KEYWORD: Guideline J; Guideline H; Guideline E; Guideline G; Guideline F

DIGEST: The record contains admissions and other substantial evidence of more than a decade of criminal conduct, including some violent incidents and many involving drugs and alcohol. Favorable decision reversed.

CASENO: 13-00596.a1

DATE: 06/26/2015

DATE: June 26, 2015

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 12, 2014, DoD 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), Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 20, 2015, after the hearing, 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 decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant works for a Defense contractor, a position he has held since 2008. He holds both bachelor's and master's degrees. His SOR contains numerous allegations under the Guidelines listed above. Applicant admitted all of the allegations, either in his response to the SOR or at the hearing.

In 1999, Applicant was at a fraternity party. He was grabbed from behind by a policeman and thrown to the ground. Charged with disorderly conduct and resisting arrest, Applicant was acquitted at trial. Later that year, a student sold Applicant some marijuana. He subsequently asked Applicant if Applicant could provide him with LSD, which Applicant did on four different occasions. This person turned out to be a police informant. "Applicant's public defender failed to argue in Applicant's behalf, and, afraid of prison, Applicant ended up pleading guilty to a lesser offense of trafficking in drugs (LSD), 4th degree felonies." Decision at 4.

In 2000, Applicant was arrested and charged with unauthorized alcohol possession and possession of drug paraphernalia. He was convicted of the alcohol offense and the drug charge was dismissed. In 2003, Applicant was driving through an alley, where he "made contact with a set of cement steps." *Id*. An officer pulled Applicant over and ordered him to remain in his car with the engine turned off. After an hour, Applicant left the car to ask if he could turn on the heater, and the officer tackled him. Applicant was charged with leaving the scene of an accident, disregard of the safety of others, "squealing tires," and resisting arrest. *Id.* He was convicted of resisting arrest or failure to comply with a police order.

The next year, Applicant and some friends entered an alley to smoke marijuana. A police search uncovered marijuana in Applicant's vehicle. In early 2005, Applicant was preparing to go on a trip. A neighbor complained that Applicant's music was too loud and called the police. When they arrived, the police asked Applicant to step outside. He said that he would do so as soon as he put on his shoes and turned on the porch light. When Applicant reached for the switch, the police knocked down his door, entered his apartment without a warrant, and beat Applicant with night sticks. After being treated in a hospital, Applicant was taken to jail. He was charged with felony assault and with disturbing the quiet and convicted of misdemeanor assault.

A month later, Applicant and a friend were at a bar. The bar owner had Applicant escorted outside of the bar. Someone pushed Applicant to the ground and other patrons started chasing Applicant. In retaliation, Applicant threw rocks at his pursuers, one rock hitting a car window and another a patron's ankle. Applicant was charged with misdemeanor assault, aggravated menacing, and misdemeanor criminal damaging. Denied bail, Applicant was convicted of assault and criminal mischief. His sentence included an order to obtain mental health counseling and attend Alcoholics Anonymous.

In 2006, Applicant was driving to work when another car cut him off. The occupants of both vehicles "exchanged gestures," and, after they pulled into a parking lot, Applicant's vehicle lightly struck the other. *Id*. at 6. A passenger in the other car, clearly drunk, threatened Applicant, who left the scene. He was later arrested for driving with a suspended license, no operator license, and leaving the scene of an accident.[1] He was convicted of the last charge.

In 2008, Applicant consumed alcohol at a friend's home. On the following day, after sleeping until 11 p.m., he woke up and drove home. A policeman pulled Applicant over and, suspecting intoxication, administered a field sobriety test and a breathalyzer. Applicant's blood alcohol level was .08. He was convicted of DWI. Among other things, he was required to attend an alcohol safety class.

In March 2010, Applicant came home after a night of drinking. He noticed that his roommate had left dirty dishes lying about. Angered, Applicant knocked some of the dishes to the floor. His roommate, who was in her room with her boyfriend, called the police. When they arrived, Applicant refused to let them in, telling them that if they tried to do so he would "blow their heads off." *Id.* at 7. Applicant was arrested and charged with communicating threats, assault on a female, injury to personal property, and probation violation. Applicant denied that he had ever struck his roommate.

Applicant started drinking at age 14. Despite attendance at various alcohol-related programs, Applicant did not believe that he had a problem with alcohol. In June 2011, he was required to seek treatment. He completed a 10 hour DUI program and a 20 hour program resulting from the 2008 incident. Applicant now abstains from consuming alcohol. Applicant also started using marijuana when he was in high school. He used it off and on, with periods of abstinence such as that following his convicted for LSD trafficking. He used it from April 2002 until March 2005 and again from September 2007 until January 2008. He has abstained from marijuana use since 2008. He states that his lifestyle has changed. He is more active with his nephews, with church activities, and with science projects. He avoids associating with persons who use drugs.

Following his 2010 conviction for assault, Applicant was required to complete a treatment program. He called 10 to 15 treatment centers, advising that he had not been drinking heavily and no longer used drugs. His insurance company refused to cover the treatment because there was no

[1]In his 2009 Clearance Interview, included in Government Exhibit (GE) 4, Answers to Interrogatories, dated August 11, 2009, Applicant claimed "that he was set up" by the passenger in the other car.

medical necessity to do so. Fearful that he would be convicted of a probation violation, Applicant decided "he had to do what was necessary, such as exaggerate his drug and alcohol use." *Id*. at 9. Accordingly, he told the intake interviewer that he consumed alcohol and smoked marijuana every day. He told the attending physician that he used marijuana daily, most recently the day before the interview. He also stated that he used cocaine rarely, as well as opiates, benzodiazepine, LSD, PCP, MDMA, and spray paint. His urinalysis test came back negative. He was successfully discharged from the program. His discharge diagnosis included cannabis dependence, alcohol dependence, cocaine abuse, opiate abuse, hallucinogen abuse (partial remission) benzodiazepine abuse (full remission), inhalant abuse (sustained full remission), and nicotine dependence. He was required to attend AA. His prognosis was considered "fair to good," depending on his compliance with a continuing care plan. Applicant recited the serenity prayer from memory. *Id*. at 10.

In completing his 2009 security clearance application (SCA), Applicant stated that he had used marijuana from April 2002 until March 2005, certifying that his response was "true, complete, and correct" to the best of his knowledge. In 2013 he completed his current SCA, in which he admitted his use in 2007 and 2008. Applicant denied that he intended to falsify his 2009 SCA, claiming that he had forgotten his latest period of marijuana use. In a subsequent 2009 interview, he stated that he had used marijuana from 2002 until 2005. The Judge found that this was not a false statement, in that Applicant was not attempting to disclose his last use, only to acknowledge his use between the two years cited. Applicant denied that he had intended to falsify his answer, again claiming that he had forgotten about the more recent misconduct. In answering DOHA interrogatories, Applicant stated that he had used marijuana from 1994 until 2000 and from 2002 until 2005. The Judge found that Applicant was not representing to DOHA that 2005 was his last use, only that he had used the drug during that period. Applicant denied intending to falsify his interrogatory answer. He stated that it was an accidental mistake.

Applicant enjoys an excellent reputation for his work performance. He also is lauded for his personal qualities, such as cheerfulness and optimism. His co-workers commend him for his professionalism. A person who has known Applicant for many years commends his ability to grow from a young kid making mistakes to someone who is an asset to the community and to his employer.

The Judge's Analysis

In concluding that Applicant had mitigated the security concerns in his case, the Judge stated that Applicant's extensive criminal conduct was affected by his difficult childhood and by his presence in an academic environment that encouraged drinking and drug use. The Judge stated that, after he entered the work force, Applicant established a new paradigm for himself. The Judge stated that Applicant had refrained from drug use since 2008 and from alcohol since 2011, with the result that he had engaged in no more criminal conduct. The Judge concluded that Applicant had demonstrated rehabilitation. In clearing Applicant under Guideline H, the Judge noted his completion of the 2011 treatment program with a "fair to good" prognosis. The Judge concluded that Applicant's representations to his treatment facility of extensive drug use were not true, as Applicant testified. The Judge found the evidence to be inconsistent and that Applicant has passed

a urinalysis, which would belie marijuana use only a day prior. The Judge noted Applicant's evidence that he no longer associates with persons who use drugs. In his Guideline G analysis, the Judge cited to Applicant's having participated in AA and to his claim of abstention from alcohol for over three and one-half years. Under Guideline E, the Judge found Applicant's demeanor to be one of candor and believability. As in his findings of fact, the Judge stated that Applicant's interview and interrogatory responses were not objectively false. The Judge stated that Applicant's omissions were simply mistakes. He stated that Applicant had furnished detailed accounts of his marijuana use, sufficient to put the DoD on notice that drug use was an issue in this case. Therefore, the Judge concluded, Applicant had no reason deliberately to omit his most recent uses.

Discussion

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). Applicant bears the burden of persuasion to rebut or mitigate the security concerns arising from his conduct or circumstances. *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 argues that the Judge's decision is impaired by a faulty credibility determination. He argues that in making his credibility determination, the Judge did not address significant record evidence that diminished the extent to which Applicant's presentation was worthy of belief. While we give deference to a Judge's credibility determinations, we have noted that a Judge should address evidence that detracts from an applicant's credibility. *See, e.g.*, ISCR Case No.10-09035 at 6 (App. Bd. Jun. 10, 2014).

Department Counsel persuasively argues that the Judge did not address the extent to which Applicant appeared to minimize his security-significant conduct. We note the Judge's findings about his criminal incidents, which were based on Applicant's version of the events. In a number of them, Applicant presented himself as having engaged in apparently innocuous behavior, or, at worst, conduct of limited legal significance that nevertheless resulted in criminal charges. For example, he claimed that in 1999 he had been standing outside a fraternity party when, for no reason disclosed by Applicant, a policeman tackled him. Again he testified that, later, he had been forced

to sit in a car by a policeman who, when Applicant left the car to ask if he could turn on the heater, also tackled him. We note Applicant's testimony that, when the police came to his door in response to a noise complaint and Applicant told them he needed to put on some shoes, they began beating him with night sticks. Applicant's purported misfortunes were not limited to those inflicted by the police, however, in light of his testimony that, after having stopped drinking in a bar, the bar owner ushered him outside where he was chased by angry patrons, again for no obvious reason. *See also* note 1, *supra*, regarding Applicant's claim that his conviction for leaving the scene of an accident was due to his having been "set up" by drunken automobile passengers. Such presentations might well lead a reasonable person to conclude that Applicant was not providing a full and candid picture of conduct which resulted in a string of criminal charges. *See* ISCR Case No. 07-04390 at 5 (A.J. Feb. 26, 2008), in which the Hearing Office Judge concluded that it is highly improbable that the applicant, as claimed, 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." Such scepticism is even more warranted when the innocent explanations have multiplied to the extent present in the case before us. The Judge's failure to address this issue impairs his credibility determination and his favorable decision.

We also note some inconsistent statements in Applicant's various versions of his criminal history. Inconsistent statements can impair an applicant's credibility. *See, e.g.*, ISCR Case No. 12-00609 at 5 (App. Bd. Apr. 4, 2014). Regarding the 2010 incident in which he was arrested for assault on his roommate, he stated in the SOR response that he came home from a night of drinking and, discovering dirty dishes lying about, knocked some of them off the table. In his 2013 subject interview, he stated that, upon discovering the dishes, he smashed them on the floor, whereupon his roommate called the police. He told the interviewer that, when the police arrived, he said to them that he would "blow their heads off." Applicant stated that the police "began to scream to just let the girl go." He told the interviewer that he then went to his roommate's door and began knocking, whereupon the door swung open and the girl ran out. Applicant told the interviewer that his having knocked on the roommate's door was the basis for the assault charge. 2013 Clearance Interview at 6, included in GE 2, Answers to Interrogatories, dated March 26, 2014. In his testimony, however, he stated that, when the police told him to let his roommate go, he went to her room and kicked her door in. Tr. at 121. These inconsistencies are not minor and could persuade a reasonable person that Applicant has not been forthright in addressing his criminal behavior. The Judge's failure to address inconsistent statements in Applicant's presentation further impairs his credibility determination and his favorable decision.

Department Counsel also argues persuasively that the Judge did not address in a reasonable manner the credibility of Applicant's testimony about his 2011 drug treatment, specifically his claim that he had deliberately falsified information in order to secure admission to the program. In the first place, one normally might conclude that when a person admits to health care providers that he has engaged in extensive drug use, it is because he has in fact done so. A person might be expected to

be truthful when seeking medical help,[2] and, on the facts of this case, apparent discrepancies such as a successful urinalysis are not enough to undermine Applicant's discharge diagnosis of abuse of and dependence on a wide variety of illegal substances. However, Applicant testified not only that he had "exaggerated" his drug history, but that he did so upon the recommendation of the court as well as of his attorney and probation officer.[3] The Judge does not address the extent to which Applicant's story might be viewed as improbable, especially in light of Applicant Exhibit B, a letter from his attorney, who confirms that Applicant claimed to have exaggerated his conduct but says absolutely nothing about any purported complicity by himself or other officials. As with the other things discussed above, the Judge's failure to address this issue significantly impairs his credibility determination and overall decision.[4]

Department Counsel argues that "Applicant's failure to acknowledge wrongdoing, both at the hearing and in false or misleading information addressed under Guideline E, vitiates any finding that Applicant's conduct is mitigated . . ." Appeal Brief at 7. His characterization of Applicant's Guideline E misrepresentations as false or misleading implicitly challenges the Judge's finding that Applicant's omissions were innocent mistakes. We find this argument persuasive. The Judge stated that Applicant had been sufficiently meticulous in relating his drug history so as to put the Government on notice that Guideline H concerns were at issue. The Judge concluded, therefore, that Applicant had no motive to dissimulate in his SCA, interview, or interrogatory responses when he disclosed no drug abuse after 2005.

However, we have considered the Judge's conclusion in light of Applicant's 2009 SCA. At Section 24, Applicant was asked to provide the dates of his drug use, to which he responded from 04/2002 until 03/2005. In a comment to this Section, he cited to the Guideline H mitigating conditions, including 26(a), arguing that his drug abuse "happened so long ago and will not recur[.]" GE 3 at 50-51. *See* Directive, Enclosure 2 ¶ 26(a). A reasonable person could believe that, contrary to the Judge's conclusion, Applicant had a motive to falsify his SCA–his desire to convince the DoD

[2]*See, e.g.*, Federal Rule of Evidence 803(4), establishing a hearsay exception for statements made for purposes of medical diagnosis or treatment. As the accompanying practice comment notes, this 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[.]" Rothstein, P., *Federal Rules of Evidence* ,Third Edition (2008).

[3]"[Applicant]: I ended up applying to 10 to 15 different treatment centers and because I had been sober for over a year, I had stopped drinking after the March incident where the assault on female occurred and then I hadn't used drugs since 2008. None of the places would take me . . ." [Applicant's Attorney]: So you had to fabricate? [Applicant]: I did. And that's what my lawyer told me, the Judge told me, and my probation officer. It was like, we don't care, you just have to go. Make it happen." Tr. at 67.

[4]Department Counsel notes that, even if one accepts Applicant's testimony at face value, one must still conclude that Applicant is, by his own admission, a person who will lie when he concludes that it is to his advantage to do so. This in and of itself is inconsistent with the standards expected of persons who hold a clearance.

that his misconduct was long behind him. The Judge's failure to address this evidence impairs his favorable credibility determination, as well as his findings and conclusions under Guideline E.[5]

In summary, the record contains Applicant's admissions and substantial evidence of a string of criminal offenses dating from 1999 to 2010, many involving drugs and alcohol and some involving violent conduct by Applicant, to include a threat to kill policemen. In addition, the record contains substantial evidence of deliberately false statements by Applicant, as well as statements and testimony that can fairly be characterized as minimizing his misconduct to the point of obfuscation. This evidence undermines the Judge's favorable credibility determination, which was a major factor in his favorable decision. Moreover, this evidence undermines a conclusion that Applicant has demonstrated rehabilitation or that he has otherwise met his burden of persuasion that he should have a clearance. Examining the record as a whole, we conclude that the Judge's favorable decision is not sustainable.

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

[5]We have examined Applicant's responses to the clearance interviewer's questions and to DOHA interrogatories, which were also alleged in the SOR. We conclude that these documents do not support the Judge's finding that Applicant was merely asserting that he had used drugs between 2002 and 2005 without implying that he had engaged in no subsequent misconduct. *See, e.g.*, the following: "He used [marijuana] from Apr. 02 to Mar. 05. He used [marijuana] 20 to 30 times over this period of time . . . He used the [marijuana] to fit in with his friends . . . he was arrested for the possession of [marijuana] in Dec. 04 . . . He has never used any other illegal drug. He has no intentions of using [marijuana] or any illegal drug in the future. *He used [marijuana] due to a very poor lack of judgment and choice of friends [with] whom he was associated . . . during this period of time*." Clearance Interview at 3, included in GE 4. (emphasis added)

James E. Moody
Administrative Judge
Member, Appeal Board