

KEYWORD: Guideline J; Guideline F

DIGEST: The Judges findings of fact contain a number of errors of differing magnitudes. Taken together those errors undercut the Judges favorable conclusions. There is a paucity of evidence on the issue of rehabilitation. Favorable decision reversed.

CASENO: 07-10256.a1

DATE: 07/24/2008

DATE: July 24, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-10256
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 9, 2007, 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 F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing, which was held on February 6, 2008. On March 31, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr. granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Department Counsel raises the following issues on appeal: (a) whether several of the findings by the Judge are erroneous because they fail to reflect a reasonable interpretation of the record evidence as a whole; (b) whether it was arbitrary, capricious or contrary to law for the Judge to conclude that Applicant’s misappropriation of funds from his employer was mitigated under Guideline J; and (c) whether the Judge’s favorable conclusions under the whole person concept are arbitrary, capricious, or contrary to the record evidence as a whole. For the following reasons, the Board reverses the Judge’s favorable decision.

Whether the Record Supports the Judge’s Factual Findings

A. The Judge made the following pertinent findings of fact:

For about two years ending in May 2005, Applicant misappropriated approximately \$8,500 from the cash accounts of his employer, a small Christian college. The misappropriated funds were mainly monies from campus vending machines. Applicant was able to accomplish this because he had worked for the college for more than 20 years and had risen to the position of vice president for administration and chief financial officer. Applicant used the money to supplement the per diem allowances of members of the college’s traveling teams, to provide short-term loans to low-income employees of the college, and occasionally to buy fast-food meals for himself when he was working late. In the past, he had supplemented the per diem and made the loans out of his own pocket. Some of the loans were repaid, and some not. Except for the occasional meal, he never used the money for his own gain.

Applicant attributed his actions to stress and frustration over the tight financial circumstances of the college, the tight finances of the city in which he lived and served as a city council member, and the failing health of his mother. He admitted to a sense of entitlement and self-pity due to his years of commitment to the college and frustration with poor decisions by the college president. However, he insisted that his feelings did not justify his conduct.

In May 2005, Applicant went to the college president and admitted the misconduct. He was motivated primarily by a guilty conscience, but also by his belief that newly hired auditors would discover the misuse of the funds. Applicant had been pressuring the college for five years to replace auditors he considered to be sloppy and incompetent, and the new auditors he had recommended

¹Department Counsel does not challenge the Judge’s favorable findings and conclusions under Guideline F.

were reviewing the financial records. Applicant made full restitution and resigned. The college's governing body voted not to take civil or criminal action against Applicant.

Applicant found work in June 2005 as a consultant on an auditing project. He told his new employer of the misconduct before he was hired. After the project was over, that employer recommended Applicant to her sister and brother-in-law for his current job, which involves classified contracts. The college president to whom Applicant admitted his misappropriation of funds, as well as others in responsible positions who are aware of it, submitted character references for Applicant, attesting to his trustworthiness. Applicant has told his family of his misconduct, giving more detail to his wife and older children. Applicant credibly testified as to his remorse.

B. Discussion

The Appeal Board's review of the Judge's findings of fact 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, 620-21 (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 several of the Judge's factual findings. Specifically, it asserts that the record evidence does not support the Judge's findings that: (1) Applicant's use of misappropriated funds for himself involved only the purchase of fast-food meals when he was working late hours; (2) Applicant's misconduct occurred for a "brief time;" (3) Applicant's misconduct occurred under unusual circumstances and when Applicant was under unusual stress; (4) the misconduct was completely out of Applicant's character; and (5) Applicant was largely motivated to confess by his guilty conscience.

The Judge found that, aside from the occasional fast-food meal, Applicant never used the money for personal gain. In response to written interrogatories, Applicant indicated that the misappropriated money he spent on himself was for "personal expenses" which he more specifically described as "mostly for eating out."² Thus, Department Counsel is correct in asserting that the Judge's more restrictive finding was erroneous.

Concerning the Judge's finding that Applicant's misconduct occurred "for a brief time," Department Counsel is correct in arguing that this finding is not supported by the record evidence and is incompatible with the Judge's own finding that Applicant's practice of misappropriating money entrusted to him took place over a period of about two years. While the Board will not employ specific measurements to establish the precise parameters of general terms like "brief," a

²Government Exhibit 3 at pp. 4-5.

course of conduct taking place over a period of time such as two years cannot reasonably be described as “brief.”

Department Counsel asserts on appeal that while there was some record evidence that the Judge could consider as supporting his findings that Applicant acted under “unusual” circumstances and under “unusual” stress, there is significant record evidence that does not support those findings. Department Counsel argues that various factors in the case, such as Applicant working long hours, his dealing with financial problems as part of his duties with the college and the City Council, feeling disgruntled with the college president over what Applicant perceived as fiscal mismanagement, and health problems of Applicant’s mother were not particularly unusual. After a review of the record as a whole, the Board is not prepared to conclude that there was insufficient evidence for the Judge to find that some unusual circumstances existed during the period of Applicant’s misconduct. The record indicates that the financial problems of both the college and the city became critical during the time period in question, and Applicant began to harbor resentment over the situation at the college in particular. Also, the stress brought on by Applicant’s mother’s final illness was arguably a factor. As Department Counsel points out, however, none of these factors, as presented in the case, are of sufficient gravity to carry a great deal of significance and Applicant did not establish what stresses were operating upon him at any given period of time during his course of misconduct what the specific connection was between those stresses and his course of conduct. Moreover, the record evidence also establishes that Applicant acted out of a sense of self-pity and feelings of entitlement. On balance, the Judge’s finding of unusual circumstances and unusual stress, although sustainable, is not entitled to much weight in mitigation, considering the totality of the record evidence.

Next, Department Counsel takes issue with the Judge’s finding that Applicant’s actions in misappropriating funds to which he had been entrusted were “completely out of Applicant’s character.” Department Counsel argues that it is implausible to characterize a course of knowing and deliberate conduct involving separate and discrete acts over a period of about two years as completely out of character. This argument has merit. The record evidence shows that Applicant’s acts of misconduct and violations of his position of trust were repeated and took place over an extended period of time. They occurred after another time period where Applicant developed feelings of resentment, self-pity and entitlement. These facts belie the notion that Applicant’s acts were completely out of character (*i.e.*, a brief, largely inexplicable, or abrupt change in behavior).

Department Counsel also takes issue with the Judge’s finding that Applicant was largely motivated to confess by his guilty conscience, and asserts that the finding is not supported by the weight of the record evidence in the case. Department Counsel cites to numerous portions of the record where Applicant knew his transgressions would eventually be discovered by auditors. Department Counsel argues that Applicant, before revealing his dishonesty, made various decisions that were indicative of calculated self-interest rather than a guilty conscience. After a review of the record, the Board concludes that the weight of the evidence supports Department Counsel’s assertions. The record contains a lengthy and detailed description of Applicant making the decision to disclose his misappropriations after he concluded that a new group of auditors at the college would discover them. Applicant also described how he allowed the audit to proceed for as long as possible before making his disclosures and waited until he had made financial arrangements to repay

the college. By contrast, the record contains only a single reference to Applicant being motivated by his conscience to make the disclosure.

Not all of the factual errors made by the Judge are of equal magnitude. However, when considered together, they work to significantly undercut the Judge's conclusions in favor of mitigation and his ultimate decision in favor of Applicant.

Whether the Record Supports the Judge's Ultimate Conclusions

A. Conclusions

The Judge reached the following conclusions: The government established a case for disqualification under Guideline J, but Applicant mitigated the security concerns. While the misconduct cannot be considered distant in time, the circumstances of the misconduct were unusual, and the misconduct itself completely out of character. There has been no recurrence of the misconduct; Applicant has made restitution; and his rehabilitation has been well documented. Tellingly, his most important associates from the college vouch for his trustworthiness, notwithstanding his misconduct. It is extremely unlikely that Applicant will ever engage in this misconduct again. A whole-person analysis leads to the same result. For a brief period of time when he was under unusual stress, he breached his fiduciary duty to his employer. For more than 20 years before the misconduct and for more than three years after his resignation, he has demonstrated his reliability and trustworthiness to his past and current employers.

B. Discussion

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)).

"[N]o one has a right to a security clearance. . . The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse a 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.

Department Counsel contends that the Judge's decision is arbitrary, capricious, and contrary to law because the Judge erroneously concluded that Applicant's conduct was mitigated under Guideline J. Department Counsel states that the Judge's conclusion that Applicant's conduct was

mitigated is not supported by the record evidence as a whole, and that record evidence of mitigation is not sufficient to warrant the Judge's application of Adjudicative Guidelines, ¶ 32.(a),³ Adjudicative Guidelines, ¶ 32.(b),⁴ and Adjudicative Guidelines, ¶ 32.(d).⁵ Department Counsel's argument has merit.

The Judge's findings/conclusions that the circumstances of the misconduct were unusual and completely out of Applicant's character have been discussed in preceding paragraphs. As stated earlier, the Board concludes that the record demonstrates that the circumstances Applicant found himself in during the salient time period were not so unusual that much weight can be afforded them in terms of establishing mitigation. The Board also stated earlier that the record does not support the finding/conclusion that Applicant's actions were completely out of character.

Additionally, Department Counsel argues that the Judge erred by concluding that: there has been no recurrence of Applicant's misconduct; Applicant made restitution; Applicant's rehabilitation is well-documented; Applicant's associates vouch for his trustworthiness notwithstanding his misconduct; a former employer recommended Applicant for his current position; and it is extremely unlikely that Applicant would ever engage in his misconduct again. Applicant misappropriated the funds to which he had been entrusted beginning in 2004 and up to May 2005. Department Counsel persuasively argues that the Judge could not reasonably place much weight on the absence of evidence that the criminal conduct has not recurred, particularly where there is no evidence that Applicant has been entrusted with the handling of money as a fiduciary since that time. Department Counsel persuasively argues that the Judge could not reasonably accord much weight to Applicant's restitution, where the restitution was made after Applicant became afraid that auditors would catch him and where his request was coupled with a request that he keep his job. There is a paucity of record evidence concerning Applicant's rehabilitation in this case. No corroborating witnesses or documents concerning job performance or other achievements were produced that would support the Judge's conclusion that Applicant's rehabilitation is "well documented." The six one-page character letters Applicant offered as evidence focus on Applicant's life and conduct prior to the misappropriations and do not speak in detail about Applicant's status or performance as a fiduciary since May 2005. In general, the weight that the Judge could reasonably afford the six character letters is limited given the fact that in four of them, the authors do not give any indication that they are aware of the relevant details of Applicant's misconduct. Indeed, two of the letters do not mention Applicant's misconduct at all. Thus, there was no basis in the record evidence for the judge

³"[S]o much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

⁴"[T]he person was pressured or coerced into committing the act and those pressures are no longer present in the person's life."

⁵"[T]here is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement."

to conclude that Applicant's associates ". . . vouch for his trustworthiness notwithstanding his misconduct. . . ."

To summarize, given the sparse favorable record evidence in this case and the fact that the burden of proof rested with Applicant to overcome the government's security concerns, the Judge erred in concluding that Applicant's conduct was mitigated under Guideline J.

The Judge largely repeats his Guideline J conclusions when making his whole-person analysis. The only additional factor in the Judge's analysis is his emphasis on the 20-year period before Applicant's acts of criminal misconduct and the 3 unblemished years since the misconduct. Department Counsel successfully argues that, on this record, the significance placed on this evidence by the Judge is unwarranted and erroneously downplays the significance of Applicant's misappropriation of college funds to which he had been entrusted for a period of two years. The Judge's favorable conclusions under his whole person analysis are not sustainable.

Conclusion

Considering the record evidence as a whole, Department Counsel has identified errors by the Judge which, taken in their entirety, warrant reversal of the Judge's favorable security clearance decision.

Order

The decision of the Administrative Judge granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board