

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant’s descriptions of his felony arrests are neither consistent with the conduct of a reasonable person nor are they credible. Also, Applicant failed to notify his employer of the most recent misconduct, as he was required to do. The Judge’s analysis does not address these incidents as a cumulative whole. The record, viewed as a whole, does not support the Judge’s favorable decision. Favorable decision reversed.

CASENO: 12-04813.a1

DATE: 07/31/2015

DATE: July 31, 2015

In Re:)	
)	
-----)	ISCR Case No. 12-04813
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 13, 2014, DoD 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On April 9, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales

granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decisions was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the Judge's decision.

The Judge's Findings of Fact

Applicant works for a Defense contractor, a job he has held since 2000. He has three children. He received a security clearance in late 2010. Applicant's SOR alleges several incidents of criminal conduct. In early 2008, he got into an argument with his girlfriend. He stopped the car he was driving, got out, and walked through an apartment complex. At the same time, the police were investigating a complaint of burglary. They ordered Applicant to stay where he was, but Applicant ignored them. When they questioned him about the burglary, he refused to answer. The police arrested Applicant for burglary (a felony) and for obstructing justice. The burglary charge was later dropped to trespassing. Applicant pled guilty to the charges as amended and was sentenced to twelve months confinement (suspended), unsupervised probation to two years, and to a fine.

Later that year, Applicant got into another dispute with his girlfriend. Applicant states that he pushed her into a television, breaking it, although she reported that he had kicked the television screen. Applicant left, taking her car keys. Applicant was charged with trespass, petty larceny, and damaging property. The charges were ultimately dismissed, Applicant paying \$91 in costs.

In late 2010, Applicant was driving with a relative to a friend's house. Five or six police cars stopped them, ostensibly for a broken brake light. Apparently a confidential informant had reported that a large quantity of cocaine was being delivered to the house. As the police approached the car, the relative fled, though he was later caught. Applicant left the car and began to walk away. A search of a trash can near where Applicant had been standing was found to contain two grams of cocaine.

Applicant did not report the 2010 incident to his employer, despite a security policy that required him to do so. Applicant's employer gave him a "Final Written Warning," stating that he had held a clearance for several years and had completed security training which discussed, among other things, employee responsibility concerning adverse information.

When he had completed his security clearance application (SCA) earlier in 2010, Applicant did not disclose his 2008 arrest for burglary. However, Applicant did state that he had been arrested for trespassing and, later in the year, for grand larceny and destruction of property, mischaracterizing the larceny charge. Applicant claimed that his failure to list the burglary charge was an honest mistake, in that he had assumed the question was limited to convictions.

Applicant acknowledged making mistakes and in being in situations where his judgment was not at its best. "He is not proud of his actions, and he has made efforts to remove himself from all volatile situations that could negatively impact him." Decision at 5. He has broken up with his

girlfriend and is active in the community.

The Judge's Analysis

The Judge found that Applicant's failure to notify his employer of his cocaine arrest was deliberate. However, he concluded that his omission of the burglary arrest was not. He cited to evidence that Applicant had disclosed his arrest on the date in question and identified another as a felony, albeit erroneously. Under the circumstances, the Judge concluded that Applicant did not intend to deceive when he omitted the burglary. The Judge also found that Applicant's circumstances raised concerns under Guideline J. In concluding that he had mitigated the concerns raised under Guidelines E and J, the Judge cited to the length of time that had elapsed since his last incident of security significant conduct, evidence that he had changed his lifestyle since the time in question, and evidence of his community involvement, which he concluded demonstrated rehabilitation.

Discussion

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 produces evidence raising security concerns, the burden falls upon the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel has challenged the Judge's finding that Applicant did not deliberately omit his 2008 felony arrest from his subsequent SCA. After examining this issue in light of the record as a whole, we conclude that the Judge's findings and analysis are sustainable.

However, we reach different conclusions regarding the other issues raised in the Appeal Brief. Department Counsel argues that the record, viewed as a whole, does not support the Judge's favorable decision. We note findings of fact, and/or record evidence, of the following: (1) Applicant was arrested for felony burglary and was ultimately convicted of obstruction of justice by refusing to follow police orders or answer lawful questions; (2) Applicant was convicted of larceny and destruction of property, resulting from his having taken his girlfriend's car keys after he shoved her against a television set, breaking it; (3) Applicant was arrested for possession of cocaine, soon after his most recent security clearance was approved; (4) Applicant's descriptions of his felony arrests

are neither consistent with the conduct of a reasonable person nor are they credible.¹ and (5) Applicant deliberately failed to notify his employer of the most recent misconduct. As Department Counsel contends, the Judge's analysis does not address these incidents as a cumulative whole. *See, e.g.*, ISCR Case No. 00-0628 at 6 (App. Bd. Feb. 24, 2003) for the proposition that a Judge "must assess the totality of an applicant's conduct and circumstances . . . not just consider [them] in a piecemeal manner." In the case before us, the Judge's analysis leaves unaddressed the extent to which this conduct continues to cast doubt upon Applicant's willingness to comply with rules and regulations, matters crucial to a clearance adjudication. *See* Directive, Enclosure 2 ¶ 30: Criminal conduct "[b]y its very nature . . . calls into question a person's ability or willingness to comply with laws, rules and regulations."

Department Counsel argues that Applicant's case for mitigation rests principally on his uncorroborated claims of reform and rehabilitation. Therefore, the Judge's credibility determination is central to a proper resolution of the issues that Department Counsel has raised. Normally, we give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. However, when, as here, an applicant has chosen a decision on the written record, the Judge's credibility determinations are not entitled to the same deference, insofar as the Judge had no ability to observe the applicant's demeanor while testifying. *See, e.g.*, ISCR Case No. 04-12680 at 3 (App. Bd. May 21, 2007). In the case before us, and as Department Counsel argues, Applicant has not presented a credible case for mitigation with the candor expected of persons who hold security clearances. In an earlier case, a Hearing Office Judge stated that it was highly improbable that the applicant had been the victim of accidental circumstances resulting in criminal charges on two separate occasions. "It is simply too difficult to believe that [the applicant] . . . had such bad luck, not once but twice." ISCR Case No. 07-04390 at 5 (A.J. Feb. 26, 2008). Similarly under the facts of this case, the inherent improbabilities in Applicant's presentation, along with evidence that Applicant has more than once deliberately failed to comply with rules and regulations, undermine the Judge's favorable conclusions about Applicant's credibility and diminish the extent to which they are entitled to even the limited deference associated with decisions on the written record.

Moreover, even if one were to accept, *arguendo*, the Judge's apparent conclusion that Applicant's criminal history is less serious than it appears, a reasonable person would still conclude that the Judge's mitigation analysis is deficient, especially regarding Applicant's failure to disclose his cocaine arrest to his employer. Willingness to advise an employer of one's own security significant conduct or circumstances is a signal responsibility of those with access to classified information. Failure to comply with his duty raises concerns about the person's fitness for a clearance. *See, e.g.*, ISCR Case No. 11-03294 at 2 (App. Bd. Oct. 24, 2012) (Failure to notify an employer of criminal charges is a significant factor in a clearance decision). In the case before us, the lack of evidence of further criminal actions, accompanied by evidence of Applicant's community involvement, do not begin to mitigate concerns arising from what the Judge himself described as a "clear cut" incident of malfeasance. Decision at 9. That is, Applicant was willing to put his own interests ahead of the need of his employer, and the DoD, for full and complete information about

¹"Applicant's uncorroborated explanations for his arrests and the bizarre circumstances he attributes to them (i.e. he just happened to be walking in the vicinity of a burglary and then refused to stop and was uncooperative with police. Or, his car just happened to be stopped by five police cars and, after he fled, cocaine just happened to be found nearby where he was arrested) def[y] common sense and [are] unworthy of credibility." Appeal Brief at 9.

matters directly relating to Applicant's continued access to national secrets. The evidence upon which the Judge relied is not sufficient to show that Applicant is no longer willing to neglect this important duty, when viewed in light of the standard set forth in *Egan, supra*.

To sum up, Applicant engaged in a pattern of criminal conduct that impugned his judgment and his willingness to abide by rules and regulations; he deliberately failed to inform his employer of his cocaine arrest, impugning his willingness to comply with security rules; and he presented his case in a way that further undermines his credibility. The record does not support the Judge's conclusion that all doubt about Applicant's fitness for a clearance has been resolved in favor of national security, as the Directive requires. Directive, Enclosure 2 ¶ 2(b). As it stands, the Judge's decision fails to consider important aspects of the case and offers an explanation for the decision that runs contrary to the weight of the record evidence. ISCR Case No. 03-22861, *supra*.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, 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