

KEYWORD: Guideline J;Guideline G; Guideline E; Guideline F

DIGEST: The Judge’s decision failed to consider important aspects of the case and ran contrary to the weight of the record evidence. Favorable decision reversed.

CASENO: 10-09035.a1

DATE: 06/10/2014

DATE: June 10, 2014

In Re:	)	
	)	
-----	)	ISCR Case No. 10-09035
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 7, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), 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 January 31, 2014, after the hearing, Defense Office of Hearings and

Appeals (DOHA) 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 erred in her application of the disqualifying and mitigating conditions; whether the Judge's findings of fact contained errors; and whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we reverse the decision.

### **The Judge's Findings of Fact**

The Judge made the following findings pertinent to the issues raised on appeal: Applicant began working for his current employer, a Defense contractor, in 2010. He enjoys an excellent reputation for integrity, dependability, and honesty. Applicant's character references all recommend him for a clearance. He served in the U.S. military for three years. He has full custody of a nine-year-old daughter.

Applicant began consuming alcohol when he was in the military. He did so usually at parties. His level of consumption increased after he left active duty, and by his early thirties he met with friends, consuming alcohol four to five nights a week. He last consumed alcohol in May 2010.

In 1993 Applicant was arrested and charged with felony possession of illegal drugs; committing an offense with a firearm, another felony; and willful and unlawful use of force against a police officer engaged in the performance of his duties, a misdemeanor. Applicant had attempted to sleep on the balcony of his girlfriend's apartment and placed his gun on a storage unit on the balcony. Applicant was subsequently arrested and, after an officer pulled Applicant's arm over his head, he hit the officer and "things escalated out of control." Decision at 4. The drug charge was dropped, and the firearms charge reduced to a misdemeanor. He pled "no contest" to possession of a concealed weapon and to battery.<sup>1</sup>

Applicant's SOR alleged an arrest in 1994, although Applicant has little memory of the incident. In a footnote, the Judge found that the source of this allegation is unknown, insofar as there is no evidence in the record of it.

In 1996, Applicant was arrested for DUI. He had been operating a motorcycle with a blood alcohol level of .08 or higher. He pled no contest, and the court sentenced him to two days in jail, three years probation, a fine, suspension of driving privileges, and attendance at a first offender's program. Applicant completed all aspects of this sentence.

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<sup>1</sup>Applicant testified that he had a backpack with a loaded 44 magnum handgun inside. He placed this backpack in a closet containing a gas heater and went to sleep on his girlfriend's patio. Tr. at 49-50. His girlfriend evidently called the police, who "put my hand up really high behind my head and was torquing it to the point of pain . . . I just spun around to get out of the pain . . . the whole thing at that point just escalated." Tr. at 52. Applicant stated that he was charged with felony offenses, although he pled no contest to misdemeanor battery on a policeman. Tr. at 54-55, 57.

In 2000, Applicant consumed several beers at dinner and two more at a concert. He crashed his motorcycle, as a consequence of which he was charged with another DUI. The court sentenced him to a suspended term of confinement, five years probation, suspension of his drivers license, community service, a fine, and a DUI second offender's program. He completed all of these requirements.

In 2009, Applicant was awarded full custody of his daughter. After a year of unemployment, Applicant was offered a job. In May 2010, he celebrated his new job and was again arrested for DUI. He pled no contest. He was sentenced to 147 days of confinement, five years informal probation, suspension of his drivers license, a fine, attendance at an 18-month alcohol program, and attendance at a Mothers Against Drunk Driving impact panel. Applicant participated in a home detention program, which entailed random drug and alcohol tests. On one occasion he tested positive for opiates, which he attributed to his having consumed a bagel with poppyseeds. He has complied with all terms of his sentence except that he remains on probation.

Applicant views his last arrest as a turning point. He realized that his drinking could interfere with his job and could have a negative impact on his daughter. He has not consumed alcohol since May 2010. His character references state that he is always sober at work and does not show signs of alcohol consumption. He does not attend alcoholics anonymous or associate with drinking friends.

Applicant's 2010 security clearance application (SCA) asked if he had "EVER been charged with any offense related to alcohol or drugs." *Id.* at 6. Applicant listed his 2004 and 2010 DUI arrests, but he did not list his 1993, 1996, and 2000 arrests. He also did not admit that he had been charged with a felony—the firearms and drug offenses in 1993.

Applicant denies that he intended to falsify his SCA. He stated that his security officer told him that he only needed to report his criminal arrests for the prior seven years. He asked the security officer if he should go back further when he saw the word "ever" and was again told seven years. He disagreed with the interviewer's summary of his clearance interview, stating that it did not include his questions about whether he needed to disclose criminal acts over his lifetime. He stated that the interviewer did not answer these questions, which he interpreted to mean that he should only go back seven years. He stated at the hearing that he believed that he only needed to go back seven years, though with the advantage of hindsight that belief does not make sense.

### **The Judge's Analysis**

Under Guideline J, the Judge found that Applicant's four DUI arrests and the 1993 felony arrest raised security concerns, noting, among other things, that he remained on probation at the close of the record. However, she found that the allegation pertaining to a 1994 arrest did not raise concerns, due to a lack of evidence. She found that the four DUI offense raised concerns under Guideline G. Regarding Guideline E, the Judge found that Applicant's SCA omissions were not deliberate. She cited to his evidence that his security officer had told him only to go back seven years for any of the questions at issue, a position that he has consistently held. She did find that two other omissions were deliberate. These omissions pertained to statements that Applicant provided

to the OPM investigator.<sup>2</sup> The Judge's findings about these last two omissions are contained in her Analysis.<sup>3</sup>

In finding that Applicant had mitigated the concerns described above, the Judge cited to evidence that Applicant had been sober since 2010, that he has been steadily employed, and that he has complied with "court requirements," although he remains on probation. Under Guideline G, she stated that Applicant had not been diagnosed as alcohol dependent, that he has been abstinent since 2010, and that he no longer associates with his former drinking companions. She noted the opinions of his character references about his dependability and sobriety. Regarding the two falsifications during the clearance interview, the Judge cited to evidence that the only way the Government knew of his earlier offenses was due to his own admissions, that the investigator had failed to give Applicant accurate guidance as to how far back he should go in disclosing his misconduct, and that his arrests are well known and, therefore, cannot be a source of coercion.

In the whole-person analysis, the Judge stated that Applicant had accepted responsibility for his misconduct, has exhibited behavioral changes regarding alcohol, and is a valued employee. She noted that he has complied with all court requirements except probation and that he successfully completed probation following his previous DUI convictions. She stated that he realizes the harm that drinking can regarding his custody of his daughter.

### **Discussion**

The standard applicable in security clearance decisions "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). In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

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<sup>2</sup>The SOR alleged that Applicant deliberately falsified material facts in a statement submitted to his interviewer that he had not been charged with any other alcohol-related incidents, failing to disclose his 1996 DUI. Another allegation stated that Applicant had falsified material facts in a statement he submitted to the interviewer to the effect that he had not been charged with any offenses other than the last three DUIs. The Judge found that Applicant's failure to disclose his earlier criminal incidents to his interviewer was intentional, insofar as he "knew he had more information to provide." Decision at 12. The statements in question were made during Applicant's clearance interview. Clearance Interview Summary, dated June 29, 2010, included in Government Exhibit 2, Answers to Interrogatories.

<sup>3</sup>We treat a finding as such regardless of where it appears in a Decision. *See, e.g.*, ISCR Case No. 10-07393 at 3, n. 4 (App. Bd. Jun. 12, 2012).

Department Counsel argues that the Judge erred in concluding that Applicant's conduct in 1994 did not raise a security concern insofar as there was no record evidence in support of the allegation. This argument is persuasive.

When an applicant controverts an allegation in the SOR, the Government bears the burden of producing substantial evidence of the facts supporting the allegation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶¶ E3.1.14; E3.1.32.1. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security-worthiness. *See, e.g.*, ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2013).

The SOR alleged at ¶ 1.e the following: "You were arrested in March 1994 in [County, State], and charged with disorderly conduct and public intoxication." In his Response to the SOR, Applicant stated the following in regard to this allegation: "I admit, however, I was unaware of having been charged." The Judge treated this as a denial, insofar as he stated "that he was unaware of this charge." Decision at 2, n. 1. However, Applicant's response most reasonably means that he admitted the behavior for which he was arrested but was not aware that he had been charged. An applicant's admission to an SOR allegation does not necessarily certify that he has a present memory of the conduct at issue, and it is possible for an applicant to admit conduct even if he claims no memory of all or part of the act or that he was unaware of the legal consequences resulting therefrom. Applicant testified to that effect at the hearing. "Q: . . . I think in your Answer you admit the conduct but say that you were not aware of the charges itself; is that correct? A; That's true." Tr. at 75. Accordingly, the most reasonable interpretation of Applicant's SOR response, one which he himself endorsed at the hearing, was that he admitted the conduct underlying the charges, though he was not aware that he had been charged as a formal matter. The Judge erred in treating this as a denial of the conduct itself. Moreover, Applicant testified about this incident in some detail:

Q: . . . [I]n 1994 you got arrested for public intoxication and disorderly conduct?

A: Yes . . . That would have been in [City, State] I think getting in a fight . . . outside of a bar and getting arrested.

Q: And how old were you then?

A: I would have been 23.

Q: Okay. And what happened to that arrest, do you know?

A: I don't think anything. Tr. at 28.

Therefore, even without Applicant's SOR admission, the record contains substantial evidence of the event described in the allegation—public intoxication and disorderly conduct—despite a lack of evidence as to any resulting legal action. Given the record as a whole, particularly its litany of alcohol-related offenses, the Judge erred in concluding that Applicant's public intoxication did not raise security concerns.

Department Counsel argues that the Judge erred in finding that Applicant's omissions to the SCA were not deliberate. In analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 11-04879 at 3 (App. Bd. Aug. 6, 2013). Department Counsel argues that the Judge failed to address significant contrary record evidence, an argument that we find persuasive.

Department Counsel cites to the clarity of the questions at issue, in that they are emphatically not time-limited regarding alcohol and drug offenses and felonies, as the Judge herself found, the word EVER being capitalized. He argues that this clarity is in itself a reason to believe that Applicant was on notice that he should divulge all of his misconduct and that his failure to do so was knowing and deliberate. That Applicant's presentation at the hearing evidenced a sufficient fluency in the English language to have enabled him to understand the questions reinforces this conclusion.

Department Counsel argues that the Judge's analysis failed to address her own findings that Applicant deliberately omitted material information in statements to the interviewer. He makes a reasonable argument that, in evaluating Applicant's intent in his answers to the SCA, the Judge should have considered her findings (and the underlying evidence) that he elsewhere made deliberately false statements regarding the same subject matter. It is a commonplace that evidence of other wrongs may be relevant on the question of intent, knowledge, etc. *See* Federal Rule of Evidence 404(b). *See also* ISCR Case No. 10-03732 at 6, n. 4 (App. Bd. Jun. 14, 2013). The Judge's failure to discuss these other deliberate omissions impairs her favorable analysis of the omissions contained in the SCA.

Department Counsel argues that the Judge's favorable credibility determination regarding Applicant's claims about his SCA omissions is contradicted by other record evidence. As he contends, the deference we give a Judge's credibility determination is not without limits. When a record contains a basis to question an applicant's credibility, the Judge should address contrary evidence explicitly, explaining why he or she finds the applicant's version of events to be worthy of belief. *See, e.g.*, ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). The record contains evidence of inconsistent statements by Applicant that undermine his credibility. For example, at one point in the hearing he testified that the instructions regarding the time frame of the questions at issue were in "fine print that—I don't even think that my eyes saw it the first time around." Tr. at 60. He testified that he was absolutely certain that he needed to go back only seven years for any of the questions regarding his criminal conduct. "I still firmly believed that I was only supposed to disclose seven years of criminal history." Tr. at 43. "... I was reading the [SCA] ... truly believing that I was only supposed to go back seven years ..." Tr. at 60. "I understand the question today as I read it, but at the time ... it had about as much effect on me as fine print on the back of a ... credit card." Tr. at 90.

Nevertheless, he also testified that, in fact, he was not certain about the time period, that the questions at issue here apparently "really tripped me up ..." Tr. at 88. He testified that he sought advice from his security officer, who told him only to report offenses in the previous seven years. Despite this purported advice, he testified that he was still not certain and inquired of the interviewer whether he should divulge crimes involving alcohol or drugs that occurred at any time in his life, to which he received no reply. "I asked her, because I was still unclear ... am I required to discuss my entire history ... And she sort of gave me a puzzled look and said: I don't know." Tr. at 61-62.

Applicant testified that he was so uncertain about the time frame of the questions that he considered submitting a second SCA, “thinking that it would be so much smoother because then I would know how to do it correctly.” Tr. at 105. He said that his uncertainty was not finally dispelled until he received the SOR, with its allegations of false statements. “You know, it wasn’t until I got my Statement of Reasons when it became crystal clear. I thought . . . well, now it’s crystal clear . . .” Tr. at 105-106.

The Judge did not address the apparent inconsistency between Applicant’s claims (1) not to have been aware of the time frame required of the questions at issue, due to the fine print in the SCA and yet (2) to have been tripped up by the language regarding time limitations to the extent that he repeatedly sought guidance on the matter. Neither did the Judge address the inherent credibility of Applicant’s claims that neither official whom he queried was able to give him a straight answer about the obvious meaning of the language at issue here. All in all, the Judge’s findings that Applicant did not deliberately falsify his SCA were not founded upon consideration of significant contrary record evidence.<sup>4</sup> These findings are not supportable.

Department Counsel argues that the Judge erred in her mitigation analysis, which we find persuasive. In the first place, her analysis did not include Applicant’s omissions to the SCA, in view of her erroneous finding that the omissions were not deliberate. Moreover, her mitigation analysis of those false statements that she did find to have been deliberate is defective in significant ways. She stated that the interviewer failed to provide Applicant with accurate guidance of the length of time he needed to cover, which is irrelevant in light of her finding that Applicant was, in fact, aware of his obligation to be forthcoming during his interview. *See* note 1, *supra*. She also stated that Applicant’s DUI arrests cannot be a source of manipulation or duress, insofar as his employer and friends are aware of them. However, this does not on its face mitigate concerns about Applicant’s deliberate falsifications during his clearance interview, including his failure to disclose a felony arrest. The Judge’s Guideline E mitigation analysis addresses little that is genuinely relevant to her findings of deliberate omissions and is not sustainable.

Under Guideline J, her analysis does not address all of Applicant’s misconduct—the 1994 arrest for public drunkenness or his recent falsifications, which were cross-alleged as criminal allegations. Because of this, and in view of evidence that Applicant remained on probation as of the close of the record and that he had violated the terms of his home detention by means of a positive urinalysis, the Judge’s favorable conclusions under Guideline J are not sustainable. In light of the foregoing, we do not need to address the sufficiency of the Judge’s favorable conclusions under Guideline G or the sufficiency of her favorable conclusions under a Guideline E allegation that incorporated Applicant’s alcohol-related criminal offenses, except to note that the same conduct can be alleged under different Guidelines and given independent weight. *See, e.g.*, ISCR Case No. 03-08257 at 3 (App. Bd. May 16, 2008). The Judge’s Decision failed to consider important aspects of

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<sup>4</sup>In addition, a reasonable person could believe and consider that Applicant had a motive to have omitted some of his misconduct: concern over losing his job. He testified that he was worried about the effect his last DUI might have on his continued employment, and it is not fanciful to suppose that this concern provided him with a strong reason to minimize the totality of his misconduct, especially his early felony arrest. The Judge did not address this, which, under the facts of this case, impairs her analysis.

the case and ran contrary to the weight of the record evidence. The favorable findings under Guidelines J and E are not sustainable in view 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