

KEYWORD: Guideline F; Guideline E

DIGEST: There is significant record evidence contrary to the Judge’s finding that Applicant did not falsify his security clearance application when he denied ever receiving other than an honorable discharge from the military. The Judge’s application of two mitigating conditions for Applicant’s other false statements is not sustainable give the record in this case. Favorable decision reversed.

CASENO: 06-18942.a1

DATE: 03/14/2008

DATE: March 14, 2008

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| Applicant for Security Clearance |) | |
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 16, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 28, 2007, after the hearing, Administrative Judge Christopher Graham 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's findings about certain of Applicant's debts are supported by record evidence; whether the Judge's conclusion that Applicant mitigated the allegation concerning misuse of a corporate credit card is arbitrary and capricious; whether the Judge's conclusion that Applicant did not provide knowingly false information concerning his military discharge failed to take into account contrary record evidence; and whether the Judge's conclusion that Applicant's Guideline E security concerns had been mitigated was arbitrary and capricious. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a senior engineer employed by a defense contractor. Applicant has amassed numerous unpaid debts, although he has entered into payment plans with his creditors and, in addition, he has received credit counseling.

Question 17 of the Security Clearance Application (SCA), dated December 6, 2006, inquired if Applicant had ever received less than an honorable discharge from the military. Applicant answered "no," even though he had previously been discharged from the Marine Corps Reserve with an Under Other Than Honorable Conditions (UOTHC) discharge.¹

While working for a previous employer, Applicant had used a company credit card for personal expenses, specifically traveling to visit his mother, who was ill. This was a violation of company rules and the employer fired Applicant. In an interview with a Special Agent (SA) of the Office of Personnel Management (OPM), Applicant stated that he had spent only \$500 on the credit card, though in truth the amount was between \$2000 and \$3000. Applicant also failed to list seven bad debts in responding to a SCA question about financial delinquencies.

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 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 Judge's findings, we are required to give deference to the

¹An Under Other than Honorable Conditions (formerly called Undesirable) Discharge is the lowest service characterization possible for administrative discharges from the military. The other two are Honorable and Under Honorable Conditions. See 32 C.F.R. § 724.109(a).

Judge's credibility determinations. Directive ¶ E3.1.32.1. Department Counsel avers that the Judge's decision did not take into account significant record evidence. The Board will address this matter in the discussion below.

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 the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Whether the Judge erred in concluding that Applicant did not falsify Question 17 of his Security Clearance Application (SCA).

As stated above, Question 17 of the SCA asked, "Have you ever received other than an honorable discharge from the military," to which Applicant answered "no." In fact Applicant had been discharged from the Marine Reserve with a UOTHC. The Judge accepted Applicant's explanation that he did not know he had received such a discharge, having left the Marines "without

making sure that all of his paperwork was in order.”² Department Counsel argues that the Judge’s analysis fails to take into account contrary record evidence. The Board finds Department Counsel’s argument persuasive.

There is significant evidence contrary to the Judge’s decision on this issue, the record containing a number of documents which demonstrate that Applicant was aware of his service characterization at the time he submitted his SCA. For example, in April 2005 Applicant sought to become an officer in a state National Guard. In furtherance of this goal Applicant submitted a memorandum to the state’s Adjutant General, dated April 13, 2005, urging his acceptance into the Guard despite his having received a UOTHC from the Marines.³ Another document, Applicant’s response to the SOR, avers that he was advised by the National Guard chain of command in August 2006 that he had received such a discharge.⁴ In addition, Applicant’s evidence at the hearing included a letter of recommendation by a National Guard Official recommending a upgrade of Applicant’s discharge from a UOTHC to a General Discharge Under Honorable Conditions. On its face it reflects that Applicant received a copy of the letter, raising the reasonable implication that Applicant was aware of its contents as to his discharge status.⁵ Yet another document, a memorandum from an official in the Marine Reserve to the Commandant of the Marine Corps, dated May 5, 1994, states that Applicant had been discharged UOTHC and that he had waived his entitlement to an administrative hearing on the matter.⁶ Although these documents do not contain consistent information as to the precise date upon which Applicant was advised of his UOTHC, their clear import is that he was so advised well prior to his submission of the SCA in December 2006, significantly detracting from Applicant’s claim of ignorance as to his service characterization. The Judge did not discuss these pieces of contrary evidence, nor did he seriously evaluate the credibility of Applicant’s various explanations.⁷ The Judge’s decision failed to examine relevant record

²Decision at 5.

³This memo is included in Government Exhibit (GE) 6, Memorandum for Recruiting and Retention Office. It reads in pertinent part: “It was only after I recently was trying to enlist in the Army National Guard that I discovered that I had been separated from the USMCR under other than honorable conditions due to unsatisfactory participation.”

⁴Answer to SOR at 2: “In August 2006 I received notice from my OCS chain of command that the discharge I had received from the U.S. Marine Corps was Other than Honorable for unsatisfactory performance. With the help of my chain of command, I immediately sent appeals paperwork to the U.S. Department of the Navy, along with seven letters of recommendation from U.S. Army officers in my OCS chain of command on my behalf. This appeal is currently pending.”

⁵Applicant Exhibit (AE) A, Memorandum for Recommendation of Commissioning.

⁶GE 5 at 7.

⁷Concerning the memo in GE 6, Applicant testified that it was written by a recruiter and that he signed it without reading it carefully. Tr. at 30. Regarding the statement in GE 5 that Applicant had waived his right to a discharge board prior to having received a UOTHC, he testified, “Your Honor, I do not recall waiving any of my rights as part of my separation from the Marine Corps.” Tr. at 98. Applicant has presented no evidence to rebut the presumption of good faith and regularity in the processing of his discharge. See ISCR Case No. 02-10446 at 3 (App. Bd. Apr. 28, 2005). Applicant’s claim not to remember essential details of so significant an aspect of his military career would cause a reasonable person to question his credibility. The Judge does not address this, however. The Judge also found that “[e]very time [Applicant] requested a copy of his form DD 214 [Certificate of Release form Active Duty] from military personnel records, the form states he received an honorable discharge.” Decision at 5. From this the Judge concluded that Applicant was reasonably mistaken as to his service characterization. However, the record contains only one DD

evidence and failed to provide a satisfactory explanation for its conclusion. Accordingly, the Board holds that the Judge's conclusion that Applicant did not knowingly falsify his answer to Question 17 is error.

Whether the Judge erred in concluding that Applicant's false statement about a credit card debt had been mitigated.

The SOR alleged that Applicant had improperly used a company credit card for personal expenses and had made a false statement as to the amount of those expenses. In an interview with a special investigator Applicant stated that the amount of the personal charges on the credit card was \$500. In reality, the extent of these charges was much more, the SOR alleging over \$8000, Applicant admitting to \$2000 to \$3000. Applicant testified that he purposely understated the amount of these improper charges due to "grave embarrassment." He stated that, immediately following the interview, he regretted the statement, although he acknowledged that he did not correct it in a subsequent interview.⁸ The Judge concluded that this misconduct was mitigated insofar as "he disclosed his improper use of the credit card, that he was fired by his employer, even though the use was in an unusual and stressful situation. The fact is he did not remember the exact amount. He guessed at it. It was too low, but he did disclose the series of incidents that caused the debt."⁹ The Judge concluded that Applicant had mitigated the security concern raised by this false statement, under Personal Conduct Mitigating Conditions (PCMC) 17(c) and (d).

Department Counsel persuasively argues that the Judge's application of these mitigating conditions is in error. The former mitigates Personal Conduct security concerns when "the offense is so minor, or so much time as passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgement."¹⁰ The Judge's decision does not appear to take into account significant contrary record evidence. The Judge does not discuss how it is that a false statement made after he submitted the SCA is not recent, nor how is it that one made for purposes of obtaining a security clearance is minor. Neither does the Judge explain how it is that this particular false statement was unlikely to recur, insofar as Applicant, subsequent to his interview, repeated it in his answer to the SOR. More significantly, the Judge does not address the contrast between Applicant's SOR answer and his testimony on this particular security concern. He does not attempt to explain why this inconsistency is merely apparent rather than actual, or why, even if actual, it is of limited weight in evaluating the credibility of Applicant's testimony at the hearing.

214 evidencing an honorable discharge for Applicant, one issued in 1991 upon his release from active duty into the reserves. There is no copy of a DD 214 purporting to show that his release *from the reserves in 1994* was honorable. Furthermore, this DD 214 was received by Applicant from the National Personnel Records Center in 2007, after he had submitted his SCA. There are no documents in the record to buttress Applicant's claim that, when he completed the SCA in December 2006, he honestly believed he had never received less than an honorable discharge from the U.S. military.

⁸Tr. at 17. Compare this testimony with Applicant's answer to the SOR: "I deny that I deliberately falsified information during my interview with a Special Agent of [OPM] . . . I did not purposefully conceal any information that I knew at that time."

⁹Decision at 9-10.

¹⁰Directive ¶ E2.17(c).

All in all, the Judge’s explanation for his favorable application of this PCMC 17(c) runs contrary to the record evidence and, on the facts of this case, is not sustainable.

PCMC 17(d) mitigates Guideline E concerns when “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.”¹¹ As regards this mitigating condition, the Judge gave credit to Applicant for having admitted to his employer that he misused his company credit card. However, the Guideline E concerns arising out of this misconduct are not limited to Applicant’s misuse of the card but extend to his subsequent false statement to the investigator as to the amount of the improper charges. The Judge does not explain why Applicant’s relatively belated acknowledgment at the hearing that he significantly understated this amount satisfies the first clause of PCMC 17(d). Furthermore, when viewed in conjunction with Applicant’s false statement about his military discharge, it is not reasonable to conclude that Applicant has demonstrated rehabilitation. Accordingly, the Board concludes that the Judge’s favorable application of the Guideline E mitigating conditions to Applicant’s false statement about his military discharge and to his false statement about the amount of his misuse of the credit card, is arbitrary, capricious, and contrary to law. Examining these incidents of misconduct in light of the entire record, the Board concludes that the record does not sustain a conclusion that Applicant has met his burden of persuasion that it is “clearly consistent with the interests of the national security” for him to have a clearance. *Egan*, 484 at 528. Accordingly, the Board holds that the Judge’s favorable security clearance decision under Guideline E is arbitrary, capricious, and contrary to law. In light of this holding, the Board need not address Department Counsel’s remaining assignments of error.

Order

The Judge’s favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

¹¹Directive ¶ E2.17(d).

