also concluded that Applicant had mitigated the government’s security concerns by establishing lack of recency (Criminal Conduct Mitigating Condition 1) and by establishing clear evidence of rehabilitation (Criminal Conduct Mitigating Condition 6). Department Counsel argues that application of these mitigating conditions was arbitrary, capricious, and contrary to law. Department Counsel also contends that the Judge’s whole-person analysis is arbitrary and capricious because it engages in piecemeal analysis and fails to consider significant record evidence.

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*.

Department Counsel asserts that the Judge’s application of Criminal Conduct Mitigating Condition 1 was arbitrary, capricious, and contrary to law. Department Counsel’s arguments have mixed merit.

Regarding Criminal Conduct Mitigating Condition 1, Department Counsel argues that when the Judge applied it, he failed to take the entire adverse record into consideration. A considerable portion of Department Counsel’s argument here is based on the premise that Applicant’s more recent

³Decision at 4.

alcohol consumption was a violation of probation. Inasmuch as the Judge did not find that Applicant's drinking was a violation of probation and the Board has found that finding sustainable, Department Counsel's argument is, to a degree, undercut. However, Department Counsel also argues that in applying the mitigating condition, the Judge evaluated only the recency of the two allegations under Guideline J and ignored the record as a whole. While the Board is not convinced after a reading of the decision that the Judge ignored the record wholesale, he did fail to consider important evidence in evaluating lack of recency as a mitigating factor. Applicant admitted at the hearing that he used marijuana up to the time of his December 2002 conviction for drug possession. This revelation at the hearing established that, in addition to falsifying his June 21, 2004 security clearance application, Applicant apparently falsified a set of interrogatories (included in the record as Government Exhibit 2) on November 14, 2005 by indicating that he last used marijuana in September 2001.⁴ The Judge made a finding that Applicant had not used any illegal drugs since before his December 2, 2002 court date but did not reference the 2002 date or the discrepancy between Applicant's last admitted marijuana use and Applicant's answer on the 2005 interrogatory when applying the mitigating factor. Therefore, the Judge's assessment of the recency of Applicant's criminal conduct failed to take into consideration an additional likely instance of criminal activity (falsification, a violation of Title 18, United States Code, section 1001) that took place almost a year and a half after the June 2004 falsification that was evaluated by the Judge. Given evidence that strongly suggests an additional falsification in November 2005 and given the totality of the evidence, on this record it was not reasonable for the Judge to conclude that Applicant's criminal conduct was not recent.

A similar analysis pertains to Department Counsel's arguments regarding the Judge's application of Criminal Conduct Mitigating Condition 6. While Department Counsel's argument regarding a probation violation lacks merit, he persuasively argues that the record evidence does not support the Judge's conclusions concerning successful rehabilitation. As pointed out by Department Counsel, Applicant has a long history of drug abuse (his use of marijuana began in 1968), including instances of temporary decreases in drug use followed by increases (this includes a 2001 relapse where Applicant began smoking marijuana again and then, for the first time, began occasionally using cocaine). The record also establishes that Applicant used illegal drugs after his September 2001 arrest and up until his December 2002 conviction, willfully continuing this illegal conduct as long as possible, in part because Applicant understood that he would be tested for drugs once he was placed on probation. Department Counsel also aptly notes that Applicant has been on probation since his 2002 conviction and that his rehabilitation since that time has been largely dependant upon the controlling influences inherent in probation. The Judge does not address the fact of Applicant's continuing probation in his analysis of Criminal Conduct Mitigating Condition 6. Nothing in the Directive indicates that an applicant's current probationary status is a *per se* bar to a favorable security clearance decision. Nor is it a *per se* bar to the application of Criminal Conduct Mitigating Condition 6. However, the fact that Applicant will remain on probation until 2008 (Government

⁴In the case below, Department Counsel made no mention of this second apparent falsification, which was established only in light of Applicant's hearing testimony. However, the considerable discrepancy between Applicant's November 14, 2005 interrogatory response and his admissions during his hearing testimony became a matter of record at that point and was extremely important evidence in light of the other record evidence of falsification. When reaching conclusions concerning mitigation, the Judge cannot simply ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.,* ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004) ("... the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case").

Exhibit 3) cannot simply be disregarded. *See, e.g.*, DISCR Case No. 90-1115 at 3 (App. Bd. Oct. 6, 1992). In light of the requirement of Criminal Conduct Mitigating Condition 6 that there be “clear evidence” of successful rehabilitation, Applicant’s ongoing status of probation, where he can be expected to exhibit good behavior or face significant adverse consequences if he does not do so, significantly undercuts the Judge’s favorable application of Criminal Conduct Mitigating Condition 6.

Then there is the matter of Applicant’s June 2004 falsification and the apparent additional falsification of November 2005 that is established by the record evidence. The Judge’s analysis suffers from the same infirmity here that it did under Criminal Conduct Mitigating Condition 1 in that consideration of a likely second, more recent falsification, which established a pattern of conduct, is absent. The Judge also committed error when assigning mitigating value to Applicant’s expression of “contrition” regarding his June 2004 falsification. A more detailed analysis of the Judge’s consideration of Applicant’s contrition as a matter in mitigation is contained in succeeding paragraphs dealing with the Judge’s “whole-person” analysis. For purposes of analyzing Applicant’s contrition under Criminal Conduct Mitigating Condition 6, it is sufficient to point out that evaluating an expression of contrition without consideration of the apparent additional act of falsification in 2005 was error. These errors, combined with the matters discussed in the preceding paragraph, render the Judge’s conclusions regarding Criminal Conduct Mitigating Condition 6 arbitrary and capricious.

Department Counsel also contends that the Judge’s whole-person analysis is arbitrary and capricious because it engages in piecemeal analysis and fails to consider record evidence. Department Counsel’s argument has merit. In his whole-person analysis, the Judge emphasized Applicant’s behavior at the hearing—his openness about his past drug use and his life in general—and his testimony concerning rehabilitation. The Judge stressed the “‘whole person’ that [Applicant] is today.”⁵ These were matters that the Judge was obviously entitled to take into consideration when assessing the “whole-person.” However, a whole-person analysis is intended to be a commonsense evaluation of an applicant’s conduct and circumstances as a whole. *See, e.g.*, ISCR Case No. 00-0628 at 5-6 (App. Bd. Feb. 24, 2003). In focusing on Applicant’s conduct at the hearing along with his current attitudes and demeanor, the Judge gave insufficient weight to the portions of the record dealing with Applicant’s overall patterns of drug use and falsification. Indeed, regarding Applicant’s entire history, the Judge’s whole-person analysis suffers from the same errors of omission that exist in his analysis of Criminal Conduct Mitigating Conditions 1 and 6.

Another significant component of the Judge’s whole-person analysis was his conclusion that Applicant’s June 2004 falsification was mitigated by his “contrition regarding his SF-86 answers.” This conclusion warrants a separate, detailed discussion.

When analyzing the case under Guideline E (Personal Conduct), the Judge concluded that Applicant deliberately falsified material facts regarding drug use on his SF-86, and that Personal

⁵Decision at 10.

Conduct Disqualifying Condition 2⁶ applied.⁷ The Judge concluded that none of the Personal Conduct Mitigating Conditions applied. The Judge then stated that Applicant now appreciates that such conduct was wrong and expresses contrition. Under his whole-person analysis, the Judge repeated his conclusion that Applicant's contrition was a mitigating factor. Given his conclusion that none of the Personal Conduct Mitigating Conditions applied, Applicant's contrition and admission of wrongdoing were the only bases for the Judge's conclusion that Applicant's falsification had been mitigated. Using these factors, the Judge entered formal findings in Applicant's favor regarding the June 2004 falsification under both Guideline J and Guideline E.

Webster's Ninth New Collegiate Dictionary defines the act of being contrite as "grieving and penitent for sin or shortcoming." A review of the record evidence in this case does not support the Judge's finding that Applicant was contrite regarding his false answer to the question about drugs on his June 2004 security clearance application. When discussing his false answer, Applicant indicated only that he admitted the answer was false.⁸ There are no expressions of regret, remorse, or apology in the record on the part of Applicant regarding his false answer. Notwithstanding the deference the Board must give to a Judge's findings of fact or conclusions concerning an Applicant's hearing demeanor, in this case there is insufficient objective testimonial evidence in the record to support the Judge's finding that Applicant demonstrated anguish over his answer and contrition for having answered the question in the negative. Even if the record had contained evidence of contrition sufficient to support the Judge's finding, that evidence would have been of limited probative value. While sincere expressions of remorse are the first steps on the road to rehabilitation, they are not evidence that demonstrates a track record of reform and rehabilitation. *See, e.g.*, ISCR case No. 94-1109 at 4 (App. Bd. Jan. 31, 1996).

Closely related to—but distinct from—expressions of contrition are admissions of wrongdoing. There is record evidence to support the Judge's finding that Applicant has admitted wrongdoing with regard to the falsification. An applicant's acknowledgment of the wrongfulness of his or her past conduct, if found to be credible, has some probative value with respect to a Judge's consideration of whether an applicant has demonstrated reform and rehabilitation sufficient to mitigate a falsification. However, as in the case of expressions of remorse and regret, such an acknowledgment is merely a first step and is likewise of limited probative value. ISCR Case No. 98-0424 at 3 (App. Bd. Jul. 16, 1999). Furthermore, Applicant's acknowledgment of the wrongfulness of his past conduct cannot be viewed in isolation, but must be considered in light of the record evidence as a whole, including evidence that fairly detracts from it. *See Directive, Additional Procedural Guidance, Item 32.a.* Given the totality of the record evidence in this case, Applicant's mere admission of wrongdoing is insufficient to mitigate his June 2004 falsification.

⁶"The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

⁷SOR allegation 3.a. The SOR also alleged that Applicant falsified his answer to another question on his June 21, 2004 security clearance application concerning alcohol-related treatment (allegation 3.b.). The Judge found that Applicant did not engage in falsification as stated in allegation 3.b. Department Counsel did not appeal the Judge's finding regarding this allegation.

⁸Hearing Transcript at 37.

Department Counsel has met its burden of demonstrating harmful error that warrants reversal.

Order

The Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board