

KEYWORD: Guideline J; Guideline E; Guideline F

DIGEST: In 2006-7, Applicant stole approximately \$8,000 of goods from her employer. The record as a whole does not demonstrate that this conduct has been mitigated. Favorable decision reversed.

CASENO: 09-03251.a1

DATE: 03/09/2011

DATE: March 9, 2011

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In Re:)	
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-----)	ISCR Case No. 09-03251
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 4, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 15, 2010, after the hearing, Administrative Judge Wilford H. Ross 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 application of the mitigating conditions was not supported by the evidence and whether the Judge conducted a piecemeal analysis of the allegations. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following findings of fact:

Applicant is employed by a Defense contractor and seeks to obtain a security clearance in connection with her job.

Between January 2006 and September 2007, Applicant stole approximately \$8,000 from the Army and Air Force Exchange Service (AAFES). Applicant testified that she committed the thefts due to events in her personal life, including the deaths of her father and brother.

When her thefts were discovered, Applicant admitted the misconduct. Subsequently, she resigned from the employ of AAFES. At the time of her resignation, she had worked in various locations for AAFES for 13 years.

Applicant has worked out a repayment plan with AAFES whereby she will pay \$173.34 a month until the debt is extinguished. Between September 2009 and the date of the hearing,¹ Applicant had not made any payments, due to “other financial issues that came up, some connected to deaths in her family.” Decision at 3.

When Applicant submitted her security clearance (SCA) application, she did not state her AAFES employment during the time that she committed the thefts. However, when asked on the same SCA if she had ever left a job following charges or allegations of misconduct, she answered “yes” and advised about her thefts.

In July 2009, Applicant paid off a \$627 debt she owed to the Federal Government for back taxes.

¹The hearing occurred on January 28, 2010. Tr. at 3.

Applicant enjoys a good reputation for her moral standards, her work ethic, and her dedication 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 (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 does not take issue with the Judge’s favorable findings concerning Applicant’s answer to the SCA and her Federal tax debt. However, Department Counsel does contend that the Judge erred in his analysis of the Guidelines J, E, and F concerns arising from her thefts and her failure to make payments under her repayment plan. He persuasively argues that the record evidence does not support the favorable decision. We note the following evidence which is not consistent with the Judge’s decision.

Government Exhibit (GE) 4, Answers to Interrogatories, dated July 7, 2009, contains a summary of her security clearance interview. Applicant certified that the summary was accurate. In this document, she stated the reasons for her having stolen the property:

Subject admitted that she stole money from the register and various items from the Shoppette out of habit as the items were convenient and she was too lazy to pay, didn't want to pay, or didn't have the money to pay for the items. Subject admitted that she was having a bad year, was depressed, and had personal problems at home which did not excuse her behavior. Subject was aware of what she was doing but at the time did not care if she got caught or not.

The Judge appeared to conclude that Applicant's family circumstances were at the root of her misconduct. Her interview is not consistent with that conclusion. Neither is this interview consistent with the Judge's favorable application of mitigating conditions 17(c),² 20(a),³ and 32(a),⁴ each of which require Applicant to show that the conduct "does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

Applicant testified that her father and brother died in 2009. Tr. at 38. She stated the same thing in her answer to DOHA Interrogatories. GE 4. Applicant testified that she committed the thefts because she was upset over her father's remarriage. Tr. at 48. This evidence contradicts the Judge's finding that Applicant committed the theft because of depression resulting from the deaths of her father and brother.

The Judge's findings and the record evidence underlying those findings support a conclusion that Applicant's misconduct took place over a course of nearly two years. Indeed, in her security clearance interview, she stated that she "stole daily various items from the AAFES Shoppette, including bags of chips, coffee, soda, magazines, candy, and about \$40.00 cash every weekend from the register." GE 4. There is no evidence in the record to explain why such purposeful and repeated misconduct is logically connected to Applicant's having been disturbed over her father's remarriage, as she testified. *See* ISCR Case No. 08-05351 at 8 (App. Bd. Mar. 12, 2010) (There was nothing in the record to establish a nexus between the death of applicant's son and applicant's security significant misconduct).

Furthermore, in discussing her reasons for the theft, Applicant testified that, in addition to having been upset over her father's remarriage, she was upset over her brother's death. "And I just got depressed and I did what I did because I didn't know where my life was headed." Tr. at 49. However, as stated above, Applicant's other testimony and her answer to DOHA interrogatories

²Directive, Enclosure 2 ¶ 17(c).

³Directive, Enclosure 2 ¶ 20(a).

⁴Directive, Enclosure 2 ¶ 32(a).

indicate that her brother died in 2009, well after the thefts. The Judge did not address this inconsistent statement and the extent to which it undermines Applicant's credibility.

The Judge found that Applicant had not made payments to AAFES under her repayment plan for several months preceding the hearing. She stated that she had stopped making payments due to "financial difficulty." Tr. at 37. She attributed her financial difficulty in 2009 to her having had a bad year, which included the deaths of her father and brother. She testified that she does not have an emergency fund, that she lives paycheck to paycheck, and that her "account is minus right now[.]" Tr. at 38. This evidence undermines the Judge's conclusion that her repayment efforts show mitigation, especially of the Financial Considerations security concerns.⁵ The Judge did not discuss the extent to which Applicant's security significant debts appear connected to her experience of personal difficulties which, while painful, are not "qualitatively different from what an average person might expect to encounter during the course of a lifetime." ISCR Case No. 06-23362 at 4 (App. Bd. Apr. 4, 2008).

Department Counsel argues that the Judge engaged in a piecemeal analysis of the record. We find merit in this argument. The record evidence, viewed as a whole, does not support the Judge's application of the mitigating conditions or the whole-person factors in light of the *Egan* standard. The Judge's favorable security clearance decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

⁵See also Applicant Exhibit B, a spreadsheet prepared by AAFES showing Applicant's history of repayment. According to this document, Applicant made a payment of \$133.85 in October 2007 and then made no further payment until January 2009. "[T]his does not constitute a track record of payment, and bears no relationship to the mitigating circumstances suggested by the Administrative Judge." Department Counsel Brief at 11. In addition to the mitigating conditions discussed above, the Judge concluded that Applicant had demonstrated that her AAFES debt is under control or is being resolved (Directive, Enclosure 2 ¶ 20(c)) and that she has made a good-faith effort to pay off her debt to AAFES (Directive, Enclosure 2 ¶ 20(d)).

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board