

KEYWORD: Guideline J

DIGEST: Judge’s conclusion that Applicant’s case raised Guideline J security concerns was sustainable. Judge’s whole-person analysis complied with the requirements of the Directive. The Judge’s credibility determination reflected a reasonable interpretation of the evidence. Adverse decision affirmed.

CASE NO: 09-07714.a1

DATE: 08/16/2011

DATE: August 16, 2011

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin Howry, Esq., Department Counsel

**FOR APPLICANT**

Bradley R. Corbett, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 19, 2011, 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 May 25, 2011, after the hearing, Administrative Judge Jennifer I. Goldstein 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 erred in concluding that Applicant’s case raised Guideline J security concerns; whether the Judge erred in her application

of the mitigating conditions; whether the Judge's whole-person analysis was erroneous; and whether the Judge's credibility determination was erroneous. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a 40-year-old veteran of the U.S. Navy, employed as a Government contractor since the late 1990s. His case contains evidence of three criminal offenses. The first occurred in 2002, when Applicant engaged in an altercation with another person while standing in line at a movie theater. Applicant was holding his girlfriend's clutch for her at the time. When arrested, the clutch was found to contain marijuana. Applicant was charged with fighting in public and with possession of marijuana. He pled guilty to the first offense and the second was dropped.

In 2005, Applicant was arrested and charged with DUI. A jury convicted him of the offense, and Applicant was sentenced to a fine, attendance at alcohol classes, participation in a first offender program, and attendance at a Mothers Against Drunk Driving victim impact panel.

In 2009, Applicant was arrested and charged with one count of carrying a loaded firearm; two counts of drawing or exhibiting a firearm; one count of disturbing the peace by fighting; and one count of resisting arrest. He pled guilty to the first and last of these counts. He was placed on probation, fined, required to spend five days in a public service program, and ordered not to possess any weapons or firearms.

The Judge described the circumstances underlying this offense. Applicant was angry because some children from his apartment complex had vandalized his car. Applicant told the children's father about the incident. The father punished at least one of them. However, the city decided not to prosecute the children due to their ages. Subsequently, Applicant approached the parents seeking compensation for the damage.

The Judge's findings noted significant differences between the versions of the events related by Applicant and by the victim and witnesses. The victim, the children's mother, stated that Applicant had come to her door and berated her with foul language. The woman called her husband. When he arrived at the apartment complex, the husband told Applicant not to threaten his family again or the husband would "break his neck." Applicant then came down a stairway and pointed a rifle at the husband. Someone called the police, but before they arrived Applicant had gone to his apartment. He refused to come out when the police directed him to do so. The police evacuated the neighbors, considering Applicant to be armed and barricaded. Other witnesses, neighbors living in the same apartment complex, told versions of the event consistent with the victim's account.

In Applicant's version, the husband was a drug dealer who had recently been released from prison. Applicant stated that he (Applicant) had approached the mother, asking for compensation for his car. He stated that the husband soon after entered Applicant's apartment, and Applicant had to brandish a weapon to persuade him to leave. He stated that the weapon was a pellet gun that looked like a rifle. Applicant stated that he had called the police himself but, when they arrived, they "stereo-typed him in a negative manner." Decision at 4. After a three-hour standoff, a SWAT

team used a “flash bang grenade,” persuading Applicant to leave his apartment.<sup>1</sup>

Applicant is well-respected by friends, co-workers, and supervisors. He performs satisfactorily on his job. His supervisor states that Applicant is responsible and reliable.

Applicant contends that the Judge erred in concluding that his case raised security concerns. He faults the Judge for describing his offenses as a “long criminal history” and argues that the incidents were not serious, insofar as he was not incarcerated for any of them. However, the Judge’s characterization of Applicant’s conduct reflects a reasonable interpretation of the evidence. The Judge’s conclusion that Applicant’s case raises two disqualifying conditions—31(a)<sup>2</sup> and 31(c)<sup>3</sup>—is supportable. Moreover, the Judge’s application of the mitigating conditions is reasonable. She concluded that his history of criminal conduct precluded her finding that it will not recur<sup>4</sup> and that too little time had elapsed since the last offense to demonstrate rehabilitation.<sup>5</sup> These conclusions are supported by the record.

Applicant contends that the Judge’s whole-person analysis was erroneous, in that she conducted it in a piecemeal fashion, thereby failing to consider the evidence as a whole. Specifically, he contends that the Judge did not properly weigh his evidence of good character. However, the Judge discussed this evidence, both in her findings and in her analysis, concluding that it was insufficient to outweigh the serious nature of Applicant’s criminal conduct, especially the 2009 incident. The record demonstrates that the Judge considered the totality of Applicant’s conduct in reaching her decision, thereby complying with the requirements of Directive, Enclosure 2 ¶ 2(a). *See, e.g.*, ISCR Case No. 10-00141 at 2 (App. Bd. Apr. 28, 2011). We find no error in the Judge’s whole-person analysis of Applicant’s case.

Applicant takes issue with the Judge’s credibility determination. Specifically, he argues that the Judge erred in stating that, whether one considers Applicant’s version of the 2009 incident or

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<sup>1</sup>Government Exhibit (GE) 5, Sheriff’s Report, dated March 20, 2009, pp. 7-12, contains a factual description of this incident. Among other things, the report states that the SWAT team assembled, using a nearby parking lot as a command post. “There were over thirty deputies and several pieces of special equipment on scene because [Applicant] refused a lawful order to come out of his apartment.” After Applicant was taken into custody, the officers searched his car and apartment. GE 3, Criminal Complaint with supporting documentation, includes the prosecution response to Applicant’s request for the return of his weapons following his conviction. GE 3 states that among those items law enforcement officials had seized were a Taurus .45 caliber handgun and a Ruger Mini semi-automatic rifle “loaded with 28 rounds in the magazine and one in the chamber.” The document states that Applicant had brandished these weapons during the commission of the offense.

<sup>2</sup>Directive, Enclosure 2 ¶ 31(a): “a single serious crime or multiple lesser offenses[.]”

<sup>3</sup>Directive, Enclosure 2 ¶ 31(c): “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted[.]”

<sup>4</sup>Directive, Enclosure 2 ¶ 32(a): “so much time has elapsed since the criminal behavior happened . . . that it is unlikely to recur and does not cast doubt upon the individual’s reliability, trustworthiness, or good judgment[.]”

<sup>5</sup>Directive, Enclosure 2 ¶ 32(d): “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement[.]”

the versions provided by the witnesses, one would still conclude that Applicant had shown poor judgment. He contends that, if one accepts Applicant's version, one would have to conclude that he had done nothing wrong. However, Applicant's version of the incident, contained in his security clearance interview, describes a standoff between Applicant and a SWAT team that lasted three hours. It is reasonable to believe that a person who consistently rebuffs police orders to exit a building is showing poor judgment. The Judge did not err in her credibility determination.

The record supports a conclusion that the Judge examined the relevant data and articulated 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 Judge's adverse decision is sustainable on this record. "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). See also Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

### **Order**

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

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