

KEYWORD: Guideline J; Guideline E

DIGEST: Judge’s favorable decision was undermined by significant inconsistencies among her findings. A Judge may weigh the same conduct differently under different guidelines. However, self-contradictory findings are *per se* unreasonable and not sustainable. Favorable decision reversed.

CASE NO: 09-01652.a1

DATE: 08/08/2011

DATE: August 8, 2011

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In Re:)	
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-----)	ISCR Case No. 09-01652
)	
Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 6, 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 hearing. On March 25, 2011, after the hearing, Administrative Judge Mary E. Henry 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 conclusions under Guideline J were internally inconsistent, contrary to the record evidence, and arbitrary and

capricious; whether the Judge's conclusions under Guideline E were arbitrary, capricious, and contrary to law; and whether the Judge's whole-person analysis was arbitrary and capricious. Consistent with the following, we reverse the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant is a 36-year-old engineering technician for a Defense contractor. He has attended technical school. Married, he has two children.

In 2000, Applicant took an airplane trip from his state of residence to another state for the purpose of obtaining marijuana. Applicant and an accomplice intended to return to their home state and sell the marijuana for a profit. When Applicant checked into the airport for the return trip, drug dogs alerted on his luggage. A search uncovered 106 pounds of marijuana. Applicant pled guilty to a charge of possession of marijuana weighing more than 50 lbs but less than 2000 lbs. The court concluded that the evidence substantiated his guilt but deferred an adjudication of guilt, imposing community service, 10 years of community supervision, a fine, and payment of court costs.

In 2003, Applicant flew from his hometown to a major city in his state of residence. Applicant and a friend then proceeded to drive from that city to another. Although the car was owned by Applicant's friend, Applicant was driving. A policeman stopped the car upon the appearance of erratic driving. The policeman advised that he smelled marijuana, and Applicant's friend acknowledged that he had a small amount of marijuana on his person. Applicant was aware that his friend was in possession of this marijuana. The policeman searched the car and found a firearm belonging to the friend. Applicant was arrested on a charge of driving without a license and his friend was arrested for possession of marijuana. A subsequent search of the car's trunk uncovered 2.7 pounds of marijuana secreted in a cooler. This search also uncovered four stolen lottery tickets. Applicant was charged with (1) possession of marijuana with intent to sell, which was a felony; (2) possession of a firearm within arm's reach, also a felony; (3) receiving stolen property, a misdemeanor; and (4) possession of a firearm during the commission of a crime. This last offense was also a felony.

Pursuant to a plea agreement, Applicant pled guilty to possession of marijuana with intent to distribute. In return the prosecutor recommended probation and a reduced fine, dropping the remaining charges. During the court hearing, Applicant was questioned about the offense in order to establish the providence of his plea of guilty.

Prosecutor: Okay. Where did you get the marijuana?

[Applicant]: The marijuana—I didn't get the marijuana, [friend] did.

Prosecutor: [Friend] got the marijuana. Was it his idea?

[Applicant]: Yes, it was.

Prosecutor: Did you see him put it in the cooler?

[Applicant]: No, I didn't.

Prosecutor: But you knew it was back there inside the cooler?

[Applicant]: Yes.

Prosecutor: Did he tell you he did it?

[Applicant]: I knew it because I knew he did it. He had it in the cooler.
Decision at 6.

The court sentenced Applicant to a fine and seven years probation.

Since his 2003 arrest, Applicant has not seen his friend. He has not been involved in drugs or with the police since 2003.

In 2009, Applicant was interviewed by an OPM investigator pursuant to his application for a security clearance. During this interview, he addressed the circumstances underlying his 2003 conviction for possession of marijuana with intent to distribute. He stated to the interviewer that he was "shocked by the charges for marijuana and stolen lottery tickets as he had no knowledge of these items being in the car." Decision at 7. At the hearing in the case before us now, Applicant acknowledged to having pled guilty as described above. However, he contended that, at the time of his arrest, he did not actually know that marijuana was in the car. He testified that he only learned about it later. In answers to DOHA interrogatories, Applicant stated that he last possessed marijuana in 2000. He denied responsibility for the offense.

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).

Department Counsel argues that the Judge's analysis of the Guidelines J and E security concerns did not take into account contrary record evidence. We find her arguments persuasive.

The SOR alleged, in paragraph 1, the following conduct under Guideline J:

- a. You were arrested in about August 2000 in [State A], and charged with Possession of Marijuana, More than 50 pounds, Less than 2000 Pounds. You pleaded guilty and were sentenced to 10 years of community supervision and ordered to pay a \$750.00 fine and court costs.
- b. You were arrested in about May 2003 in [State B] and charged with (1) and (2) two Counts of Violation of [State] Controlled Substance Act, (3) and (4) two Counts of Possession of a Firearm During the Commission of Felony and (5) Theft by Receiving. You were found guilty of Count (1) and the other Counts were nolle prosequi. You were sentenced to seven years probation and fined.
- c. That information set forth under paragraph 2, below, which constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, a felony.

Paragraph 2 of the SOR contained the sole Guideline E allegation:

During a subject interview with an authorized investigator for the Department of Defense on January 12, 2009, you falsified material facts in that you stated in reference to your 2003 arrest, as set forth in subparagraph 1.b above, that you had no knowledge of any marijuana in the vehicle you were arrested in; whereas in truth, you deliberately failed to disclose that you were aware of the marijuana in the vehicle, and that you were transporting the marijuana with the other passenger in the vehicle, as cited in your court courtroom testimony during your hearing.

In his Answer to the SOR, dated July 20, 2010, Applicant stated, “I admit” to each of these allegations. His admissions were not accompanied by explanations or otherwise qualified in any way. In her Analysis, the Judge concluded that the Government had met its burden of production

for all the allegations under Guideline J. In particular, she stated that “the Government provided substantial evidence for its allegation of falsification in SOR ¶ 1.c.” Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” *See, e.g.*, ISCR Case No. 08-05637 at 2 (App. Bd. Sep. 9, 2010). Department Counsel states that these conclusions were supported by the record.

Department Counsel is correct. Because Applicant admitted the SOR allegations, they are not controverted. Accordingly, these admissions relieved the Government of any burden of producing evidence. *See* Directive ¶ E3.1.14. (The Government “is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.”) *See also* ISCR Case No. 02-21087 at 2 (App. Bd. Aug. 19, 2001). Second, even without reference to Applicant’s admissions, the Government presented evidence of Applicant’s alleged misconduct, including police reports, arrest warrants, and the transcript of his 2003 court hearing, part of which the Judge quoted in her findings. These exhibits, read in the context of the entire record, to include Applicant’s testimony, constitute substantial evidence of the Guideline J security concerns which DOHA alleged in the SOR. Furthermore, as the Judge noted in her Guideline E analysis, Applicant is barred from re-litigating his felony conviction in a DOHA proceeding.

Department Counsel persuasively argues that the Judge erred in her treatment of Applicant’s case for mitigation. Department Counsel notes a significant inconsistency in the Judge’s analysis. Although, as stated above, the Judge had concluded that the record contained substantial evidence of the alleged misconduct, to include the false statement, she went on to state that “Applicant did not falsify his statement to the OPM investigator.” The Judge then proceeded to analyze the Guideline J security concerns on the view that Applicant did not make the false statement and on the apparent assumption that he was not guilty of the 2003 felony offense as well.

Under the facts of this case, the Judge’s analysis is inconsistent. Having found that the record contained “such relevant evidence as a reasonable mind might accept . . . *in light of all the contrary evidence in the record*” that Applicant made a deliberately false statement during his clearance investigation, it was contradictory for the Judge to have gone on to conclude that, in fact, he did not do so. Her conclusion that he did not falsify the statement is also contradicted by a portion of her analysis under Guideline E. Although we defer to a Judge’s credibility determination, when, as here, an applicant’s admissions to the SOR and the record evidence viewed as a whole support a conclusion that Applicant committed misconduct, a Judge must explain why he or she believes an applicant’s testimony to the contrary. Failure to do so gives rise to the possibility that the Judge has simply substituted a favorable impression of an applicant’s demeanor for record evidence. Explanations that are self-contradictory on the essential point are *per se* unreasonable and are not sustainable.

Concerning the 2003 drug offense, the record contains substantial evidence not merely that Applicant pled guilty to this offense but that he was, in fact, guilty. Among other things, the prior similar offense in 2000 is relevant on the question of Applicant’s knowledge and intent during the 2003 incident. *See* Fed. Rule Evid. 404(b).¹ The Judge’s favorable conclusion regarding mitigation

¹The Federal Rules of Evidence serve as a guide in DOHA hearings. Directive ¶ E3.1.19.

did not take into account the extent to which a reasonable person could find Applicant's presentation at the hearing to be lacking credibility.² Viewed in light of the totality of the record evidence, the Judge's conclusion that Applicant had met his burden of persuasion in mitigation of the Guideline J security concerns is not supportable.³

Department Counsel persuasively argues that the Judge erred in her analysis of Guideline E as well. The sole allegation under Guideline E was Applicant's false denial to the investigator of any knowledge, at the time of the offense, of the presence of marijuana in the cooler in his friend's car. As stated above, Applicant admitted this allegation in his reply to the SOR. Therefore, the allegation was not controverted, relieving the Government of any burden of producing further evidence. However, the Government did produce evidence that Applicant had known at the time of his arrest that the marijuana was present in the car and that, accordingly, his denial to OPM was deliberately false.

In her analysis, however, the Judge did not discuss the legal effect of Applicant's SOR admission. As she had done under Guideline J, she analyzed the record evidence to determine whether the Government had met its burden of production, concluding that it had done so. Although Department Counsel argued that the Judge's ultimate conclusion on this matter was correct, she further argued that the reasoning whereby the Judge reached this conclusion was erroneous. We find Department Counsel's argument persuasive. The Judge summarized Applicant's testimony that he had not known about the marijuana in the trunk of his friend's car, treating this testimony as true. Upon that assumption, she could not have found that his statement to the investigator was false. However, she went on to state, "[g]iven his statement that he learned about the marijuana while in the holding cell, *he did not provide truthful and accurate information to the OPM investigator about the circumstances surrounding his 2003 arrest.*" Decision at 13. (emphasis added) If the Judge believed that Applicant did not know about the marijuana at the time of his arrest, she could not logically have found that his statement to the investigator denying such knowledge was knowingly false. Her analysis of this issue is contradictory, as was her analysis under Guideline J. Although the Judge's ultimate conclusion that the Government had presented substantial evidence of a false statement is supportable, the analysis whereby she attempted to arrive at this conclusion is arbitrary and capricious.⁴

²See, e.g., Tr. at 34: "Q: . . . [Y]ou were asked several times if you knew about the marijuana in the car. And each time, you said, 'Yes' . . . [W]hy didn't you say, 'I didn't find out until after we were in jail? A: I had- I'll tell you the yes on that. I'm not - I just - I wasn't - I don't know anything about as far as when that - when that - when I was notified. I didn't - as far as when the - when the traffic stop, actually stopped, I didn't know about it."

³In her analysis, the Judge characterized Applicant as a man with only a high school education, who did not "understand the nuances of the law[.]" Decision at 12. She made this statement in support of her belief that Applicant did not understand that "intent to distribute" marijuana meant his intent at the time of the offense. However, Applicant was represented at trial by counsel.

⁴Under Guideline J, the Judge found that the Government had presented substantial evidence of a false statement. In her analysis of the same Guideline, however, she stated that she had "found that Applicant did not falsify his statement to the OPM investigator[.]" Decision at 11. Again, under Guideline E the Judge stated that Applicant did not know about the marijuana at the time of his arrest. However, she also found that his statement that he did not know about the marijuana at the time of his arrest was deliberately false. A Judge may weigh the same conduct differently under different guidelines. See, e.g., ISCR Case No. 03-08257 at 3 (App. Bd. May 16, 2008). However, even when

The Judge's conclusion that the Government had met its burden of production under Guideline E required her to evaluate Applicant's case for mitigation. Department Counsel contends that the Judge's analysis of this issue is not supportable. This analysis consisted of the following:

After his arrest almost eight years [ago], Applicant has changed his behavior and friends. He stays away from individuals engaged in criminal activity, particularly individuals who are involved with drugs. He focuses his energy on his family and his work. For more than six years, he has worked successfully with the same company. In his spare time, he plays drums at his church. He actively made a decision to stay away from his earlier acquaintances, which has changed the direction of his life. This decision shows maturity, good judgment, reliability and trustworthiness.

This was the extent of the Judge's mitigation analysis under Guideline E. The sole allegation under that Guideline was a false statement to an interviewer in 2009, yet the Judge discussed only Applicant's claim to have avoided *further drug offenses since 2000* and evidence of his good employment record, etc. Absence of other *drug* offenses cannot logically mitigate security concerns arising from Applicant's recent false statement. Moreover, Applicant's work history and devotion to his family, while not irrelevant, are nevertheless insufficient to mitigate an offense that strikes at the heart of the security clearance process. *See* ISCR Case No. 08-07575 at 2 (App. Bd. Oct. 10, 2010). As Department Counsel observed in her brief, there is no evidence that Applicant attempted to correct his false statement or that he had made it in reliance upon legal advice, etc. The Judge's favorable conclusion as to mitigation under this Guideline is not supportable on this record.

Department Counsel has challenged the Judge's whole-person analysis, citing a number of comments from the Decision which she argues constitute error. For example, she cites to the Judge's statement that "Applicant has been honest and forthcoming about his two arrests." For reasons set forth above, we conclude that this statement is not supportable regarding the 2003 offense. Department Counsel also persuasively argues that the Judge's statement that Applicant had been honest throughout the security clearance process was belied by evidence of Applicant's deliberate false statement to the interviewer. We note other evidence that undermines this statement by the Judge. Applicant testified, and the Judge found, that he was aware that his friend had marijuana on his person at the time of the 2003 offense. Tr. at 26-27. In his security clearance application, however, Applicant stated "I was not aware that any illegal drugs were in the vehicle at the time we were stopped." Government Exhibit 1 at 24. This inconsistency further undermines the Judge's conclusion that Applicant had been honest during the security clearance process. The record evidence viewed as a whole does not support the Judge's whole-person analysis.

We note Applicant's Reply Brief, in which he attempts to explain the discrepancy between his testimony to the court in 2003 and his testimony at his security clearance hearing. "In 2003 I did admit to a felony marijuana charge. I was asked if I knew marijuana was in the cooler and I stated 'yes.' In my [security clearance] hearing . . . I was very nervous, worried and tense about having

evaluating different guidelines, a Judge cannot find that the same conduct both occurred and did not occur, in the same way at the same time.

to relive my past mistakes all over again. I recall stating that I didn't know that the marijuana [was] in the cooler but again I was very tense and worried." He appears to concede Department Counsel's argument that his hearing testimony was not accurate, attributing the problem to stress. Applicant's Reply Brief provides no reason to reject Department Counsel's arguments.

In light of (1) Applicant's SOR admissions to two instances of possessing marijuana with intent to distribute and one instance of a deliberately false statement to an OPM investigator; (2) record evidence demonstrating the same; (3) inconsistent statements by Applicant; and (4) the paucity of mitigating evidence, the Judge's favorable decision is not sustainable under the *Egan* standard. "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).

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