

KEYWORD: Guideline E

DIGEST: The Judge failed to analyze pertinent disqualifying conditions. Applicant's multiple and varied types of misconduct and poor judgment over a period years undercut the Judge's favorable conclusions. Favorable decision reversed.

CASENO: 08-01075.a1

DATE: 07/26/2011

DATE: July 26, 2011

In Re:)	
)	
-----)	ISCR Case No. 08-01075
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Greg D. McCormack, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 8, 2008, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 21, 2011, after the hearing, Administrative Judge Robert E. Coacher 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’s credibility determination was erroneous; whether the Judge erred in his application of the Personal Conduct Disqualifying Conditions (PCDC); whether the Judge’s favorable decision was supported by the weight of the record evidence; and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant, who has a master’s degree, works for a Defense contractor in the field of technology integration. He served in the U.S. Army from 1989 until 2003, when he was discharged Under Other Than Honorable Conditions (UOTHC) in lieu of trial by court-martial.

In 2003, while on active duty, Applicant served overseas in a hostile fire zone. A major, he was a counterintelligence officer for a special operations unit. At the time in question, Applicant and two enlisted members had dinner in a local town, where they consumed alcohol. After dinner they visited a mountain resort area. They carried firearms. On the way, they saw an abandoned vehicle, and one of the enlisted members started shooting at it. Applicant, an officer and the senior military member, did not stop the shooting. The vehicle in which they were traveling became stuck in the snow, so they called for assistance.

After an investigation, Applicant was charged with violating two general orders (violation of curfew and drinking alcohol while in possession of a weapon);¹ damage to property;² conduct prejudicial to good order and discipline;³ and conduct unbecoming an officer.⁴ The Army accepted Applicant’s offer to resign his commission in lieu of trial by court-martial, and, as stated above, thereafter discharged him UOTHC. As a consequence, the Army suspended his access to classified information, although there is no evidence that he was aware of that fact until he was provided the information in conjunction with his preparation for the hearing in the case before us.

While married and an officer, Applicant engaged in sexual relations with an enlisted woman (W). Applicant’s marriage broke up, partly in response to this affair. After they left the Army,

¹10 U.S.C. § 892.

²10 U.S.C. § 909.

³10 U.S.C. § 934.

⁴10 U.S.C. § 933.

Applicant and W went to work for a Defense contractor and continued their relationship. They broke up in 2004. The next year, Applicant's employer informed him that W had filed sexual harassment allegations against him. He told his employer that the allegations were unfounded. He received no disciplinary action, and there is no independent evidence of the substance of W's complaint.

Applicant's employer laid him off in February 2006. Although the particular contract on which he was working terminated in March 2006, he was taken off the contract a month early because of complaints from the government/client representative. Applicant denied that he was terminated for cause, believing that there was simply a personality clash underlying the complaints. The employer could not find Applicant other work, so it laid him off, giving him a severance package. A co-worker was released from the contract due to complaints by the same government/client representative. She corroborated Applicant's version of the events. She and Applicant were in a relationship at the time.

The SOR alleged that Applicant had made false statements to investigators and on his security clearance application (SCA) concerning, *inter alia*, (1) whether he had experienced performance problems while working for the Defense contractor and (2) the reason for his termination. In January, and later in September, of 2007, Applicant was interviewed pursuant to his application of a security clearance. The interviews were summarized and did not include the questions or verbatim answers. "The Government did not offer any written statements by the Applicant concerning this interview." The Judge stated that Applicant denied making false statements to investigators or in his security clearance application. The Judge stated that he found this testimony to be credible. Decision at 4-5.

Applicant enjoys an excellent reputation for his professionalism, loyalty, trustworthiness, and dependability. His civilian and military performance appraisals reflect outstanding performance.

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)). "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). "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). 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).

As stated above, one of the SOR allegations addressed a false statement by Applicant to investigators during his security clearance interview. Specifically, Applicant was alleged to have stated to the investigator that the reason for his layoff from the Defense contractor was the expiration of a contract. The SOR goes on to state: “In truth, you were removed by [contractor] from working on a project due to performance issues raised by [contractor’s] Government client and you were laid off because [contractor] had no other work for you.” In the Analysis portion of the Decision, the Judge stated that the Government’s evidence of this statement was “based upon a report that summarized an interview by an agent who did not testify and was not subject to cross-examination.” As he had in his Findings, the Judge stated that neither the questions nor verbatim answers were included in the Government’s evidence. Accordingly, he “gave this evidence less weight than Applicant’s testimony.”

Concluding that the Government had failed to present substantial evidence of the false statement at issue, the Judge stated that PCDCs 16(a)⁵ and 16(b)⁶ did not apply to Applicant’s circumstances. Department Counsel persuasively argues that the Judge erred in this conclusion, taking issue with the credibility determination the Judge performed regarding the interview summary (Government Exhibit [GE] 3) and Applicant’s hearing testimony. While we give deference to a

⁵Directive, Enclosure 2 ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities[.]”

⁶Directive, Enclosure 2 ¶ 16(b): “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative[.]”

Judge's credibility determination,⁷ in this case we conclude that his determination was based upon an erroneous evaluation of GE 3 and is not sustainable.

It is true that GE 3 does not contain the actual questions posed or Applicant's verbatim answers; however, it was signed by Applicant, who swore to its truthfulness, with certain factual corrections on unrelated matters. As such, GE 3 became the equivalent of an admission by Applicant, and the Judge erred in not evaluating it as such. In this exhibit, Applicant discussed the allegation of sexual harassment lodged against him by W while they were working for the Defense contractor. The document goes on to state that Applicant "denied having any further problems during his employment with [contractor]. [Applicant] was laid off from [contractor] in Feb 06 because the contract ended." Moreover, at the hearing, Applicant acknowledged making this statement to the interviewer. Tr. at 154. The Judge erred in concluding that the Government had not presented substantial evidence that Applicant made the statement.

To constitute a security concern under PCDC 16(b), a statement must be false and the falsity must be deliberate. *See, e.g.*, ISCR Case No. 08-05637 at 2-3 (App. Bd. Sep. 9, 2010). Department Counsel points to record evidence that contractor had concerns about Applicant's performance prior to laying him off. GE 7 is a series of e-mails pertaining to Applicant's job performance with contractor. One of these is by a government/client representative, advising contractor officials of perceived deficiencies in Applicant's discharge of duty. This e-mail describes incidents of insubordination, misrepresentation, failure to focus on essential tasks, etc. This e-mail constitutes substantial evidence that Applicant experienced performance problems while working for contractor. We note the Judge's finding, described above, that Applicant was taken off the particular contract because of complaints from a client. The record supports a conclusion that Applicant's denial of performance problems was objectively false.

On the question of Applicant's intent, there is no evidence that Applicant saw the e-mail outlining his professional deficiencies. However, GE 7 contains additional e-mails between Applicant and a contractor human relations (HR) representative. In one e-mail, Applicant acknowledged that he was being removed and wished "to confirm that there are no performance issues pertaining to this removal." The HR representative replied:

The basic answer is that we had to transfer you off the . . . program because of the relationship with the client. I believe that is the key to the current actions. As you and I talked, this was based on the perceptions of your actions by the client. So I can not confirm that there are no performance issues in the client's decision to direct [contractor] to remove you from the program.

In a later e-mail, the HR representative mentioned efforts to place Applicant in a specified job location.

⁷Directive ¶ E3.1.32.1.

[I]t was [contractor's] plan to transition you to that location when the client was ready. Your name was submitted for that effort and we felt that this transfer would be a win-win situation—for you and for [contractor]. However, [contractor] has now been placed in a situation where there have been some performance issues raised by the current client to the potential client which will place your performance under close scrutiny . . . [R]ecent events have caused the client to question your performance . . . Therefore, the company has made the decision that you are probably not the appropriate employee to be assigned to the . . . location. This is purely a business decision, while unfortunate for you, was contributed to by your actions.

The HR representative stated that the contractor was looking for other jobs for Applicant to perform. However, as the Judge found, the contractor subsequently terminated Applicant's employment. These e-mails were sufficient to have placed a reasonable person on notice that management had problems with Applicant's job performance in the days preceding his layoff. The Government has presented substantial evidence that, at the time Applicant denied to the security clearance interviewer that he had experienced job problems with contractor, he could not reasonably have believed that his denial was truthful. Accordingly, this evidence raises the security concern described in PCDC 16(b), and the Judge erred by concluding otherwise.

The Judge did conclude that Applicant's poor leadership while in the Army raised Guideline E security concerns, but he further concluded that Applicant had demonstrated mitigation. However, Department Counsel argues that the Judge erred in not specifically analyzing the case under PCDCs 16(c)⁸ and (d)⁹ in order to address the full scope of Applicant's conduct. Department Counsel cites to the Judge's Findings and to record evidence of the following: (1) the misconduct underlying Applicant's court-martial and his subsequent UOTHC discharge; (2) Applicant's additional fraternization with W while they were both on active duty; (3) the harassment allegation filed by W against Applicant while they were working for the contractor; (4) the circumstances surrounding Applicant's loss of employment; and (5) the false statement to the investigator.

Department Counsel persuasively argues that these matters, considered together, support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, and lack of candor. Even if, when viewed in isolation, some of these incidents might be of limited concern, taken together they paint a picture of Applicant's judgment and reliability that is at odds with the

⁸Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

⁹Directive, Enclosure 2 ¶ 16(d): "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations or other characteristics indicating that the person may not properly safeguard protected information[.]"

requirements of national security as set forth in the Directive. Evidence of these incidents is sufficient to raise the two disqualifying conditions mentioned above. Department Counsel persuasively argues that, by not raising these PCDCs, the Judge foreclosed a mitigation analysis that took into account the full scope of Applicant's security significant conduct. Rather, he limited his analysis to conduct occurring during Applicant's military service, which, viewed by itself and without reference to subsequent events, could plausibly be mitigated due to the passage of time.

The Judge's application of the mitigating conditions and the whole-person factors did not consider the totality of Applicant's conduct and was erroneous. *See, e.g.*, ISCR Case No. 06-23384 at 3 (App. Bd. Nov. 23, 2007) (The Directive requires a Judge to evaluate the totality of an individual's conduct and circumstances in determining the individual's security eligibility). Accordingly, we conclude that the Judge's decision failed to consider important aspects of the case and ran contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate Applicant's security concerns under the *Egan* standard.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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