



The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 20, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 7, 2009, after the hearing, Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge denied Applicant due process of law; whether the Judge mis-applied the doctrine of collateral estoppel; and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding error, we remand.

### **Facts**

The Judge found that Applicant is seeking a security clearance as a condition of employment with a Government contractor. He has prior federal law enforcement experience. The Judge made the following additional findings:

In December 2007 Applicant and two friends, A and B, left a bar and were walking home. C, “[a] large male,” began making anti-Semitic remarks to the three friends. An argument ensued, after which Applicant, A, and B walked away. However, A went back to the scene. Applicant and B heard A scream and, returning to the vicinity, saw C body slam A into the street.

Applicant told C that he, Applicant, was a former federal agent. C immediately retreated. C asked to see Applicant’s badge, and Applicant replied that he was not a federal agent. C asked about an apparent bulge at Applicant’s waistline, implying that it was a weapon. Applicant denied to C that he was carrying a weapon. C went into a nearby townhouse, which Applicant believed to be owned by a friend of C.

Applicant went to his own nearby home and, about 30 minutes later, police came to his door. He told the police that he had former law enforcement experience and that he had a gun at his residence. Two days later, the police returned, questioned Applicant, and asked for consent to search his residence. He provided consent, and the police discovered a Glock 9 mm handgun. They seized the gun, holster, and ammunition. Applicant was arrested and charged with carrying a concealed weapon and with impersonating an officer, both class one misdemeanors.

Consistent with local law, Applicant was tried by a Judge without a jury. The Judge convicted him of the concealed weapon charge and acquitted him of the impersonation charge. Applicant appealed the conviction to a higher trial court. Although offered deferred adjudication with an expungement in exchange for a guilty plea, Applicant elected a trial *de novo* before a jury. The Jury also convicted Applicant of the concealed weapon charge.

Applicant enjoys an excellent reputation for job performance, trustworthiness, leadership, honesty, and commitment to national security.

## **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 (9<sup>th</sup> 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).

## **Due Process Violation**

At the beginning of the hearing, Department Counsel noted that Applicant’s response to the SOR included a letter from the attorney who represented him in the jury trial. The letter expressed the attorney’s opinion that Applicant was not guilty of the offense for which he was convicted. Department Counsel asked the Judge to disregard the letter’s “ultimate conclusions in that they invade the province of the trier of fact . . .” Tr. at 17.

At this point, the Judge raised the issue of collateral estoppel. Although Department Counsel stated that he did not believe that the doctrine precluded Applicant from denying his guilt in this case, the Judge replied that his understanding was to the contrary. He stated that he would “check it out” before he wrote the decision but that in the meantime the hearing would proceed “as though it does not apply.” Tr. at 19.

Applicant then inquired, “Is it okay for me to ask what exactly you guys just discussed?” The Judge explained the meaning of collateral estoppel. He gave reasons for its application in DOHA hearings, principally the unavailability of witnesses and other evidence. He also cited the principle of comity between states and the federal government as a justification (see note 1 below). Tr. at 21. Applicant asked, “Does that mean that you will or will not let me . . .”

Judge: We will let you do it [deny guilt] because we haven’t thoroughly researched the issue . . . And if I decide that it does apply . . .

Applicant: Then whatever I present for that specific argument will just not be taken into . . .

Judge: Right, then I won’t be allowed to contradict the fact that you were carrying a concealed weapon. I mean we’re stuck with that as a fact then. Tr. at 21-22.

The Judge returned to this point at the end of the proceeding, promising that he would do more research after the hearing before deciding whether collateral estoppel applied in Applicant’s case.

Applicant: So you’re saying that everything that we testified about the incident itself will ultimately be . . .

Judge: It could be irrelevant.

Applicant: Irrelevant, exactly.

Judge: It could be irrelevant. I have to research it. I’m still going to summarize the facts, even if they are irrelevant, in my decision, what the testimony was. However, I don’t know until I thoroughly look into it. Tr. at 126-127.

Based upon the foregoing, a reasonable person in Applicant’s position would likely have understood that the Judge was going to proceed at the hearing as if collateral estoppel did not apply and that Applicant would be permitted to present exculpatory evidence. However, should later research demonstrate that collateral estoppel did apply, then Applicant’s exculpatory evidence would be irrelevant and the Judge simply would not consider it, producing his decision as if the evidence had not been presented.

When the Judge rendered his decision, he concluded that the doctrine of collateral estoppel applied to the facts of Applicant's case.<sup>1</sup> However, rather than simply exclude that portion of Applicant's testimony which he believed barred by collateral estoppel, the Judge considered that evidence on the question of rehabilitation. He stated,

I cannot conclude that [Applicant] was truthful at his hearing and in his SOR response because he has denied that he carried a concealed firearm when he confronted [C] . . . Applicant's failure to provide truthful information at his security clearance hearing has created doubts about his "judgment, reliability, and trustworthiness. By its very nature it calls into question a person's ability or willingness to comply with laws, rules and regulations." Decision at 11, quoting Directive ¶ E2.30.

Later on, in his whole-person analysis, the Judge continued

Having decided that the criminal court's finding that he possessed a concealed firearm is binding, I logically must conclude Applicant's denial was the presentation of false information at his security clearance hearing. *An Applicant who provides materially false information at his security clearance hearing raises security concerns that cannot be mitigated.* His decision to deny possession of the firearm when he confronted [C] in December 2007 was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Decision at 12. (emphasis added)

Therefore, rather than exclude the evidence as irrelevant, the Judge in fact considered it, and then used it to resolve the essential issue of the case. He considered it as demonstrating that Applicant had not successfully mitigated the security concern arising from his conviction, and, indeed, he further considered it as evidence of an additional security concern, that of providing false information during the clearance process. This is a security concern usually addressed under

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<sup>1</sup>The Appeal Board set forth the criteria to apply in determining the applicability of collateral estoppel in a DOHA case. These are "[F]irst, that the party against whom an earlier decision is asserted must have been afforded a "full and fair opportunity" to litigate that issue in the earlier case. Second the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. Third, the application of collateral estoppel in the second hearing must not result in unfairness." ISCR Case No. 04-05712 at 8 (App. Bd. Oct. 31, 2006), internal citations omitted. Although the Judge referenced this case in his discussion, he also mentioned other cases. Among the policy reasons for applying collateral estoppel, the Judge listed that of "comity between the state courts and the federal government," citing in support 28 U.S.C. § 1738. This statute requires all courts in the U.S. to give full faith and credit to judicial proceedings of U.S. states, territories, or possessions. However, as Applicant notes, ISCR Case No. 04-05712 explicitly rejected the comity provisions of this statute as a reason for applying collateral estoppel in DOHA cases. Rather, the Board based its reasoning upon, *inter alia*, the Executive Branch's special expertise in security clearance cases as recognized by *Egan, supra*, and the need for uniformity in DOHA proceedings. Applicant raises an issue that the Board construes as asserting that the Judge was biased because he relied in part on reasoning he cited in a separate opinion he wrote in the 2006 Appeal Board decision. Applicant notes that the Judge's reasoning in that decision was rejected by the majority. The Board need not address the bias issue since we are remanding the case to another Judge for other reasons.

Guideline E (Personal Conduct), which is not alleged in this case. *See* Directive ¶ E2.15. Applicant's alleged lack of forthrightness at the hearing is unrelated to his eligibility for access to classified information under the allegations cited in the SOR. By advising Applicant that he could proceed as if there were no barrier to his denial of guilt, the Judge in effect invited him to present the very evidence which later formed the basis for concluding that Applicant had raised "security concerns that cannot be mitigated." Providing materially false information at the hearing not being alleged in the SOR, the Judge erred in relying on such a finding in concluding Applicant was ineligible for access to classified information. *See, e.g.*, DISCR OSD Case No. 93-0519 at 5 (App. Bd. Apr. 14, 1994); ISCR Case No. 02-12789 at 7 (App. Bd. May 13, 2005) (It was error for the Judge to conclude that Applicant's having minimized the case against him raised additional security concerns not alleged in the SOR).

Of course, a Judge is free to amend the SOR, to include adding new allegations, in order to conform the SOR to the evidence adduced at the hearing. However, if he does so, the Judge must give the parties an opportunity to request additional time to prepare, which was not done in this case. Directive ¶ E3.1.17.

The Directive requires that all DOHA proceedings "shall be conducted in a fair and impartial manner." Directive ¶ 4.1. "Administrative Judges have broad latitude and discretion in how they write their decisions. However, that latitude and discretion must be exercised within the legal constraints of the Directive and basic concepts of due process." ISCR Case No. 98-0809 at 2 (App. Bd. Aug. 19, 1999). After examining the record, we conclude that a reasonable person, whether a *pro se* applicant or an attorney, would not have expected the Judge to make such use of Applicant's exculpatory evidence, particularly that the Judge would find in the evidence an additional security concern, one which he believes to be categorically beyond mitigation. Under the circumstances, we conclude that Applicant was denied a reasonable opportunity to prepare for the hearing and to present evidence, in that, had he understood what use the Judge would have made of his evidence, he would most likely have presented his case in a substantially different way. *See* ISCR Case No. 02-20403 at 4 (App. Bd. Apr. 7, 2003). Under the facts of this case, the Judge's error is clearly harmful. *See* ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009); ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006).

Accordingly, we conclude that the best resolution of this case is to remand it for another hearing, one conducted consistent with the discussion above. Because the Judge has expressed an unequivocal opinion concerning both Applicant's credibility and the nature and extent of the pertinent security concerns, the case should be remanded to a different Judge. To the extent that issues of collateral estoppel arise in the new hearing, they should be resolved in accordance with ISCR Case No. 04-05712, *supra*, n. 1. Any such ruling shall be administered in accordance with Directive ¶¶ E3.1.8 - E3.1.19, which specify the obligation to conduct proceedings in a fair, timely, and orderly manner and which repeatedly specify the need to provide notice to an applicant. The prior proceeding shall not be considered. In light of our resolution of this case, the remaining assignments of error are not ripe for consideration.

**Order**

The Judge's adverse security clearance decision 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

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