KEYWORD: Guideline J; Guideline E

DIGEST: The Judge's favorable decision under Guideline J is predicated on her finding that Applicant's breaking of another person's vehicle window was an accident despite contrary record evidence. Similarly, the Judge's decision accepts Applicant's claim that he exited a highway unaware that the authorities were pursuing him. Contrary record evidence shows that he had accelerated to a speed of 140 miles per hour. Favorable decision reversed.

CASENO: 07-10158.a1

DATE: 08/28/2008

DATE: August 28, 2008

In Re:	)	
	)	
--------	)	ISCR Case No. 07-10158
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tom Coale, Esq., Department Counsel

FOR APPLICANT
John F. Mardula, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 8, 2008, DOHA 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 hearing. On May 12, 2008, after the hearing, Administrative Judge Noreen A. Lynch 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 certain of the Judge's findings of fact are based upon substantial record evidence; whether the Judge's application of the Guideline J mitigating conditions is unsupported by record evidence; whether the Judge's decision under Guideline E is arbitrary and capricious; and whether the Judge's whole person analysis is unsupported by record evidence. 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 36 years old, divorced with no children. He works for a government contractor and has held a security clearance since 1996.

In July 2002, Applicant was driving on an interstate highway. Another driver moved toward Applicant's vehicle suddenly, forcing Applicant onto the shoulder of the road. As traffic was heavy, and had come to a stop, Applicant got out of his car and approached the driver of the other vehicle, with whom he engaged in a "verbal exchange." "When Applicant was leaving he put his palm on the driver's window and leaned on it. This caused the window to shatter." Decision at 2. Applicant was ticketed for aggressive driving and destruction of property. However, all charges were dropped when the driver of the other vehicle failed to appear in court.

In 2005, Applicant was arrested and charged with disobeying a police officer, fleeing or attempting to elude a law enforcement officer with sirens/lights activated, and reckless driving. He was found guilty of reckless driving, a second degree felony. The incident occurred during Applicant's visit with a friend. "They decided to go out motorcycle riding. Applicant insists that he saw a police car go ahead of him and stop his friend for speeding. Applicant saw the police officer and took the next exit. He insists that the police were not trying to stop him, nor did the police car have lights or siren alerting him to stop. Applicant exited the highway and stopped several times. He eventually followed the signs to the airport. When he reached the airport, police cars surrounded him. He reports that he was in shock and had no idea that he was being followed . . . Applicant testified that he was advised to plead guilty to the felony charge and not risk a trial and the possibility of jail time." *Id.* and 2-3.

Applicant has had no other driving incidents on his record. He no longer rides a motorcycle and uses cruise control on his vehicle. He has received a Certificate of Restoration of Civil Rights for his felony conviction.

In 2006, when filling out his security clearance application (SCA), Applicant listed the 2005 incident under the question inquiring about felony convictions. However, as to the question about other arrests, charges or convictions, he answered "no," failing to list the 2002 incident. "He testified credibly that it was an honest oversight. He forgot about the 2002 incident, and because he was the one who called the police and reported it and the charges were dismissed, it did not register as an arrest. He felt as if it never happened." *Id*. 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 a conclusion in light of all the contrary evidence in the same 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 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel challenges the sufficiency of certain of the Judge's findings of fact. The Board will address these challenges below in its discussion of whether the Judge's decision was unsupported by the record evidence.

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 choice 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 rebut or mitigate those concerns. *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).

The Judge properly concluded that Applicant's case raised security concerns under Guidelines J and E. However, Department Counsel persuasively argues that the Judge's application of the pertinent mitigating conditions was not reasonably supported by the record. The Board notes record evidence unaddressed in the Judge's decision which significantly undercuts her favorable conclusion as to mitigation. For example, the Judge's decision under Guideline J is predicated, in part, on her finding that Applicant's breaking of the van window during the 2002 incident was accidental, that he merely placed his palm on the window and leaned on it. However, there is record evidence, based on Applicant's own statements, that places the incident in a different light. For example, Government Exhibit (GE) 7 contains, *inter alia*, the summary of Applicant's personal subject interview. This document relates Applicant's description of the incident to a security clearance investigator: ". . . Subject and the driver of the van had a verbal exchange, as the subject was walking away from the van *he hit the driver's window with the butt of his hand* and the window broke." GE 7 at 6 (emphasis added). Similarly, Applicant testified at the hearing that "out of frustration as I was walking away, *I banged on his window* and . . . I was surprised that it just shattered . . ." Tr. at 78 (emphasis added). The Judge's decision does not discuss this apparent contrary evidence, with the result that she adopts without explanation a view of the incident that a reasonable person could find implausible, that Applicant having merely leaned on the van window caused the glass to shatter.

Similarly, the Judge adopts without discussion or explanation Applicant's description of the 2005 incident. That description presents him as exiting the highway unaware that the police were following him and that, after stopping a few times, he found himself arrested at an airport. Applicant's account is not consistent with the police report of that event, contained in GE 4. That exhibit states that the reporting officer observed Applicant "make [an] illegal u-turn." The officer further states that he began pursuing Applicant with his emergency lights on. "The driver saw me make my turn and accelerated rapidly, fleeing. I accelerated and made an attempt to catch up to the driver." The officer states that, with his lights and siren on, he got to within 10 to 15 feet of Applicant's motorcycle, at which point Applicant saw him and accelerated "at a very high rate of

speed, reaching approx[imately] 140 MPH according [to] the [police surveillance] aircraft." This officer describes Applicant's further efforts to elude the police, at one point driving his motorcycle between two automobiles that were stopped at a red light. He states that he lost contact with Applicant, but that other police and the aircraft kept him under observation, driving through exchanges at a major airport, where he was eventually arrested. GE 4 at 1 - 2. This account is detailed and internally consistent. It bears the name, badge number, and initials of the reporting officer and the name, signature, and badge number of the officer's supervisor. It is also consistent with Applicant's own evidence that his attorney subsequently advised him to plead guilty to a felony in an effort to avoid going to jail. As with the 2002 incident, the Judge's decision does not explain why she accepts Applicant's presentation of the event and why she concludes that the police report is less credible. The Judge does not explain why she discounts evidence which, on its face, would suggest that Applicant's presentation at the hearing was self-serving. This, in turn, undercuts her conclusion that he has demonstrated trustworthiness or rehabilitation.[1]

Regarding the Guideline E allegations, the Judge accepted Applicant's explanation of having forgotten about the 2002 incident in completing his SCA. The Judge does not explain why she finds this credible, in light of the relative recency of the event and its unusual circumstances, which a reasonable person could believe would not easily be forgotten.[2] Neither does the Judge address apparent inconsistencies in Applicant's explanations for his false answer, on one occasion calling it an honest oversight (Tr. at 106) and on another that he misread the question on the SCA (Tr. at 152). While the Board gives deference to a Judge's credibility determinations, that deference is not without limits. Where, as here, the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect of the record explicitly, explaining why he or she finds an applicant's version of events to be worthy of belief. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 03-23504 at 6 (App. Bd. Dec. 12, 2007) (in holding for Applicant, the Judge relied too heavily on his interpretation of Applicant's demeanor and did not evaluate Applicant's credibility in light of the record as a whole). *See also Fieldcrest Cannon, Inc. v. N.L.R.B.*, 97 F.3d. 65 at 69 - 70 (4th Cir. 1996), to the effect that a Judge's credibility determinations can be rejected if they are unreasonable, contradict other findings of fact, are based on an inadequate reason, or on no reason at all. Furthermore, the Judge found for Applicant on one of the Guideline E allegations without any discussion at all–the decision mentions the allegation nowhere except in the formal findings. While this particular allegation incorporated the Guideline J concerns, the Judge should have evaluated it in light of the disqualifying and mitigating conditions contained under Guideline E.

---

[1] *See* Directive ¶ E2.32(a), (d).

[2] *See* Department Counsel Brief at 20: The Judge "characterized the July 2002 arrest as forgettable in March 2006 as being in the 'distant past,' when the 2002 arrest was the first time he had ever been arrested, charged with two misdemeanors under circumstances that he thought [were] inexplicable, was arraigned for the first time before a magistrate, had to hire a lawyer, and then was spared a trial only because the complaining witness failed to appear to testify. These events are not credibly forgettable after less than four years . . ."

After considering the briefs of the parties, the Judge's decision, and the record as a whole, the Board concludes that the Judge's material findings of security concern are not supported by "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 same record." Directive ¶ E3.1.32.1. *See also Consolo*, 383 U.S. at 620. Moreover, Department Counsel has met his burden of establishing that the Judge failed to consider an important aspect of the case, failed to articulate a satisfactory explanation for material conclusions, and offered an explanation for her decision that ran contrary to the record evidence. Accordingly, the Judge's overall favorable decision under Guidelines J and E is not sustainable under the *Egan* standard.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael D. Hipple
Michael D. Hipple
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