KEYWORD: Guideline E; Guideline D

DIGEST: The Appeal Board defers to a Judge's credibility determination unless that determination is unreasonable or is contradicted by other evidence. The Judge's finding that Applicant had not deliberately made false statements was not supported by substantial record evidence. Evidence of other wrongs or acts is relevant in evaluating an applicant's *mens rea*. Favorable decision reversed.

CASE NO: 11-11959.a1

DATE: 10/15/2013

DATE: October 15, 2013

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Alison O'Connell, Esq., Department Counsel

FOR APPLICANT
William F. Savarino, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 11, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 21, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 credibility determination was erroneous; whether the Judge erred in finding that Applicant had not deliberately provided false information to persons investigating his requests for security clearances; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant works for a Federal contractor. He first applied for a security clearance in 2003, receiving the clearance in 2005. He enjoys as excellent reputation for the quality of his work performance.

In 2001, Applicant and some friends purchased a used car. Subsequently, the car was burglarized and left inoperable. One of the friends proposed to set the car on fire. Applicant tried to dissuade the friend without success and left the scene. He was charged with misdemeanor arson, and, after Applicant completed a fire safety course, the court dismissed the charge.

When Applicant completed his security clearance application (SCA) in 2003, none of the questions required him to disclose the juvenile charge of arson. During a subsequent background interview, he mistakenly told the interviewer that he had been charged with a felony and had served probation. Despite this erroneous information, Applicant was granted a clearance.

In 2006, Applicant completed another SCA for a position requiring access to sensitive compartmented information (SCI). This position was with another government agency (AGA). When questioned by investigators, Applicant did not advise that he had been questioned by police in connection with the arson. In 2010, prior to being confronted about this omission, he voluntarily disclosed the information.

During the SCI interview, Applicant made several admissions:

> Applicant admitted to downloading music and games from the internet without paying for them . . . He also admitted that, starting at 15 years of age, he would search for, download, and view pornography from the internet–some of the pornography he viewed at that time involved minors like himself. He told the investigator that, after turning 18, he only sought out adult pornography on the internet. But, admitted that he had inadvertently downloaded and viewed what he suspected might be child pornography on several occasions . . . He continued to search for and download pornography from the internet knowing that he was exposing himself to the risk that some of the material he downloaded might contain suspected child pornography. Decision at 3 (internal citations omitted)

After this interview, AGA stopped processing Applicant's request for SCI access, although he retained his clearance. When completing his current SCA, Applicant voluntarily disclosed that AGA did not finalize the processing of his SCI request and the basis for the action.

At the hearing, Applicant testified that, during his teenage years, he would download pornography onto his personal computer at home, using peer-to-peer file sharing networks. Upon reviewing the files, if he suspected one or more might contain child pornography, he would not download it. Sometimes he could not tell if a file contained child pornography or not. If he viewed a file that contained suspected child pornography, he would immediately delete the file. Applicant denies ever intentionally looking for, downloading, viewing, saving to his computer, or distributing child pornography.

Applicant has revealed the Government's security concerns to his family, friends, co-workers, facility security officer, and neighbors whose minor children he regularly babysits. They all provided letters attesting to his character and stating their opinions that he did not exhibit sexually deviant behavior. He told his wife of the security concerns in his case prior to their wedding.

The Judge's Analysis

The Judge concluded that the misdemeanor arson charge and Applicant's admission that he had inadvertently downloaded suspected child pornography on several occasions raised concerns under Guideline E. He stated that Applicant's repeatedly having exposed himself to the possibility of downloading child pornography was risky and called his judgment into question. He concluded that the arson charge was aberrant behavior that occurred during Applicant's minority which has not been repeated. He also concluded that Applicant had mitigated the concerns arising from his internet use by having taken responsible steps to avoid the danger of downloading and viewing illicit material. Moreover, at the time of the hearing, he had not viewed any pornography in over three years. The Judge specifically found that Applicant had not intentionally downloaded or searched for child pornography, noting his consistent claim that, since age 18, he had not done so. Additionally, by fully informing his family, friends, and co-workers about his security concerns, Applicant removed the possibility that he could be subjected to coercion or duress.

The Judge concluded that Applicant had mitigated security concerns arising from his omission of the arson charge from his 2006 and 2010 SCAs. The Judge also concluded that Applicant had not deliberately failed to advise during his clearance interview with AGA of his 2001 interaction with the police. The Judge concluded that Applicant had honestly believed that he did not have to inform interviewers about this matter. The charge had been dismissed more than seven years prior to his current SCA, and he had informed the Government of this concern during his initial background investigation in 2003.

The Judge concluded that Applicant, by voluntarily disclosing on his current SCA the adverse information that had led AGA to terminate the processing of his request for SCI, had demonstrated the trustworthiness required of those given access to classified information. He also stated that, after having reviewed the evidence and observed Applicant's demeanor at the hearing, Applicant had not deliberately provided false information during the processing of any of his SCAs.

Decision

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 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).

Department Counsel argues that the Judge erred in his credibility determination. We are required to defer to a Judge's credibility determination unless it is unreasonable or contradicted by other evidence. *See, e.g.*, ISCR Case No. 10-08705 at 2 (App. Bd. May 14, 2012). In particular, Department Counsel challenges the Judge's reliance upon Applicant's hearing testimony, arguing that the Judge failed to give reasonable consideration to contrary evidence. This contrary evidence consisted of answers that Applicant had reportedly provided in connection with polygraph testing by AGA. These answers are summarized in Government Exhibit (GE) 6, a letter with attachment from the General Counsel (GC) of AGA.

The gravamen of this issue is Applicant's claim that he never intentionally sought child pornography during his internet searches. In GE 6, the GC stated that the attached interview summary was a true copy of the original maintained by AGA. The GC further stated that it was in the regular course of AGA business for persons with knowledge of the act or event in question to make a record at or near the time of the event or reasonably soon thereafter. The attachment to the GC letter states that Applicant submitted to two polygraph examinations in August 2006. During interviews connected with these examinations he advised the interviewers of the following, among other things: (1): between 1998 and 2004 he downloaded 13,000 songs valued at $13,000, 100 to 150 movies valued at $20 each, software valued at $2,000 to $3,000, and 100 to 150 computer games valued at $50 each; (2) beginning at age 15, he actively searched for and viewed child pornography, the images depicting children between 12 and 13 years old; (3) since age 18, he has not deliberately sought out child pornography; and (4) in the previous seven years he had downloaded about 25,000 pornographic images, of which about 2,500 were child pornography.

GE 6 also states that Applicant submitted to another interview in June 2007. During this interview he stated, among other things, the following: (1) in his lifetime he has illegally downloaded about 20,000 songs, most of which have been deleted from his computer; (2) in his lifetime he has illegally downloaded about 500 movies and 200 computer games; (3) he knows that this practice is illegal, but he will continue it out of convenience; (4) he downloads large quantities of pornographic images at a time, of which 5% to 10% depict children; (5) he continues to visit these sites, knowing that child pornography is present; (6) he deletes the child pornography; and (8) he last viewed an image of child pornography in 2006.

At the hearing, Applicant corroborated much of this evidence. He acknowledged that (1) he underwent polygraph testing pursuant to an application for SCI; (2) he was interviewed in connection with these tests; (3) he admitted that he had engaged in peer-to-peer file sharing, downloading songs, etc; (4) he admitted that he would access large amounts of pornography; (5) at the time he accessed the pornography, it was reasonably foreseeable to him that some of the files would depict children; (6) he acknowledged that the summary accurately depicted his answers as to the proportion of these files that contained child pornography; and (7) based on his answers AGA terminated processing of his application for SCI. Moreover, during his testimony Applicant did not challenge GE 6 in its depiction of his answers regarding the downloading of songs, movies, etc, either as regards the amount and value of the material he obtained, the illegal nature of his having done so, or that he had stated his intent to continue this conduct.[1] Therefore, Applicant's presentation confirms that the summary was, in the main, accurate, his principal disagreement being with the proposition that he had intentionally sought and viewed child pornography.

Although the Judge stated that he found Applicant's contention credible, Department Counsel argues that this conclusion by the Judge was at odds with the language quoted in the Findings section above. That is, the Judge found that Applicant sought and viewed pornography, some of the material he viewed depicting children. The Judge found that Applicant had ceased actively looking for child pornography after age 18. This finding tracks the language of GE 6 and most reasonably implies that Applicant had knowingly sought such material in earlier years. As Department Counsel argues, this finding is not consistent with a conclusion that Applicant was credible in having denied such conduct. Neither is the Judge's finding that Applicant downloaded music and games without paying for them consistent with that determination.[2] In addition, although Applicant contends that he did not admit to the AGA interviewers that he had actively sought child pornography, he provided no evidence to establish a reason for the interviewers to have misrepresented his answers or to rebut the presumption that Federal officials undertake their duties

[1]In an April 2012 interrogatory answer, Applicant stated that he had not illegally downloaded material from the internet since the summer of 2006. GE 3 at 4.

[2]This conduct was not alleged in the SOR. Non-alleged conduct may be considered in evaluating an applicant's credibility, rehabilitation, case for mitigation, etc. *See, e.g.*, ISCR Case No. 11-13664 at 5, n. 2 (App. Bd. Aug. 15, 2013).

in good faith.[3] *See, e.g.*, ISCR Case No. 11-07509 at 6 (App. Bd. Jun. 25, 2013). The Decision viewed as a whole did not reasonably address evidence that contradicted the Judge's favorable opinion of Applicant's credibility. "While a Judge is presumed to have considered all of the evidence in the record, he or she must address 'significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision.'" *See* ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007). Viewed in light of the record as a whole, the Decision does not reasonably explain why the Judge discounted record evidence that Applicant had actively sought to view child pornography at some time in his life. We conclude that the challenged credibility determination is not supportable.

Department Counsel challenges the Judge's findings that Applicant had not deliberately made false statements during the processing of his various SCAs. In analyzing an Applicant's *mens rea*, a Judge must consider the applicant's answers in light of the record as a whole. *See, e.g.*, ISCR Case No. 11-14265 at 3 (App. Bd. Aug. 28, 2013). One of the alleged false statements was made during the course of a 2006 interview by representatives of AGA, contained in GE 5. During this interview, Applicant stated that he had never had any contact with Federal, state, or local police authorities. This statement was objectively false, in light of the 2001 arson incident. Given the obvious significance to Applicant of the arson and its aftermath, a reasonable person would not likely conclude that Applicant had simply forgotten about the event when he provided this statement to the interviewers. Evidence that the charge had been dismissed does not logically provide a reasonable basis for concluding that Applicant honestly believed that his blanket denial of police involvement was truthful, as the Judge found.

We note other evidence of false statements, such as Applicant's failure to have mentioned the arson in two of his SCAs,[4] and evidence that Applicant intentionally downloaded music, movies,

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[3]"Based upon the specific, detailed information contained in [GE 6], almost all of which was confirmed by Applicant's hearing testimony, a reasonable person could only conclude that [GE 6] represents an accurate depiction of Applicant's statements made during his [AGA] interviews and is not the result of a misunderstanding of Applicant's answers. To reach any other conclusion one [would] have to believe that there was a willful fabrication by [AGA] officials. However, there is no evidence of this and federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their responsibilities." Appeal Brief at 21. Applicant's Reply Brief addresses this contention. Applicant states that he is not proposing that GE 6 represents a willful misrepresentation. "Rather, it is a recognition that the purported statements are inherently subject to and affected by the subjective interpretation of the person or persons who were involved in the process or processes of converting [Applicant's] actual oral statements to the written report." Reply Brief at 11-12. We do not find Applicant's argument persuasive, in light of the detail with which GE 6 describes Applicant's answers. A reasonable person would not likely conclude that such detail was the result of honest misunderstanding or ambiguity of speech. While a summary by definition is not a verbatim report, a misinterpretation of the magnitude inherent in Applicant's position cannot reasonably be characterized as honest or inadvertent. This lends persuasive force to Department Counsel's argument that, absent evidence of willful fabrication by AGA interviewers, the most reasonable conclusion is that GE 6 correctly summarized Applicant's answers.

[4]The SOR alleged that, in SCAs completed in 2006 and in 2010, Applicant had failed to mention that he had been charged with a felony. He presented evidence that authorities had treated the arson as a misdemeanor. However, even assuming that Applicant had never been charged with a felony, in his 2006 SCA he failed to mention the incident in response to a question about other offenses not listed elsewhere in the SCA. He also failed to mention the incident

etc. without paying for them, which are relevant in evaluating his intent.[5] *See* ISCR Case No. 10-03732 at 6, n. 4 (App. Bd. Jun. 14, 2013) for discussion of the relevance of other wrongs or acts to the question of an applicant's state of mind; *see also* ISCR Case No. 11-13664, *supra*. Moreover, under the facts of this case, evidence that Applicant provided truthful information about this matter in an interview four years later is not sufficient to demonstrate that he lacked an intent to deceive in 2006.

Another alleged false statement occurred in an answer to DOHA interrogatories in April 2012 (GE 3). In that answer, Applicant stated that he had never intentionally downloaded or viewed child pornography. Given the contents of GE 6, the Judge's finding that Applicant, after age 18, limited his search to pornography that depicted adults, and evidence of other false statements discussed above, we conclude that the Judge's finding that Applicant did not deliberately falsify this answer is not supportable.

In summary, the record contains substantial evidence that (1) as a teenager, Applicant had been charged with arson, which charge was dismissed for reasons consistent with actual guilt; (2) at some point in his life, Applicant had actively sought child pornography from the internet; (3) into his adult life Applicant repeatedly sought large amounts of pornography reasonably believing that some portion would contain depictions of children; and (4) Applicant made deliberately false statements about his security significant conduct. The record also contains evidence of other, non-alleged, false statements and of Applicant's having downloaded music, movies, games, etc. in substantial amounts without paying for them and that he stated an intent to continue doing so, which the Judge failed reasonably to address in the context of Applicant's credibility and case for mitigation. Examined in light of the entirety of the record evidence, the Judge's decision failed to consider important aspects of the case and ran contrary to the weight of the evidence. Under the facts of this case, the evidence does not support the Judge's favorable findings under either of the alleged Guidelines, in light of the standard set forth in *Egan, supra*, and in light of the requirement in the Directive that "any doubt" must be resolved in favor of national security.

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in responding to a pertinent question in his 2003 SCA. In addition, in the same SCA, he stated explicitly that he had "never been charged with a crime however I was placed on a 1 year Mandatory probation for an incident that occurred in November 2001 . . ." GE 7, SCA, at 29. When cross-examined about this statement, Applicant stated "Since it was expunged that would have been why I would have said that I hadn't been charged with a crime. Q: But being expunged doesn't mean that you were never charged, correct? A: I understand that there is a difference. Q: Did you understand, at the time that you wrote . . . that there was a difference between being charged and being expunged? A: Yes. Q: So then why did you say that you had never been charged with a crime? A: I misspoke, or miswrote." Tr. at 92-93. The Judge's finding that none of Applicant's SCAs required him to disclose the arson charge is not supportable.

[5]In addition to Applicant's denial of involvement with police authorities, GE 5 states that he "commented that he had illegally downloaded 2 computer games but has since purchased them." Compare with the contents of GE 6 that he had done so on numerous occasions and that he would continue to do so.

Order

The 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

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