

KEYWORD: Guideline D; Guideline E

DIGEST: The Judge's negative credibility assessment conflicts with his conclusion that there is no reason to doubt Applicant's reliability and trustworthiness. The Judge reached conflicting conclusion under different guidelines. The Judge erred by relying on Applicant's current minimal access to classified information to assess the significance of Applicant's previous conduct. Favorable decision remanded.

CASENO: 09-00306.a1

DATE: 11/19/2010

DATE: November 19, 2010

In Re:)
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 -----) ISCR Case No. 09-00306
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 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Andrea Reino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 17, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 3, 2010, after the hearing, Administrative Judge Philip S. Howe granted Applicant's request for a security clearance. Department Counsel appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (a) whether the Judge's analysis and conclusions under Guideline D are arbitrary, capricious and contrary to law; (b) whether the Judge's analysis under Guideline E is arbitrary, capricious and contrary to law; and (c) whether the Judge's analysis under the whole-person concept is arbitrary, capricious and contrary to law. For the reasons discussed below, the Board remands the Judge's favorable decision.

The Judge made the following pertinent findings of fact: Applicant joined the Navy in April 2005. He served three years of active duty until being administratively discharged on January 31, 2008, with an honorable discharge. During his Navy service, Applicant had a security clearance. No violations of security procedures or regulations were committed by Applicant while he held the clearance. Applicant had some personality conflicts with other service people while on active duty. He attributed the conflicts to judgments people made about his poor economic background and his bisexual interests. Applicant was involved in three incidents involving other service people and alcohol. These involved assaults. After one of the incidents, Applicant informed his command that he was assaulted because he was gay. Because of this admission, his commander began processing him for administrative separation. About two months later, in June 2007, Applicant attended a party where everyone drank alcohol, and it was Applicant's impression that everyone was intoxicated. Applicant drank to excess, claimed he later blacked out, and does not remember making any sexual or improper advances toward any woman or man during the party. Applicant asserted that one friend at the party wanted him to engage in three-way sex with him and the friend's girlfriend. The friend and his girlfriend deny that this request occurred. While at the party, Applicant was alleged to have groped his friend's girlfriend while seeking sex from her, to have put his hands down the pants of another male party-goer, and to have later performed fellatio on his friend who invited him to the party. Thereafter, a Navy investigation occurred that resulted in court-martial charges and an Article 32 investigation. Applicant was accused of sodomy, assault, and indecent assault under the UCMJ. The charges were withdrawn when Applicant accepted the administrative discharge. Applicant no longer consumes alcohol. He works for his defense contractor, attends college classes, and goes to his synagogue. Since March 2008, he has attended counseling to help him understand his life and interests. Applicant did not disclose on his SF-86 the circumstances under which he left the Navy. He did disclose that he left a civilian job in August 2003 by mutual agreement after allegations of unsatisfactory performance.

The Judge reached the following conclusions: Under Guideline D, Applicant's sexual acts in June 2007 at a party with friends were of a criminal nature; showed a pattern of compulsive sexual acts on that occasion; made him vulnerable to coercion, exploitation, or duress; and showed a serious lack of discretion and judgment. Applicant's actions occurred three years ago while he was

in the Navy. He studies, works, and generally minds his own business now. He is not a party-goer. The unique situation in which Applicant found himself in June 2007 has not been repeated. He continues to comply with all security requirements for his clearance. The changes Applicant made in his life or were made for him by the administrative discharge do not cast doubt on his current reliability, trustworthiness, or good judgment. His behavior in 2007 no longer serves as a basis for coercion, exploitation or duress. He is not now in a position, as he was in the Navy working with classified military information and systems, in which he would be able to compromise classified information. There have been no further incidents and Applicant no longer consumes alcohol. Applicant's current sexual actions are strictly private and discreet. His activities at the 2007 party were not private, but two of the actions occurred in bedrooms with an expectation of privacy. There are no other incidents after his discharge, and his record of behavior is clear. Being abstinent now helps Applicant exercise proper judgment. Under Guideline E, the government alleged the same conduct as it alleged under Guideline D. Applicant's answers about his employment on the SF-86 will be considered only as they relate to his general credibility. Applicant's conduct in June 2007, in the subsequent investigation and administrative discharge, and in his failure to explain specifically and with clarity the circumstances surrounding those incidents as he applied for a security clearance make him vulnerable to exploitation, manipulation, or duress because it appears he is attempting to conceal information about himself. This attitude diminishes Applicant's credibility as he attempts to explain the events of June 2007. The incidents occurred three years ago, and there is no evidence of similar conduct. The behavior occurred when Applicant was drunk at a party, and he has ceased drinking alcohol. The actions are unlikely to recur based upon all the changes Applicant has made in his life since January, 2008. The incidents do not cast doubt on his current reliability, trustworthiness, or good judgment. He has made positive changes to reduce or eliminate any vulnerability to exploitation, manipulation, or duress. Regarding the whole-person concept, Applicant was in a military environment in which he could not function positively. Applicant was 22 years old at the time and lacked a maturity level that would have allowed him to handle the stresses of military life. Following his discharge, he successfully sought counseling and employment. There is little likelihood of a recurrence of such incidents because Applicant has matured through professional counseling. Applicant mitigated the security concerns arising from his sexual behavior and personal conduct.

Department Counsel argues that the Judge's Guideline D mitigation analysis is flawed because he wrongfully concluded that Applicant's conduct at the June 2007 party and Applicant's "diminished credibility" did not cast doubt on Applicant's current reliability, trustworthiness, and judgment under Mitigating Condition ¶ 14(b).¹ Department Counsel states that the Judge's analysis does not take into account significant record evidence and fails to weigh the seriousness of Applicant's conduct at the June 2007 party. Department Counsel states that the Judge's assessment of Applicant's current reliability, trustworthiness, or good judgment did not reflect the Judge's own negative view of Applicant's credibility, which included the Judge's conclusion that Applicant had refused to acknowledge his behavior, notwithstanding the evidence of the misconduct contained in the statements of the victims.

¹ "[T]he sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

Concerning the alleged failure of the Judge to weigh properly or assess the seriousness of Applicant's conduct at the party, Department Counsel's argument is not persuasive. The argument lacks detail as to the precise manner in which the Judge erred. After a review of the Judge's decision, the Board concludes that the Judge reasonably characterized the incidents at the June 2007 party as serious, noting at various points in his decision that Applicant's behavior was criminal, highly risky, and indicative of a lack of discretion and judgment. At the same time, for purposes of evaluating mitigation under ¶ 14(b), the Judge pointed out the unique circumstances surrounding the conduct at the party, the fact that Applicant has attended counseling, and the fact that Applicant has made positive changes in his life in support of his conclusion that Applicant's prior behavior no longer casts doubt on his current reliability, trustworthiness, or good judgment. These matters in mitigation are reasonably supported by the record evidence.

Under ¶ 14(b), the Judge concluded that Applicant's credibility was diminished in the context of his explanation of the events of June 2007 because it appeared that he was attempting to conceal information about himself. Department Counsel argues that this negative credibility assessment conflicts with the Judge's conclusion that there is no reason to doubt Applicant's reliability and trustworthiness under ¶ 14(b). This argument has merit. The Judge's comments about Applicant's credibility that were referenced by Department Counsel are actually contained in an analysis under Guideline E as opposed to Guideline D. However, the fact that a conflicting conclusion occurred under a different adjudicative guideline is of no consequence. The concepts of reliability, trustworthiness, and good judgment are not malleable to the point where their meaning varies among the several guidelines. By analyzing the case in a piecemeal fashion, the Judge reached conclusions that are in conflict. While a negative credibility determination does not mandate a particular result in a case, its presence in a case is troubling where the Judge ultimately deems Applicant reliable and trustworthy.

Department Counsel takes issue with the Judge's conclusion under Guideline D Mitigating Condition ¶ 14(c)² that, in his current position, Applicant is not in a position to compromise classified information. The conclusion is based on Applicant's testimony that, as an administrative assistant, he currently needs a clearance only to have occasional access to classified areas of his workplace. Department Counsel rightly argues that the notion that Applicant is not in a position to compromise classified information is incongruous with the holding of a security clearance. The Judge's conclusion is in error.

Department Counsel also points out that the Judge's application of ¶ 14(c) is in conflict with his later analysis under Guideline E where he stated that Applicant's failure to explain specifically and clearly his conduct at the party makes him vulnerable to exploitation, manipulation, or duress. Thus, again, the Judge has reached conflicting conclusions under two different Adjudicative

² "[T]he behavior no longer serves as a basis for coercion, exploitation, or duress[.]"

Guidelines, one of which is a mitigating condition (under Guideline D) and the other a disqualifying condition (under Guideline E).³

Department Counsel also correctly points out that the Judge misapplied Guideline D Mitigating Condition ¶ 14(d).⁴ By relying on Applicant's current sexual actions as a partial basis for applying the mitigating condition, the Judge erred by (1) referring to facts that are not part of the record evidence, and (2) by misinterpreting the proper scope of ¶ 14(d). There is no evidence in the record, either explicit or discernable by reasonable inference, that would allow the Judge to make a favorable assessment of Applicant's current sexual practices. Also, the sexual behavior anticipated by the mitigating condition must, of necessity, be sexual behavior that gave rise to the initial security concerns, *i.e.*, the June 2007 sexual activity alleged in the SOR. The mitigating condition would cover current sexual behavior only if the sexual conduct of security concern was ongoing. Ongoing sexual behavior of security concern is not present in this case. The Judge also discusses the 2007 sexual conduct when applying the mitigating condition, and he states that Applicant assumed he was invited for sexual activity with his friend and the friend's girlfriend, and two of the sexual incidents occurred in bedrooms with an expectation of privacy by Applicant. These factors were presumably offered by the Judge in support of his conclusion that the June 2007 sexual activity was "strictly private, consensual, and discreet." However, the Judge made other findings of fact that conflict with those used to justify application of the mitigating factor. He found that Applicant's acts were criminal, compulsive, highly risky, were of a public nature, and demonstrated a lack of discretion and judgment. The Judge also found that Applicant's friends did not consent to Applicant's activities and eventually filed criminal complaints. After a review of the record and the Judge's decision, the Board concludes that the Judge erred by invoking mitigating factor ¶ 14(d) because the facts used to justify its applicability are in conflict with other factual findings of the Judge, and the reasons offered in support of applying ¶ 14(d) are not sustainable given the substantial contrary record evidence.

Department Counsel persuasively argues that there are similar problems with the Judge's analysis under Guideline E. Again, the Judge's negative credibility determination undercuts the Judge's application of Guideline E Mitigating Factor ¶ 17(c) with its requirement that the behavior does not cast doubt on the individual's reliability, trustworthiness, or good judgment. As discussed previously, it is difficult to square the Judge's conclusion that Applicant appears not to have been entirely forthright about his involvement in sexual activity in June 2007 with his conclusion that Applicant is ultimately reliable and trustworthy. The Judge's application of Guideline E Mitigating Factor ¶ 17(d) is also problematic in that one of the requirements stated therein is "the individual has acknowledged the behavior." The record does not contain such an acknowledgment from Applicant. Notwithstanding the fact that Applicant's ingestion of alcohol may have impaired his ability to remember details concerning his behavior, the Judge's negative credibility assessment appears to discount this possibility, and it is improper to apply a mitigating condition where a key

³The applicable Guideline E provision is ¶ 16(e), which states in part, "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress. . ."

⁴"[T]he sexual behavior is strictly private, consensual, and discreet[.]"

component of the condition is not present in the record evidence. Regarding Guideline E Mitigating Condition ¶ 17(e),⁵ Department Counsel correctly argues that the Judge’s analysis in applying the condition is contradicted by his specific conclusion that Applicant was vulnerable to exploitation, manipulation, and duress because it appears he is attempting to conceal information about himself.

Department Counsel acknowledges that many of the same errors in analysis discussed previously are contained in the Judge’s whole-person analysis. On remand, the Judge is directed to conduct his whole-person analysis in a manner consistent with the correction of errors described herein. The Board also notes that Department Counsel included as an assignment of error the Judge’s omission of Guideline E Disqualifying Conditions ¶ 16(c) and ¶ 16(d) from his analysis. After a consideration of the entire record, the Board concludes that the Judge was not required to apply those disqualifying conditions as a matter of law.

On remand, the Judge shall issue a new decision in which: (1) the Judge’s credibility determination is integrated into his analysis under each of the applicable guidelines and under the whole-person analysis; (2) the Judge does not consider Applicant’s current exposure, or lack thereof, to classified information as a factor in determining Applicant’s security eligibility; (3) the Judge does not speculate about matters not in evidence; and (4) the Judge’s analysis under individual guidelines or the whole-person does not contradict his analysis under other guidelines.

Order

In accordance with the Board’s preceding discussion, the Judge’s decision granting Applicant a security clearance is REMANDED.

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

⁵“[T]he individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]”

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