

KEYWORD: Guideline J; Guideline E

DIGEST: Record contains two warrants issued against Applicant. They provide substantial evidence that Applicant committed criminal conduct and that he made false statements during his clearance interview. Evidence that Applicant was unaware of the warrants does not provide a reason to believe that he did not commit the underlying criminal acts. Favorable decision reversed.

CASE NO: 08-08831.a1

DATE: 01/04/2011

DATE: January 4, 2011

In Re:)	
)	
-----)	ISCR Case No. 08-08831
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 8, 2010, 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 decision on the written record. On August 30, 2010, after considering the record, Administrative Judge John Grattan Metz, Jr., 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 the Guideline J mitigating conditions; whether the Judge erred in concluding that the Government failed to establish security concerns under Guideline E; and whether the Judge's whole-person analysis was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a technical coordinator employed by a Defense contractor. He is married, with two children and two stepchildren.

In June 1993 Applicant was arrested for malicious mischief and reckless endangerment. He paid a fine without appearing before a Judge. In February 1994, Applicant and two friends broke into an office building in order to commit theft. Applicant was caught, though his friends got away. He was tried in Juvenile court, pled guilty, and was sentenced to 24 months community supervision, 50 days detention, and a fine.

In February 1996, a warrant was issued for Applicant's arrest on charges that he stole tools from a hardware store. The probable cause affidavit (Item 8) was not accompanied by the police report to which it refers. Applicant contends that he was never served with this warrant. In September 1996 a bench warrant was issued for Applicant's arrest for failure to appear in court on a forgery charge. There is no evidence that Applicant was served with this warrant. Applicant became aware of these warrants in July 2008. He contacted several lawyers in his hometown and received minimum quotes of \$15,000 for representing him. He began saving money but had an unexpected medical emergency, which consumed his funds. "He understands that he must eventually resolve the warrants." Decision at 3.

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). 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 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).

Guideline J

Under Guideline J, the SOR alleged the criminal conduct occurring in 1993 and 1994. It also included the following:

1(d): "A warrant was issued on February 5, 1996, for your failure to appear on charges of Theft 2, felony, which occurred in approximately June 1995. As of the date of this [SOR], you have not resolved this warrant."

1(e): "A warrant was issued on September 4, 1996, for your failure to appear on a charge of forgery. As of the date of this [SOR], you have not resolved this warrant."

The Judge concluded that the evidence established security concerns under Guideline J. He also concluded that Applicant had met his burden of persuasion as to mitigation. He stated that the criminal conduct, including that alleged in the 2 paragraphs quoted above, was old, that Applicant had been a teenager when he committed them, and that he had demonstrated rehabilitation in the intervening years by his employment record, his educational attainments, and his family life.

Department Counsel argues that the Judge's conclusions about mitigation are erroneous. This argument has merit. While the underlying offenses may have occurred in the early to mid-1990s, Applicant's failure to resolve the outstanding warrants is ongoing. Even if one accepts as true Applicant's statements in his replies to the SOR and to the file of relevant material (FORM) that he had no knowledge of these warrants until his July 2008 security clearance interview, he has had two years from that date until the close of the record to resolve them, and he has failed to do so. The Judge found credible Applicant's explanation that legal representation was too costly, due to his having experienced unexpected medical problems. Applicant's explanation is not corroborated, nor are his financial condition or the nature and extent of his medical problems explained in detail. Neither is there any record evidence of Applicant's having explored other possibilities for obtaining representation, such as the services of a public defender, etc. or otherwise to develop a meaningful strategy for addressing the warrants. As it is, even accepting as true Applicant's statement that he had made some contact with lawyers, the decision does not reasonably explain why Applicant's acknowledgment that "he must eventually resolve the warrants" (Decision at 3) is sufficient to demonstrate mitigation under the *Egan* standard.

Moreover, the record contains significant contrary evidence that is not consistent with the Judge's favorable credibility determination regarding Applicant. We note that Applicant chose to

have his case decided on the written record. As a result, the Judge did not have an opportunity to question Applicant and observe his demeanor. In such circumstances, the Judge's favorable credibility determination is not entitled to the same deference on appeal that it would receive had it been made in the context of a hearing. *See, e.g.*, ISCR Case No. 04-04302 at 3-4 (App. Bd. Jun. 30, 2005).

Concerning the two warrants, Applicant stated in his reply to the SOR that he was not aware of the charges reflected in these warrants until they were pointed out to him during his interview. Applicant's reply to the FORM included a computer-generated printout summarizing his court cases. It is not stated who prepared this document or on what sources the author relied. However, concerning the case that resulted in a bench warrant, this document can reasonably be interpreted to mean that, on August 9, 1996, officials of the county Superior Court prepared (1) a probable cause affidavit, (2) an order by a named county commissioner that probable cause existed as to the offense in question, and (3) a summons to the defendant to appear. The document also states that on August 30, 1996, a motion hearing was scheduled to be conducted before another named county commissioner. Item 9, the Bench Warrant and supporting documentation, states that Applicant failed to appear in court on that date. In particular, the Order for Bench Warrant states in pertinent part: "This matter coming on regularly before the Court, this 30th day of August, 1996, the [State] being represented by [named attorney], Deputy Prosecuting Attorney in and for [County, State], and the defendant not appearing," the Clerk of Court is ordered to issue a bench warrant for the apprehension of Applicant. This document is signed by a county commissioner. There is nothing in the record to suggest any irregularity in the processing of the case in question. *See, e.g.*, *U.S. v. Wilson*, 169 F.3d 481, 425 (7th Cir. 1999); *Honeycutt v. Ward*, 612 F.2d 36, 41 (2d Cir. 1979) (There is a strong presumption of regularity in state judicial proceedings). Neither is there anything in the record or in the Judge's decision to explain why it is reasonable to believe that this case proceeded to a motion hearing without Applicant being aware of it. The Judge's failure adequately to discuss this matter undermines his favorable decision.

Concerning the February 1996 arrest warrant, in addition to his claim of ignorance in his reply to the FORM, Applicant stated in his July 2008 interview that he "has no knowledge of this charge." Item 5, Interrogatories, at 3. However, Item 8, Arrest Warrant, includes the probable cause affidavit upon which the warrant was based. This document contains a detailed description of the offense for which Applicant was charged. It states that on June 21, 1995, Applicant purchased tools from a hardware company on the account of a former employer. The employer had terminated Applicant's employment on June 10, 1995. This affidavit states that Applicant obtained a tool chest valued at \$250 and welding supplies valued at \$850. It states that the information concerning the theft came from a manager of Applicant's former employer. The manager's name is given in the affidavit. In addition, another named individual, an employee of the hardware store, identified Applicant as the person who purchased the items in question on employer's account. Specific as to names and dates, this document states that its contents were provided by the local sheriff's office. It constitutes substantial evidence that Applicant committed the offense of theft, which was the basis for the warrant. It is significantly contrary to Applicant's claims not to know anything about the underlying offense. Indeed, for Applicant's claim of ignorance to be credible, one would have to conclude that the affidavit is totally false. There is nothing in the record to address or even to broach the possibility that the local district attorney fabricated a case against Applicant. As it stands, the evidence underlying the two warrants alleged in the SOR is not consistent with a favorable credibility

determination concerning Applicant and undermines the Judge's favorable decision.

To sum up, the record demonstrates that Applicant committed a series of criminal offenses in the 1990s. It demonstrates that Applicant has two outstanding warrants dating from that time, one for theft of over \$1,000 of tools and equipment and one for failure to appear in court. Although Applicant has known about these warrants for at least two years, he has taken no affirmative steps to resolve the underlying charges. Furthermore, the record contains evidence that is inconsistent with Applicant's credibility. Viewed as a whole, the record does not support the Judge's favorable conclusion under Guideline J, either under the mitigating conditions or the whole-person factors.

Guideline E

The Judge concluded that the Government's evidence did not establish Guideline E security concerns. The SOR incorporated under Guideline E the criminal concerns alleged under Guideline J. It also alleged that Applicant had made a false statement during his security clearance interview by denying any criminal conduct after 1994. The Judge stated that the criminal conduct allegations did not raise a security concern not contained under Guideline J. He also stated that the language of the Guideline E disqualifying conditions does not extend to the criminal conduct alleged against Applicant. Furthermore, the Judge found that, insofar as Applicant did not know about his outstanding warrants at the time of the interview, he did not make a knowingly false statement.

The security concern under Guideline E is as follows: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Directive, Enclosure 2 ¶ 15. The disqualifying conditions listed under Guideline E, as with the other guidelines, are illustrative only, not exhaustive and exclusive. In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. *See* ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008); *see also* ISCR Case No. 06-20964 at 4-6 (App. Bd. Apr. 10, 2008) (an applicant's failure to file income tax returns properly alleged both under Guideline F and Guideline E).

Regarding the alleged criminal acts, Applicant's having failed to resolve his outstanding warrants is an ongoing course of conduct that evidences "questionable judgment" of a nature to undermine his reliability and trustworthiness. Furthermore, for reasons stated in the discussion of Guideline J above, a reasonable person could conclude that Applicant's denial of criminal conduct after 1994 was not credible. The warrants arising from 1996 provide substantial evidence both that Applicant engaged in criminal conduct after 1994 and that he made a deliberately false statement to the interviewer. Merely to conclude, as the Judge did, that Applicant was unaware of the warrants does not provide a reason to believe that he had not committed the criminal conduct to which they refer. Guideline E is particularly concerned with failure to provide truthful and candid answers during the security clearance process. Directive, Enclosure 2 ¶ 15. Accordingly, the Judge erred in his conclusion that the evidence presented by the Government did not demonstrate disqualifying concerns under Guideline E. Viewing the record as a whole, there is a paucity of evidence to demonstrate mitigation of the Guideline E concerns, especially with regard to the false statement. In light of the foregoing, the Judge's favorable decision under both guidelines is not sustainable.

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

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