KEYWORD: Guideline E; Guideline J

DIGEST: The Judge's application of Directive, Enclosure 2 ¶ 17(c) is not sustainable on this record where Applicant engaged in extensive illegal drug use while holding a clearance and then repeatedly and deliberately omitted the drug use on security clearance applications and from interviews for more than two decades. Favorable decision reversed.

CASENO: 07-14127.a1

DATE: 08/12/2010

DATE: August 12, 2010

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT
Robert R. Bohn, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 27, 2009, 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 April 14, 2010, after the hearing, Administrative Judge Richard A. Cefola 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 issues on appeal: whether the Judge erred in his application of Directive, Enclosure 2 ¶17(c) and whether the Judge's whole-person analysis was erroneous.[1] Consistent with the following discussion, we reverse.

Facts

The Judge made the following pertinent findings of fact: Applicant is the Chief Scientist for a contractor. He has held a security clearance since 1978.[2]

Applicant purchased and used numerous illegal substances from about 1975 until 1992, when he quit such use. He smoked marijuana during the entire period, with the heaviest use occurring in the mid-1980s.[3] He also used marijuana "once or twice" during lunch breaks during this period. Decision at 2.

In addition, Applicant purchased and used cocaine approximately monthly from 1980 to 1990.[4] He used hallucinogenic mushrooms approximately three times in the early 1980s, and he used quaaludes and LSD one time each in the 1980s. On one occasion, he took a double dose of a prescription painkiller following surgery.

In July 1995, Applicant completed a security clearance application (SCA). He knowingly failed to disclose his past drug usage, drug purchases, and one-time misuse of a painkiller. In a

[1]The Judge's favorable findings under Guideline J are not at issue in this appeal.

[2]Compare with Applicant's testimony that he received his first security clearance in 1975 or 1976. Tr. at 71.

[3]We note record evidence that Applicant used marijuana between 400 and 500 times from the mid-1970s to the early 1990s. Applicant's Response to SOR, March 20, 2009; Government Exhibit (GE) 5, Interrogatories, at 1; Tr. at 84. There is also evidence that he spent between $25,000 and $50,000 on marijuana during this period. GE 5 at 11. *See* Tr. at 36 - 37: "Q: Did you know it was wrong to use marijuana while you held a Security Clearance, sir? A: Yes, sir, I did. Q: And, so, why did you continue to use marijuana for a period of time during which you held a security clearance? A: I rationalized the fact that it wasn't affecting my work. It wasn't affecting my school. I knew I handled classified information very carefully, and I didn't see the connection between my marijuana use and holding a Security Clearance."

[4]Applicant stated that he used cocaine approximately 100 times. GE 5 at 4.

follow-up interview with an investigator, Applicant stated that there were no omissions or errors in the SCA.

Applicant completed another SCA in 2001. In this one, he failed to disclose his having used illegal drugs while holding a security clearance. In a subsequent interview, Applicant noted no omissions or errors in his SCA.

In 2005, Applicant, who held a special access clearance, was called in for a polygraph examination. In the pre-polygraph interview, he admitted his prior drug use.[5]

In 2006, he completed a SCA. On this one, he disclosed his drug use while holding a security clearance. Later that year, he submitted another SCA, this time electronically. He also disclosed his prior drug use on the electronic form.

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). 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. In rendering a final decision, an "agency must 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 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).

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).

In the Analysis portion of the Decision, the Judge properly concluded that Applicant's deliberate omissions constituted security concerns under Guideline E. However, he extended

[5]*See* Tr. at 57 - 58: "Q: . . . So what happened after June 2006 with [your] Special Access clearance? A: The following month, in July, late July, I was called in and my access was revoked. Q: For what reason was your access revoked, sir. A: That was for, essentially, lying on the, you know, on the forms, the previous forms."

favorable application to Directive, Enclosure 2 ¶ 17(c).[6] The Judge stated that Applicant's last false statement was ten years prior to the hearing and that, since then, "Applicant has repeatedly and willingly disclosed all of his past drug abuse[.]" Decision at 6.

Department Counsel persuasively argues that the Judge's application of this mitigating condition is not consistent with the totality of the record evidence. He points to record evidence that Applicant's falsifications began when he lied on his first security clearance application in 1975. Applicant finally disclosed his drug use to the Government following a pre-polygraph examination in 2005. Department Counsel Brief at 5.

Therefore, as Department Counsel argues, the Judge's decision does not appear to consider the full extent of Applicant's false statements, which date back twenty years prior to the earliest one alleged in the SOR. Furthermore, evidence that Applicant admitted his drug use starting in 2005 is not consistent with the Judge's statement that he had been truthful about it since 2001. This evidence undermines the Judge's conclusion as to the amount of time which had passed since the last incident of security significant conduct.

Additionally, the circumstances under which Applicant acknowledged his past behavior are not totally consistent with the Judge's favorable application of ¶ 17(c). Applicant's having made disclosure in anticipation of a polygraph is inconsistent with the Judge's finding that he did so *sua sponte*. A reasonable person might conclude that Applicant revealed his past drug use only because he suspected that it would come out during the polygraph exam anyway. The record provides no reason to believe that, had the polygraph not occurred, Applicant would still have admitted his drug history. The burden is on Applicant to establish matters in mitigation. The circumstances of Applicant's disclosure vitiate a favorable conclusion under the last clause of ¶17(c), insofar as they cast doubt upon his reliability and good judgment.

We have considered Department Counsel's argument concerning the Judge's whole-person analysis. The Judge listed the nine whole person factors contained in Directive, Enclosure 2 ¶ 2(a) and stated that he had considered all of the evidence, which left him with no doubt as to Applicant's security worthiness. While there is no explicit error in this analysis, at the same time it is merely conclusory. We note, for example, that the Judge did not address ¶ 2(a)(1-3), concerning the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; and the frequency of the conduct. As such, the whole-person analysis provides no additional basis for the Judge's favorable decision.

To sum up, the record demonstrates that (1) Applicant engaged in the extensive use of illegal drugs while holding a security clearance; (2) he deliberately and repeatedly omitted disclosing this drug use in a series of SCAs and interviews from 1975 to 2001; and (3) he acknowledged his drug

[6]Directive, Enclosure 2 ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]"

use only when confronted with a polygraph examination. We conclude that the record does not support application of ¶ 17(c) or any of the other Guideline E mitigating conditions, to the extent that their application would overcome doubts about Applicant's reliability, trustworthiness, and ability to protect classified information. In view of the Directive's requirement that any doubt be resolved in favor of national security (Directive, Enclosure 2, ¶ 2(b)), we conclude that the Judge's favorable decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board