

KEYWORD: Guideline E

DIGEST: The Board notes the paucity of record evidence in the case, especially in support of Applicant’s position. His presentation consists principally of promises of future good conduct which are less probative than actual record evidence. Given the Judge’s own conclusions that Applicant had an “intent to deceive” and committed “egregious and serious” conduct, such uncorroborated promises do not support a conclusion that Applicant has met his burden of persuasion. Favorable decision reversed.

CASENO: 05-16046.a1

DATE: 09/18/2007

DATE: September 18, 2007

In Re:)	
)	
-----)	ISCR Case No. 05-16046
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 28, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 29, 2007, after the hearing, Administrative Judge Thomas M. Crean 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 raised the following issues on appeal: whether the Judge erred in applying Guideline E Mitigating Condition (PCMC) 5¹; and whether the Judge erred in his whole person analysis. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: In June 2002, while on a business trip for a former employer, Applicant became intoxicated and left his hotel room in his underwear. He was arrested for, and convicted of, “open lewdness,” a misdemeanor offense. After the offense, but prior to the conviction, Applicant attended alcohol counseling and Alcoholics Anonymous meetings. This is the only criminal or alcohol-related offense by Applicant.

“Applicant never completed a security clearance application until he completed one for the defense contractor in January 2005. In a moment of quick indecision and haste, he answered ‘NO’ to question 24 asking if he had ever been charged with or convicted of an offense related to alcohol or drugs. Applicant also answered ‘NO’ to question 30 asking if in the last seven years the use of alcoholic beverages resulted in any alcohol- related treatment or counseling. Applicant deliberately responded ‘NO’ to both questions even though he knew he had been convicted of an alcohol-related offense and received alcohol-related counseling or treatment. He was embarrassed by the incident and did not want his company to learn of it, since it may affect his job. His wife, son, and family physician know of the incident. He does not believe he can be blackmailed about the offense since his family, the people that mean the most to him, know of the incident.” Decision at 3.

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.

¹Directive ¶ E2,A5.1.3.5. “The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress...”

Department Counsel does not challenge the Judge's findings, adopting them for purposes of his brief on appeal. Therefore, the Judge's findings are not at issue in this case, and we rely upon them in deciding the issues raised by Department Counsel. *See* ISCR Case No. 03-11765 at 3 (App. Bd. Apr. 11, 2005).

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. 518, 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.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 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).

Regarding the first issue, the Judge apparently concluded that PCMC 5 had some pertinence to Applicant's case, insofar as those closest to him are aware of the underlying misconduct for which he was convicted, thereby reducing his vulnerability to coercion, exploitation, or duress on that account. Decision at 5. However, the Judge explicitly stated that no mitigating conditions *per se* would excuse Applicant's falsification of his security clearance questionnaire. Decision at 6. Department Counsel's argument that the Judge sought to clear Applicant on the basis of PCMC 5, therefore, appears to rest upon a misreading of the Judge's decision. We resolve the first issue adversely to the Government.

The crucial issue in this case is the second one on appeal, whether the Judge's whole person analysis is arbitrary, capricious, or contrary to law. We acknowledge that the circumstances of Applicant's single arrest were not of sufficient security concern to serve as an independent basis for

denying Applicant a clearance under Guidelines G or J.² We also acknowledge Applicant's testimony that he would divulge any required information in the future.³

On the other hand, the Board notes the paucity of record evidence in this case, especially in support of Applicant's position. His presentation consists principally of promises of future good conduct, which are less probative than actual record evidence. *See, e. g.*, ISCR Case No. 02-29884 at 2 (App. Bd. Mar. 16, 2006); ISCR Case No. 02-31872 at 4 (App. Bd. May 24, 2005); ISCR Case No. 03-14542 at 4 (App. Bd. Apr. 26, 2005); ISCR Case No. 03-02097 at 5 (App. Bd. Mar. 17, 2005); ISCR Case No. 02-24743 at 4 (App. Bd. Jun. 15, 2004). In this case the Judge's sustainable findings and the relatively slender record establish that Applicant was a person of mature years at the time of the falsification; he committed the falsification relatively recently with respect to his current SCA; and the falsification was for the purposes of protecting his job and obtaining a clearance.⁴ The Judge himself concluded that Applicant's falsification was done "with an intent to deceive" and characterized it as "egregious and serious." Decision at 5-6. Given this record evidence, and weighing that evidence against Applicant's uncorroborated promise of future good behavior, the record does not support the conclusion that Applicant has met his burden of persuasion that it is "clearly consistent with the interests of national security" for him to have a security clearance. *Egan*, 484 U.S. at 528. We conclude that the Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law.

²Concerning Guideline G, the incident was not part of a pattern. *See* Directive ¶ E2A7.1.3.1. It occurred a number of years prior to the issuances of the SOR. *See* Directive ¶ E2.A7.1.3.2. Applicant's subsequent behavior with alcohol indicates rehabilitation. *See* Directive ¶ E2.A7.1.3.3. As regards Guideline J, it was neither a "single serious crime" nor were there "multiple lesser offenses." *See* Directive ¶ E2.A10.1.2.2. There was no pattern of criminal activity. *See* Directive ¶ E2.A10.1.1. The offense was an isolated incident that was not recent. *See* Directive ¶¶ E2.A10.1.3.1 and E2.A10.1.3.2.

³Question by Department Counsel: So you understand the concern that . . . if you're not answering questions truthfully on . . . the security clearance application and you become involved in a mishandling of classified information, there's a need to go and report that, although that could be embarrassing?

Applicant: Yes, I understand.

Question: . . . what can you tell the Judge that would lead him to conclude that you could properly handle that, in spite of the fact that you falsified your security clearance application?

Applicant: . . . I've learned a lot . . . about this process, and I've also learned a lot about the seriousness of the whole Defense effort. Not to make light, but I did work in the commercial steel industry, which is totally different . . . [a]nd having jumped immediately into a Defense position . . . I understand the seriousness and I would fully . . . divulge any information in the future that's required. Tr. at 17-18.

⁴Applicant: "I looked at [the question] and I went, "Oh. Uh, gee. I'd better say no, because if I don't, I'll - you know - I'll lose my job or I won't get a security clearance.'" Tr. at 22.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board