KEYWORD: Guideline E

DIGEST: The Government presented substantial evidence of Guideline E security concerns arising from Applicant's multiple job dismissals, false statements, and a threatening communication. The deference the Board owes a Judge's credibility determinations has limits. In this case, the record did not support the Judge's credibility determinations of the three principal witnesses. Favorable decision reversed.

CASE NO: 09-08394.a1

DATE: 01/16/2013

DATE: January 16, 2013

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Holly Emrick Svetz, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. DOHA issued an undated statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On February 6, 2012, the Government amended the SOR, adding another allegation and modifying an existing one. Applicant requested a hearing. On September 24, 2012, after the hearing, Administrative Judge Robert Robinson Gales 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 erred in his application of the Disqualifying Conditions (DC) and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant is a president of a Defense contractor. He has a doctoral degree in computer science and has held a Top Secret security clearance.

In 2002, while serving as a sales engineer for a previous employer (C1), Applicant sold company property through the internet. He met with an attorney for the company, who demanded several things, including that Applicant pay the company $1,500 and that he submit his resignation. Applicant resigned one week later.

In 2006, Applicant began working for another company (C2), which was certified as a small, disadvantaged company under the Small Business Act. C2 had a facility security clearance and had four classified contracts with the Federal Government. However, the clearance of the president, Witness 1 (W1), was withdrawn, with the result that C2's facility clearance was defective. Attorneys acting on behalf of C2 submitted a mitigation plan to the Defense Security Service (DSS). This plan required that W1 would give up his status as facility security officer and that a subsidiary company (C3) would be created that was wholly owned by C2 but which would otherwise be a separate business entity, with its own board of directors, officers, and management. All of C2's contracts would be transferred to C3 by way of novation, and the new company would have its own facility security clearance. The novations would have to be approved by the contracting officers for the various contracts. Applicant was made president of C3. W1 was to have no role in the operations of C3.

Subsequently, DSS advised W1 that the mitigation plan was acceptable. Applicant undertook certain actions in furtherance of the mitigation plan, such as leasing space for C3. He and other C3 officials urged W1 to make the novation of the classified contracts a priority. At some point, W1 and the attorneys decided that it was appropriate to focus attention on regaining C2's facility clearance, although W1 did not advise Applicant of this shift. The Judge also stated that Applicant and W1 differed in their interpretations of the mitigation plan, such as the extent to which the two companies, C2 and C3, could share resources, have common procedures, etc. W1 was also concerned that complying with the mitigation plan could imperil C2's status as a small, disadvantaged business. Applicant suggested novating the classified contracts to another company (S), which Applicant had formed prior to beginning employment at C2.

W1 believed that the mitigation plan was proceeding adequately. After speaking with a lawyer, who was also a secretary for C3, he concluded that Applicant's proposal to novate the contracts to his own company was inconsistent with Applicant's fiduciary duties to C3. Accordingly, he terminated Applicant's employment. As a result of this termination, C2 lost

between 60 and 70 per cent of its business. W1 also stated that, after the termination, he discovered other incidents of wrongdoing by Applicant, including his having submitted a DD Form 254, a request for a facility security clearance, which contained numerous false statements.

W1 sued Applicant, S, and other individuals, alleging that the defendants had attempted wrongfully to appropriate contracts and business opportunities, proprietary information, etc. The defendant's counterclaimed, alleging lack of compliance with labor laws and failure to provide consideration. The parties settled the lawsuit, each side releasing the other from all claims. W1 had to pay Applicant substantial reimbursement. Additionally, the parties were required to refrain from disparaging each other.

In late 2008, W1's security clearance was restored following a DOHA hearing. In the case presently before us, the Judge found that W1 and the attorneys had intentionally failed to implement the mitigation plan. The Judge stated that the plan had "purportedly" been approved by DSS, that W1 had exercised control over both companies in contravention of the plan, that no contracts were novated from C2 to C3 as required by the plan, and that W1 made an inconsistent statement during the hearing concerning his activities in managing the companies in question. Applicant presented character witnesses at the hearing who testified that he enjoyed an excellent reputation for honesty and trustworthiness. One of these witnesses testified that Applicant did not believe that it was appropriate to take shortcuts in the performance of company activities.

In the Analysis, the Judge summarized the evidence that the Government had presented in its case in chief, stating that Guideline E DC 16(c),[1] 16(d)[2], and 16(e)[3] "have seemingly been established by these situations and actions." Decision at 25. However, he stated that the Government's case rested upon the testimony of two witnesses, W1 and Witness 2 (W2), who was Applicant's successor as CEO of C3. The Judge stated that their interpretations of Applicant's conduct were sometimes supported by documentation but sometimes not, that W1 made statements that were mutually inconsistent and/or that were contradicted by other evidence, and that W1 was motivated not by business judgment in his actions regarding Applicant but by ill will. The Judge also stated that it "is of substantial significance that [W1] settled the lawsuit he filed against

[1]Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

[2]Directive, Enclosure 2 ¶ 16(d): "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information."

[3]Directive, Enclosure 2 ¶ 16(e): "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing . . ."

Applicant and was required to pay Applicant; Applicant was not required to pay [W1] any sum of money." Decision at 26. He stated that W1 lied during the course of the implementation of the mitigation plan in order to keep himself in control. The Judge stated that Applicant did submit a DD 254, and that he had received guidance from DSS in preparing the form. The Judge stated that Applicant had acted in his capacity as facility security officer for C3 in doing so and that he had intended to use his own company to control classified contracts. He stated that the evidence did not support a conclusion that this was an effort to steal a contract. The Judge found that W2 was not credible, insofar as he had been a party to the lawsuit and had settled, as had W1. He stated that W2 ignored documentation that undercut his testimony that Applicant was not trustworthy. He stated that he had given W2's testimony "reduced weight" because W2 was biased against Applicant. The Judge concluded that Applicant had succeeded in demonstrating that the Government witnesses were not reliable and that Applicant had the personal characteristics worthy of a security clearance.

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 erred in concluding that the Government had failed to meet its burden of production regarding SOR ¶¶ (a), as amended, and (b). These two paragraphs alleged respectively that Applicant had been terminated for cause from the employ of C2 and that Applicant had completed a facility security clearance request which contained false statements. In a DOHA proceeding, the Government's task is to produce substantial evidence regarding allegations that have been controverted, as was the case with these two allegations. Directive ¶ E3.1.14. *See also* ISCR Case No. 09-07219 at 4, n. 1 (App. Bd. Sep. 27, 2012). It is not obvious that the Judge actually concluded that the Government had failed to meet its burden of production. As noted above, he stated that the evidence "seemingly" established three DCs and then proceeded to list and address the Mitigating Conditions. Accordingly, it would appear that he had found the evidence sufficient to support these two allegations.[4] To the extent that Department Counsel's reading of the Decision is accurate, however, we note that the Government submitted numerous documents, to include copies of e-mail transmissions concerning material issues in the case; Applicant's request for a facility security clearance for his own company, which includes the DD 254, and which the record establishes contained statements that were not factually correct; the mitigation plan; the complaint in the lawsuit involving W1 and Applicant; and the settlement agreement that resolved the suit. The Government also called two witnesses, W1 and W2, whose testimony was not materially impeached upon cross-examination. Viewed in light of the entire record, the testimony and documents cited above constitute substantial evidence that Applicant had been fired from C2 and that he had made false statements in the facility clearance application. Under the facts of this case, these allegations set forth security concerns under Guideline E, insofar as a reasonable person could conclude that the evidence raises questions about Applicant's judgment, candor, honesty, and/or willingness to comply with rules and regulations. *See* Directive, Enclosure 2 ¶ 15. The Government has met its burden of production regarding the two challenged SOR allegations.

Department Counsel has challenged the Judge's treatment of the mitigating conditions and the whole-person factors. We find Department Counsel's arguments to be persuasive. The Judge relied in large measure upon his credibility determinations regarding the two Government witnesses and the Applicant. The deference that we owe to a Judge's credibility determination is not without limits. For example, the coherence of a witness's testimony with other evidence; the internal consistency of such testimony, or the lack thereof; and extent to which testimony is plausible or implausible can significantly affect the extent to which we can defer to the Judge's credibility determination. *See, e.g.*, ISCR Case No. 10-03886 at 3 (App. Bd. Apr. 26, 2012). In this case, the Judge found W1 to be lacking credibility, based upon a number of factors. He stated, for example,

[4]This impression is bolstered by the Judge's comments under the whole-person analysis. He stated that "there is some evidence against mitigating Applicant's conduct," acknowledging that Applicant submitted the DD Form 254 based on a "'bona fide procurement requirement for access to classified information,' and listed a particular contract number, when there apparently was no such 'bona fide procurement requirement,' and there was no contractual relationship between the two companies listed." Decision at 28-29.

that W1 had made inconsistent statements during the hearing. However, after considering the transcript, we do not conclude that the statements in question were obviously inconsistent.[5] The Judge also relied upon evidence that W1 had agreed to settle the lawsuit he had filed against Applicant, apparently concluding that the settlement in some way demonstrated that the lawsuit was frivolous, thereby evidencing W1's unfounded ill-will against Applicant. However, a settlement does not, in and of itself, suggest that the underlying lawsuit was groundless. *See, e.g., Ford Motor Company v. Mustangs Unlimited, Inc.*, 487 F.3d. 465, 469-470 (6th Cir. 2007) for a discussion of the strong public policy in favor of settlement, in the interests of justice to the parties, economy of judicial resources, and the saving of tax dollars. *See also Ismert and Associates, Inc., v. New England Mutual Life Insurance Co.*, 801 F.2d 536 (1st Cir. 1986). Moreover, the Judge's apparent belief that W1 did not receive an economic benefit from Applicant in the settlement is belied by the settlement's own terms, which provide that the parties will enter into a teaming agreement for purposes of mutual economic advantage, with significant profit sharing among them. It is not reasonable to conclude that the fact of a settlement, or the terms of this particular agreement, demonstrate that W1 was motivated by unjustified ill-will toward Applicant.[6]

The Judge also concluded that W2 was not credible. One reason he gave was W2's having been a co-plaintiff in the above described lawsuit and having agreed to the settlement. For reasons set forth above, we conclude that evidence of this lawsuit and settlement does not support the Judge's credibility determination. He also stated that W2 ignored documentation that impeached W2's testimony that Applicant had not been truthful. However, after examining the transcript, we do not find that the record evidence supports this conclusion by the Judge.[7] In addition to these

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[5]The Judge stated that, at one point in the hearing, W1 testified "that the mitigation plan did not prohibit his management of [C3] through at least February 2008. He essentially denied that comment later in the hearing." Decision at 18. The Judge cited to testimony concerning a meeting W1 had called between Applicant and other parties regarding things that needed to be done by C3 to effectuate the mitigation plan. W1 was then asked the following by Department Counsel: "Q: Did the mitigation plan prohibit your management of [C3], the subsidiary? A: Not at that point, no." Tr. at 69. Applicant's counsel asked the following question on cross examination: "Q: Doesn't that document [mitigation plan] say that you were to have no role in [C3] . . . ? A: Yes. Q: But then you just earlier testified that you didn't have any limits on your role in managing [C3]? A: I don't believe that's what I said." Tr. at 90-91. Whether or not W1 was correctly interpreting the mitigation agreement, and given his qualified answers to the questions, these two answers are not inconsistent with one another, as the Judge found them to be.

[6]The Judge's negative credibility determination of W1 was influenced by the Judge's conclusion that W1 was out for revenge as evidenced by what the Judge termed W1's "campaign of constantly disparaging Applicant." Decision at 29. While W1 did make negative comments about Applicant during the course of an official OPM investigation interview, there is no record evidence to support the Judge's characterization of W1's actions as a campaign of constant disparagement.

[7]The record establishes that W1 fired Applicant on or about May 1, 2008. W2 testified that Applicant had told him, one or two months prior to the job termination–that is, in March or April 2008–that Applicant intended to transfer C3's government contracts to Applicant's own company and that W1 was aware of this. W2 testified that he came to believe that Applicant had not been truthful in stating that he had discussed this matter with W1. The Judge questioned W2, showing him an e-mail from Applicant to W1, sent on April 29, 2008, about two days prior to the firing. In this e-mail Applicant advised W1 of his plans to transfer government contracts to Applicant's company. The Judge then asked: "Does that change your opinion of whether or not he was telling you the truth then or whether he was lying? A: No, sir. [Judge]: So based on the fact that you read a document dated 2008, where he's telling [W1] what he should be

matters, the Judge also found that W1 was a person interested in maintaining control of his company and that he did not devote time and energy to implementing the mitigation plan. Rather, W1 shifted his attention, at some point, to regaining his security clearance, and with it the facility clearance of C2. Were that to have occurred (and the evidence demonstrates that it did in fact) it would have obviated the need for a mitigation plan. The Judge's view appears to be that Applicant's desire to implement the plan was contrary to W1's desire to exercise control over his own company, thereby serving as a basis for W1 to feel unjust hostility toward Applicant. Again, however, evidence that W1 shifted his attention to regaining his own clearance and that of his company would likely appear to a disinterested party to be a business decision, whether wise or not. Evidence that W1 did not act expeditiously in executing the mitigation plan, even if true, does not necessarily impeach the testimony of W1 regarding the impropriety of Applicant's attempt to transfer the contracts to his own company, conduct that was not consistent with the terms of the mitigation agreement and which formed the basis of Applicant's dismissal.[8] We note in this regard ISCR Case No. 10-03886, *supra*, at 3, which states that an employer's decisions are entitled to some deference. The Judge's failure to extend the appropriate deference to the business judgments of W1 undercuts the Judge's adverse credibility determination concerning him.

Department Counsel further argues that the Judge ignored record evidence that impugns Applicant's credibility. We find this argument to be persuasive. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 11-05512 at 2 (App. Bd. Oct. 24, 2012). However, he should be expected to discuss significant evidence that has a material bearing on the case. Department Counsel contends that Applicant made unexplained inconsistent statements that the Judge failed to address. Department Counsel notes record evidence, from Applicant himself, that he had resigned from C1 in 2002 after having been advised to do so by a company attorney, due to Applicant's having improperly sold company property. However, at the hearing Applicant stated that he had left that company because it had given him an unrealistic sales quota. He also stated that no action had been taken against him due to the investigation regarding his disposition of company property, but that he had been advised that his future in the company, along with that of others, was limited. Tr. at 190. On cross-examination, Applicant did not provide a reasonable explanation for these inconsistencies.[9] Department Counsel points to inconsistencies

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doing, you still deny that he was telling you the truth? The Witness: Because the conversations in which he told us that he was communicating with [W1] were a month or two prior to his termination. This was two days prior to the termination . . . [Judge]: Okay. So you're still of the opinion that [Applicant] was telling something other than the truth? The Witness: At that time yes, yes sir." Tr. at 351-352. Evidence that Applicant had announced his intention to W1 on April 29 does not undermine W2's opinion that Applicant's statements made one to two months prior to that date were false. The cited evidence does not support the Judge's conclusion about W2's credibility.

[8]The argument in Applicant's Reply Brief that it would not have been possible for Applicant surreptitiously to have novated C2 contracts to his own company rather than C3 without approval of all parties does not call into question record evidence that Applicant's conduct was not consistent with the mitigation plan. Neither does it undermine W1's testimony that he found this conduct to be inconsistent with Applicant's fiduciary duties as CEO of C3.

[9]"Q: But you recognize that saying that you left voluntarily is quite a different explanation that you've given today . . . that an attorney flies out from California and . . . asks for your resignation? . . . He . . . confronted you about what you did, and asked for your resignation; correct? A: That's what I said. That's what I said." Tr. At 243.

in Applicant's various statements concerning the disposition of the check that he gave to C1 in response to a demand by the attorney. The inconsistencies pertain to the amount of the check–whether it was valued at $1,500 or $2,500–as well as C1's subsequent actions in regard to the check.[10] We also note that, at the hearing, Applicant acknowledged that a statement he had made in his Answer to the SOR concerning his activities after his second job termination was not true.[11] Department Counsel cites to evidence of the facility security clearance application that Applicant prepared on behalf of his own company. Department Counsel notes that the application contained numerous statements that were factually untrue, and also contained certain errors in the attached DD Form 254. Applicant claimed that he had been assisted by a security expert from DSS, who had visited Applicant at home and had guided him in the preparation of the application. Department Counsel notes that the Judge did not discuss various aspects of these documents which undermine Applicant's claim that he had expert assistance in preparing them. For example, Department Counsel argues that, if an expert had actually provided line by line assistance as Applicant claimed, it is unlikely that Applicant would have made errors on the form that were later corrected by that same expert.[12] This evidence, on its face, undercuts the credibility of Applicant. The Judge's failure to address it undermines his credibility determination. All in all, we conclude that the Judge's credibility determinations regarding the Government witnesses and Applicant are not supported by the record and that they do not support the Judge's favorable application of the mitigating conditions or the whole-person factors.

In summary, the record contains substantial evidence that Applicant was twice terminated for cause from the employ of two different companies; that he submitted a facility security clearance application that contained false statements, the number of which could persuade a reasonable person to believe that they were deliberately false, given Applicant's status and experience as a facility security officer; and that he had sent a threatening text message to W1, who had provided information to OPM in the course of Applicant's clearance investigation. We also note that, as stated above, the record contains evidence of inconsistent statements by Applicant that he did not

[10]Department Counsel cites to evidence that Applicant variously stated that he had paid the company for the value of the property, that the company had not cashed the check, and that the company had in fact returned the check, which are not totally consistent.

[11]"Q: I'm showing you your second answer to the Statement of Reasons, page six. Bottom of page six, right before paragraph four . . . Did you write that? . . . A: Yes. That's it's not accurate. I do know that this is my document. I don't remember writing that." Tr. at 268.

[12]Applicant testified that, in preparing the facility clearance application, he had the assistance of a DSS field representative. "He came out, he showed me, he helped me fill out the form. We went through our security binder. We selected the appropriate DD-254. We . . . sat down and did multiple versions of this until we got it correct . . . So he actually helped me fill this out . . ." Tr. at 222. After Applicant submitted the application, he received a letter from DSS advising that it could not approve the request. The letter noted, among other things, a discrepancy concerning whether Applicant's company would have a safeguarding requirement. Applicant apparently sent an updated copy of the form to the field representative, who identified other errors. The number and apparent significance of these errors are not consistent with Applicant's claim to have had the advantage of expert help. Moreover, there is nothing in the field representative's e-mail to indicate that he believed himself to bear responsibility for these errors. *See* Attachment G to Applicant Answer to Amended SOR.

reasonably explain, that diminish his credibility, and that are pertinent in evaluating his state of mind regarding the false statements alleged in the SOR. After considering all of the evidence and the briefs of both parties, we conclude that the Decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Viewed as a whole, the record does not support a favorable decision in light of the *Egan* standard.

Order

The 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