

KEYWORD: Guideline E

DIGEST: Clearance Decision Statement by other government agency demonstrated that Applicant had used countermeasures to influence the outcome of a polygraph exam. Such contact constitutes a security concern under Guideline E. Favorable decision reversed.

CASE NO: 11-03452.a1

DATE: 06/06/2012

DATE: June 6, 2012

In Re:)	
)	
-----)	ISCR Case No. 11-03452
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

Mark F. Riley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 29, 2011, DOHA issued a 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). Applicant requested a hearing. On February 17, 2012, after the hearing, Administrative Judge John Grattan Metz, Jr., 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 issue on appeal: whether the Judge erred in concluding that the record did not establish Guideline E security concerns. Consistent with the following, we reverse the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant works for a Government contractor. In 2008, his employer nominated him for access to sensitive compartmented information (SCI) at another Government agency (AGA). In order to gain access to SCI, Applicant was required to pass a polygraph examination.

In October of that year, Applicant took such an examination. The examiner advised him that the results were inconclusive and that he would have to take another. A week prior to the second polygraph, Applicant spoke with a prospective employee who told him about a website that provided information about passing a polygraph. The day before his second examination, Applicant visited the site and purchased the materials offered therein. Contrary to his expectations, the site merely described countermeasures to defeat the polygraph, information which held no interest for him.

At the second polygraph, the examiner asked Applicant if he had done any research about polygraphs, and he fully disclosed his exploration of the website discussed above. Applicant passed the counterintelligence portion of the examination, but the examiner confronted Applicant about his breathing and asked him about any countermeasures that he might be taking. This made Applicant more nervous. The examiner repeatedly instructed Applicant to breath normally and relax. She became increasingly angry with Applicant, who failed successfully to complete the examination.

Applicant enjoys an excellent reputation for honesty and trustworthiness. His work performance is excellent.

In the Analysis, the Judge concluded that the Government had failed to establish security concerns under Guideline E. He found that Applicant had not employed countermeasures, stating that he was not bound by contrary conclusions in the documents obtained from AGA. He stated that these documents are entitled to little weight, but are the examiner's conclusion, "colored by an assessment of what the polygraph charts meant." Decision at 4. In any event, the Judge concluded that, even if Applicant had engaged in the conduct alleged in the SOR, such conduct did not constitute a security concern under Guideline E.

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’s conclusions are not supported by the record evidence. We find her arguments persuasive.

Department Counsel first notes the language from the Judge’s Analysis, quoted above, in which the Judge opines that the evidence against Applicant was in some way colored by the examiner’s interpretation of the test data. She states, correctly, that Applicant was not denied a clearance because of the results of the polygraph examination but, rather, because he allegedly sought to employ countermeasures to affect the outcome of the examination. As we observed in an earlier decision, there is a critical difference between the results of a polygraph examination *per se*, and any statements that a person might make during the course of such an examination. The reliability of a polygraph machine and the examiner’s interpretation of the charts are factually and legally distinct from a subject’s statements made during the course of an examination. *See, e.g.*, ISCR Case No. 02-31428 at 4 (App. Bd. Jan. 20, 2006).

The SOR contains a single allegation: “Prior to being polygraphed by another government agency about 2008-2009 you went online to research techniques for influencing polygraph examination results and employed these techniques during your polygraph examination.”

Concluding that the Government's evidence lacked credibility, the Judge found that Applicant did not employ countermeasures. We examine a Judge's findings to see if they are supported by substantial record evidence, which 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 ¶ E3.1.32.2. *See also* ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012). The Government's case depended, in large measure, upon the contents of Government Exhibit (GE) 3, a Clearance Decision Statement issued by AGA in denying Applicant access to SCI. Applicant did not object to the admission of this document into evidence (Tr. at 18), and the record provides no reason to doubt its authenticity. Clearance Decision Statements are admissible as substantive evidence in DOHA hearings. *See, e.g.*, ISCR Case No. 07-18324 at 5 (App. Bd. Mar. 11, 2011). This document states that, when queried by the examiner about certain perceived discrepancies between the counterintelligence and suitability portions of the examination, Applicant stated that he had visited a website that guaranteed successful completion of a polygraph.

On the night prior to this polygraph interview, [Applicant] visited this website and paid \$45 for information regarding the guaranteed successful completion of his polygraph test. Although he knew he was not going to lie during the polygraph interview, he also knew that he needed to successfully complete the test, so he proceeded to purchase and read the material provided . . . The information obtained indicated that there were three things a person needed to do in order to successfully complete a polygraph examination. First. . . that an individual control breathing during the examination; second, the site recommended a person squeeze their anal sphincter at the "controls;" and third, the site recommended a person use their imagination to put "yourself in a happy place." [Applicant] attempted to control his breathing from the beginning of . . . this interview . . . He controlled his breathing not because he was lying, but in order to help him successfully complete the polygraph . . . During the second and third suitability portion [Applicant] began using his imagination during the test to get to a "happy place." When asked why he manipulated an/or attempted to manipulate the process, [Applicant] advised that he . . . needed to successfully complete the test, so he manipulated the process in an attempt to do so. GE 3 at 1-2.

Contrary to the Judge's analysis, this language is not conclusory. Rather, it purports to convey facts, i.e., the content of Applicant's responses to questions about certain anomalous aspects of his suitability polygraph examination. This language is detailed and specific, sufficiently so as to preclude that it reflects a mere misunderstanding of Applicant's statements. The record contains no evidence suggesting a motive for the examiner to have intentionally misrepresented them. Applicant's appeal letter to AGA explicitly denies attributing such conduct to her. GE 7 at 6. We note that the denial of Applicant's SCI was upheld by two levels of appellate review within AGA. Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See, e.g.*, ISCR Case No. 10-11076 at 4 (App. Bd. Feb. 9, 2012). Moreover, GE 3 is corroborated in significant measure by Applicant's own testimony and

evidence.¹ The record contains substantial evidence that Applicant admitted to the examiner that he had employed countermeasures in order to ensure successful completion of the polygraph. The statements in question are such that a reasonable person would not be expected to have made them unless he believed that they were true.² Accordingly, the record contains substantial evidence of the SOR allegation at issue in this case.

The Judge also concluded that, assuming *arguendo* Applicant had employed such countermeasures, he was “not convinced that Applicant’s conduct constituted a failure to cooperate with the security clearance process that normally results in an unfavorable clearance action.” Decision at 3.

The security concern under Guideline E is as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any . . . failure to cooperate with the security clearance process. Directive, Enclosure 2 ¶ 15.

In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. *See, e.g.*, ISCR Case No. 08-08831 at 5 (App. Bd. Jan. 4, 2011).

In the case under consideration here, the website in question did not merely explain the nature of a polygraph and the need for an examinee to cooperate with the examiner and to be truthful in answering questions. Rather, it provided guidance on methods for influencing the actual results of the polygraph. Applicant himself testified the advice contained in the presentation was “deceptive and dishonest.” Tr. at 41. It is axiomatic that the use of such techniques is inconsistent with the purposes of the polygraph and diminishes the value of the test in evaluating an applicant’s suitability for access to classified information. Indeed, DoD Instruction 5210.91, *Polygraph and Credibility*

¹Applicant testified that he consulted the website in question, purchasing the video and online electronic book accompanying it. He testified that the material he purchased consisted of methods to distort polygraph results. Tr. at 39. His testimony corroborated GE 3 as to the specific techniques recommended—breath control, imagining that one is in a “happy place,” and sphincter control. Tr. at 40. He testified that, to relax during the test, he “imagined a beach scene with water lapping” (Tr. at 50), which is consistent with one of the countermeasures mentioned in the website. He also stated that the examiner told him that he “was not breathing right” and that “there’s something wrong with [his] breathing” (Tr. at 47-48), which could suggest to a reasonable mind efforts by Applicant to influence the outcome of the test in a manner consistent with the website instruction. GE 8, Answers to DOHA Interrogatories, includes a summary of Applicant’s clearance interview. In this interview he acknowledged having read about countermeasures prior to the polygraph, but he denied having used them.

²*See* Federal Rule of Evidence 804(b)(3), which permits the introduction into evidence of a “statement which was at the time of its making . . . to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” The Federal Rules of Evidence serve as a guide in DOHA proceedings. Directive ¶ E3.1.20.

Assessment (PCA) Procedures, August 12, 2010, at Enclosure 4, paragraph 9, sets forth procedures for the detection and prevention of countermeasures during polygraphs performed under DoD auspices. Applicant's efforts improperly to influence the results of a DoD polygraph constitute a failure of cooperation with the security clearance process. His conduct also evidences questionable judgement, which is inconsistent with the qualities required for access to national security information. Accordingly, Applicant's conduct sets forth security concerns under Guideline E. Insofar as Applicant's presentation at the hearing was based upon his denial of security significant conduct, there is a paucity of record evidence demonstrating extenuation or mitigation of the security concerns raised by the Government's evidence. The record does not support a conclusion that Applicant has met his burden of persuasion under *Egan, supra*.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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