

KEYWORD: Guideline E; Guideline J

DIGEST: The Judge's statements that had Applicant initially been truthful about his marijuana use, he would have been denied his clearance, and that his falsifications were the sole determining factor in the granting of his clearance are problematic. Such language is not the product of reasonable inference, and was speculative. The Board does not evaluate a passage in a decision in isolation. The Board will evaluate passages with reference to the decision as a whole, when determining if the language has any harmful effect. The gravamen of the Judge's adverse security decision was his finding that Applicant deliberately concealed his drug use from the government and did so to put his personal needs ahead of legitimate government interests. The Judge also stressed the importance of truthfulness and honesty in those persons who hold clearances and the desirability of giving clearances to those persons who are willing to be scrupulously honest in dealing with classified information. The Judge's doubts about Applicant's ability to be trustworthy under such circumstances serve as an adequate basis for his ultimate decision. Applicant correctly points out that the Judge's decision was bereft of any mention of Guideline J mitigating factors. As the Judge concluded that Guideline J disqualifying factors were operative in the case, he was obligated to give some indication that he considered Guideline J mitigating factors. Failure to do so was error. However, the Board views this error as ultimately harmless in that the Judge's ultimate decision is supportable given his sustainable analysis under Guideline E. Adverse decision affirmed

CASENO: 07-04494.a1

DATE: 06/10/2008

DATE: June 10, 2008

In Re:)
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Applicant for Security Clearance)
_____)

ISCR Case No. 07-04494

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Paul M. DeLaney, Esq., Department Counsel

FOR APPLICANT

Leslie McAdoo Gordon, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 25, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge relied heavily on evidence that was neither contained in the written record, nor proffered by either party at the hearing; (2) whether the Judge’s conclusion that no mitigating factors applied to Applicant’s case was erroneous; and (3) whether the Judge’s whole-person analysis was arbitrary and capricious. Finding no harmful error, we affirm the Judge’s decision.

The Judge made the following findings of fact: In the process of applying for a security clearance, Applicant completed two security clearance questionnaires, one in December 2005 and one in May 2006. The first application was completed on-line with the help of his mother. Question 24 of those applications asked him about drug use within the last seven years. Applicant answered “no” on both applications, even though he had used marijuana at least four times each during the summer of 2001 and the fall of 2004. Applicant later disclosed his marijuana use to his facility security officer in September 2006. Applicant knew that his company’s plan was to eventually grant him access to sensitive compartmented information, and he knew the background investigation would include a personal interview with an investigator and a polygraph examination. Thus, his drug use and falsifications could become an issue in the clearance process. Before being contacted by an investigator, Applicant prepared a written account of his drug use and falsifications, stating that he concealed his drug use because he was very scared of admitting it to an authority figure and his parents. During an interview in October 2006, Applicant repeated this information to an investigator, who noted in his report Applicant’s stated fear of embarrassment and not getting his clearance as reasons for concealing his drug use.

The Judge concluded that Applicant deliberately concealed his drug use from the government and did so knowing that his illegal drug use was of security concern to the government, and believing

that his clearance was at risk if he told the truth. The Judge concluded that Applicant misled both his employer and the government, notwithstanding Applicant's claims that his principal reason for concealing his drug use was fear of his parents' reaction. The Judge also concluded that none of the Guideline E mitigating conditions applied, asserting specifically that Applicant's revelations of his falsehoods were not prompt. The Judge also resolved the Guideline J allegation against Applicant without any discussion. The Judge did provide a detailed analysis of the case under the more general factors listed in paragraph 2 (a) of the Adjudicative Guidelines, and concluded Applicant has not mitigated the security concerns arising from his falsifications.

Applicant asserts on appeal that the Judge relied upon evidence that was not contained in the record when reaching his conclusions. Specifically, Applicant states that throughout his decision, the Judge mentions that Applicant obtained his security clearance only because of the falsifications on his applications, and that, had he been honest, there would have been either a further inquiry into his drug use or a denial of clearance. The Applicant cites to such passages in the decision as “. . . based on [his] false answers, [he] obtained his clearance[s]” (Decision at 2), the government “detrimentally relied” on Applicant's falsifications in granting his clearance (Decision at 4), Applicant “. . . collected benefits from his falsifications—obtaining first his initial clearance, then an interim upgrade.” (Decision at 4), that Applicant was willing to “benefit from his misconduct,” (Decision at 5), that Applicant “intended to . . . effect [sic] the course of his background investigation” (Decision at 4), and “Applicant's falsifications prohibited the government from evaluating his illegal drug use in a timely fashion, and at a time when such recent drug use might have raised significant security concerns.” (Decision at 4). Applicant argues that these statements by the Judge are not based on record evidence, are no more than speculative assumptions, and were improperly relied upon by the Judge in making his adverse clearance decision.

Some, but not all, of the Judge's language cited by Applicant is problematic. The Board does not regard as error the Judge's statements concerning the manner in which Applicant's falsifications affected the government's investigation, including the timing of that investigation. It is proper for Judges to draw reasonable inferences from the record evidence and to make findings of fact based on those inferences. It was reasonable, and not speculative, for the Judge to infer that the subject of Applicant's falsifications—his drug use—would have raised security concerns for government investigators at an early stage, had they known about it.¹ It was also reasonable for the Judge to infer that Applicant's falsifications affected the manner in which the investigation was conducted and the time it took to complete it.² The Judge's observation that the government relied to its detriment on Applicant's false answers when granting him his initial clearance is axiomatic.

¹The fact that Applicant's conduct would have raised a security concern does not mean that he would have ultimately been denied a clearance after investigation. However, Applicant's citation to the Administrative Desk Reference describes an analytical process in evaluating drug use that the government was prevented from engaging in as a result of Applicant's falsifications. Thus, the government's investigation was affected.

² See Footnote No. 1. Also, in evaluating any claim that the Judge's pronouncements about Applicant's security clearance investigation are “speculative,” it is reasonable to assume that DOHA Administrative Judges have a passing familiarity with the rudiments of the security clearance investigative process.

More problematic are the Judge's statements suggesting that had Applicant initially been truthful about his marijuana use, he would have been denied his clearance, and that his falsifications were the sole determining factor in the granting of his clearance. Such language is not the product of reasonable inference, and was speculative. As a result of this error, the Board must evaluate Applicant's claim that it formed the basis for the Judge's ultimate decision in the case. In arguing that the error was harmful, Applicant notes correctly that the Judge used this language several times in his decision. Notwithstanding this fact, the Board does not evaluate a passage, or even several passages, in a decision in isolation. *See, e.g.*, ISCR Case No. 02-10216 at 6 n.4 (App. Bd. Jan 30, 2004). Rather, the Board will evaluate such passages with reference to the decision as a whole, when determining if the language complained of has any harmful effect. In this case, after a consideration of the entire record and the Judge's decision as a whole, the Board concludes that the gravamen of the Judge's adverse security decision was his finding that Applicant deliberately concealed his drug use from the government and did so to put his personal needs ahead of legitimate government interests. The Judge also stressed the importance of truthfulness and honesty in those persons who hold clearances and the desirability of giving clearances to those persons who are willing to be scrupulously honest in dealing with classified information—even to the extent of reporting one's own breeches of security to the government. The Judge indicated that he had doubts about Applicant's ability to be trustworthy under such circumstances, and those doubts serve as an adequate basis for his ultimate decision against Applicant.

Applicant raises the issue of the Judge's treatment of various mitigating factors in the case. Central to Applicant's argument is his interpretation of the Judge's discussion of the mitigating factors as indicating the Judge's belief that there was no possibility that any of the Guideline E mitigating factors could serve to overcome the government's security concerns. While Applicant's argument on this point is not a model of clarity, he appears to assert that, once the falsification was established, the Judge viewed the case as one that could not be mitigated *per se*, and thus ignored or failed to consider the mitigating factors.

There is a rebuttable presumption that the Judge considered all the evidence in the case unless there is a clear statement to the contrary. *See, e.g.*, ISCR Case No. 03-15308 at 4 (App. Bd. Aug. 2, 2005). There is also a presumption that federal officials and employees carry out their duties properly and in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). With these presumptions in mind, and after a review of the record and the Judge's decision, the Board concludes that the Judge did not ignore or categorically dismiss the mitigating factors in this case. The Judge specifically mentions the fact that Applicant came forward to correct the falsification on his own, and the Judge gives him some credit for it. The Judge ultimately decided not to apply the mitigating factor in Applicant's favor however, owing to the fact that the coming forth could not be considered "prompt." The fact that the Judge engaged in this specific analysis belies Applicant's assertion that he ignored the mitigating factors. Applicant points out that none of the other Guideline E mitigating factors were discussed by the Judge and that this lack of discussion equates to the Judge's failure to articulate a satisfactory explanation for the decision. While a detailed and comprehensive discussion of numerous mitigating factors is sometimes useful, there is no requirement that a Judge provide a detailed analysis as to the applicability or non-applicability of every disqualifying or mitigating factor listed under a particular Guideline. Also, decisions of

DOHA Judges are not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996). In this case, under these facts and considering the mitigating factors enumerated for application under Guideline E, the Board does not conclude that the Judge's analysis of potential Guideline E mitigating factors was inadequate or that his exposition of that analysis in his decision was inadequate. Applicant mentions on appeal that, during the hearing below, he cited numerous mitigating factors that arguably applied to the facts of this case. The fact that Applicant disagrees with the Judge's application of mitigating factors, or can articulate an alternative interpretation of the record evidence that would bring such factors into more prominent play does not establish that the Judge's analysis was arbitrary, capricious, or contrary to law. *See* ISCR Case No. 06-08111 at 2 (App. Bd. Jul. 2, 2007).

Applicant correctly points out that the Judge's decision was bereft of any mention of Guideline J mitigating factors. As the Judge concluded that Guideline J disqualifying factors were operative in the case, he was obligated to give some indication that he considered Guideline J mitigating factors. Failure to do so was error. However, the Board views this error as ultimately harmless in that the Judge's ultimate decision is supportable given his sustainable analysis under Guideline E.

Applicant argues that the Judge's application of the whole person concept to this case was arbitrary and capricious, because he did not examine relevant evidence, he failed to articulate a satisfactory explanation for his conclusions, and his conclusion does not reflect a reasonable interpretation of the record evidence as a whole. As the trier of fact, the Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. In his whole person analysis, the Judge specifically listed numerous generally applicable disqualifying and mitigating factors in some detail before concluding that they led to the same result he reached when considering the more specific factors under Guidelines E and J. It is undisputed that Applicant deliberately falsified information about drug use on two separate security clearance applications. Given these facts, Applicant bears the burden of presenting evidence to rebut, explain, extenuate, or mitigate that potentially disqualifying conduct, and had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. The Judge's conclusion that Applicant failed to meet that burden is sustainable on this record.

In his appeal brief, Applicant requests that, if the Board concludes that the decision of the Judge should be remanded, that the case be remanded with a recommendation that the case be assigned to a different Judge. The basis for the request is Applicant's assertion that the Judge in this case has proven in his decision that he is unwilling to apply any mitigating factors to this case, and believes simply that there is no way to mitigate a falsification. Applicant's request could be construed as an assertion of bias on the part of the Judge.

A party asserting a claim of bias against a Judge has a particularly high burden to satisfy on appeal. *See, e.g.*, ISCR Case No. 99-0710 at 5 (App. Bd. Mar. 19, 2001). Applicant has not met that burden, in that he has not identified anything in the record that indicates a basis for a reasonable person to conclude that the Judge was biased.

Order

The Judge's unfavorable security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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