

KEYWORD: Guideline J; Guideline E

DIGEST: The Judge ignored multiple examples of corroborating evidence in his analysis of the case. A DOHA Judge must consider the evidence as a whole, rather than in a piecemeal manner, in rendering a decision. Directive ¶ 6.3. When viewed in its entirety, the evidence in this case does not support a conclusion that Applicant was an innocent victim who was merely acting in self-defense during the incidents involving the child’s mother. Instead, the evidence shows that he repeatedly participated in, or instigated, arguments with the mother that escalated into what can be fairly described as mutual assaults. The Judge even described one of the alleged incidents as a “mutual physical assault.” Decision at 4. Applicant’s pattern of engaging in such confrontations and assaults sufficiently establishes he engaged in conduct raising security concerns under Guidelines J and E. Favorable Decision Reversed.

CASE NO: 20-00347.a1

DATE: 08/11/2021

DATE: August 11, 2021

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Dan O’Reilly, Esq. Department Counsel

**FOR APPLICANT**

Asya Hogue, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 12, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 30, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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 issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. In his Appeal Brief, Department Counsel stated that he is not challenging the Judge’s favorable findings under Guideline E that pertain to alleged employment terminations. Appeal Brief at 2, n.1. Consequently, the alleged employment terminations are not addressed in this decision. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant is in his early thirties. He served on active duty in a reserve branch of the military for less than a year and was honorably discharged. He continues to serve in the inactive reserves. He has three minor children. In 2017, he married and has a stepchild. He was granted a security clearance about seven years ago. Due to the conduct discussed below, his security clearance was suspended in 2017, reinstated in 2018, and suspended again in 2019.

“Applicant is involved in an extremely volatile and hostile relationship with the mother of one of his children.” Decision at 3. This relationship has led to five, possibly six, of the seven allegations of criminal conduct, which were also cross-alleged under Guideline E. Their problems center around child custody issues. In 2015, Applicant filed for custody of the child because the mother interfered, if not actually prohibited, his attempts to see the child. After he filed for custody, their relationship became increasingly hostile, resulting in repeated criminal complaints against him. While a custody agreement was in place by July 2016 that did not end the hostilities. Between 2016 and 2019, the mother essentially brought domestic violence charges against Applicant, including assault, child abuse, and trespassing. The charges set forth in six of the SOR allegations were either dismissed (*nolle prosequi*) or placed on an inactive docket (Stet status). The remaining Guideline J allegation is unrelated to the others. It involved Applicant’s conviction for operating a motor vehicle while intoxicated during Mardi Gras in 2017.

Although not alleged in the SOR, another incident occurred between Applicant and the child’s mother during a custody transfer in August 2020. This incident resulted in Applicant being arrested and charged with malicious destruction of property less than \$1,000. This charge has not yet been resolved. Conduct not alleged or otherwise fairly embraced by the SOR may be relevant for certain purposes such as in making a credibility determination; in evaluating an applicant’s case for extenuation or mitigation; in assessing the extent to which the applicant has demonstrated

rehabilitation; or in performing a whole-person analysis. *See*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Applicant is remorseful about the situation with the mother of his child. He has obtained mutual protective orders and changed the location of the child custody transfers, *e.g.*, at a police facility. He provided character references attesting to his talents, versatility, and outstanding morale character. His military evaluations reflect that he is a proven performer who meets or exceeds the reported performance traits.

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

Disqualifying conditions under Guidelines J and E were established. However, various mitigating conditions under both guidelines apply. “On each occasion, the women’s version of the events – the sole source of information presented to the police – was accepted by the arresting police officers, even when there was little or no independent evidence that her versions were truthful.” Decision at 10. There was one occasion when witnesses refuted her allegation that he tried to strangle her. “With few exceptions, his explanations have gone un rebutted. . . . Examining the rather sketchy and incomplete damaging documentary evidence submitted against him, and the substantial number of dismissals, leads to a conclusion that Applicant’s explanations are essentially true.” Decision at 11.

The most recent alleged criminal conduct happened two years ago. Although his child’s mother will probably file other criminal charges against him, there are no realistic concerns about future criminal conduct. He has taken steps to insulate himself from the ire of the child’s mother. His past history of alleged criminal conduct no longer casts doubt on his worthiness for 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 national security eligibility will be resolved in favor of the national security.” Directive, Encl. 2, App. A ¶ 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.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> 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. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

In deciding whether the Judge’s rulings or conclusions are erroneous, we 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. *Id.*

Department Counsel argues that the Judge’s favorable decision does not reflect a reasonable interpretation of the record viewed as a whole, citing to testimony and to various pieces of evidence that he contends undermine the Judge’s decision. We find these arguments to be persuasive. Criminal conduct raises doubts about a person’s judgment, reliability, trustworthiness and willingness to comply with laws, rules, and regulations. Directive, Encl. 2, App. A ¶ 30. We note the following, drawn from the Judge’s findings as well as the record evidence.

In mid-2015, the mother reported a physical confrontation with Applicant to the police. Earlier in the evening, Applicant had the child who was scheduled to attend school the next morning. When he returned the child about 40 minutes late, the mother yelled at him. He then approached closely to her yelling. She pushed him away. He grabbed her by the arms, pushed her to the ground, and held her there for a period. When she called 911, he left the scene. The police officer observed minor scratches on her arm. She declined to press charges because he was in the military and she did not want to cause trouble for him. Government Exhibit (GE) 8 at 19-20. This incident was neither alleged in the SOR nor discussed in the Judge’s decision.

In late 2015, the child’s mother reported to the police that Applicant broke into her residence, stole items, and damaged her property. He had lived at her residence three years earlier, and she believed he still had a key. After attending a sporting event, the mother returned home to find her flat screen television lying on the floor, its power cord was cut in two places, and the power cord to her Christmas tree lights was also cut. The police report contains pictures of the damaged property. She further discovered that her child’s birth certificate and Social Security card were taken from the binder in which she kept important documents. In the previous months, Applicant had asked multiple times for the child’s original birth certificate. The

police report notes that there was no damage to the door, door frame, or locks to the residence. GE 8 at 23-27. This incident is not discussed in the Judge’s decision.<sup>1</sup>

In early 2016, the child’s mother reported to the police that Applicant would not leave her apartment without the child. GE 7 at 4. At this point, they did not have a custody agreement. Applicant testified a custody agreement was not in place until Christmas of 2016. Tr. at 39-40. The responding police officer asked Applicant questions—such as do you have any identification on you—but he ignored the questions. The police officer ordered Applicant to exit the residence and the property. The police officer followed Applicant out of the residence and into the stairwell. When Applicant would not comply with the order to exit the building, the officer advised him he was trespassing and needed to exit the building. Applicant then took two steps and stopped completely. Upon finally exiting the building, Applicant leaned against an exterior window. The officer told him he was trespassing and he needed to leave the property. As the officer was closing the exterior door, Applicant placed his foot in the doorway to stop the door from closing. Thereupon, the officer placed him in handcuffs and transported him to the police station. GE 7 at 4. In his background interview, Applicant reportedly stated that he was trying to leave but “the police had blocked his car in and was yelling to not let [him] leave.” GE 2 at 4-5. When the Judge asked whether he put his foot in the doorway, Applicant testified that he did not get his foot out of the way in time. Tr. at 75. The charges against Applicant for failure to obey a reasonable and lawful order and trespass on private property were later dismissed. GE 3 at 3-4; Tr. at 30, 38-40, and 74-75; Decision at 3.

In mid-2016, the mother invited Applicant to her residence to see the child. When he attempted to leave with the child, the mother told him he could not do so. She reported that he then pushed her against a wall and started strangling her with both hands for about three minutes. She stated he let her go when he realized their child was watching. As he attempted to leave the residence with the child, the mother started pulling on his shirt. She claimed he pushed her down and held both of her shoulders down at the bottom of the stairs. The police officer noticed redness on the side of the mother’s neck and a scrape on her shoulder. Photographs were taken of Applicant’s and the mother’s injuries. A witness who lives in the building stated she heard a loud argument, opened the door, and saw Applicant on top of the mother. Applicant claimed the mother was pulling on him and they fell at the bottom of the

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<sup>1</sup> The SOR¶ 1.e alleged that Applicant was charged with trespass on private property, malicious destruction of property less than \$1,000, and disorderly conduct in mid-2016. These charges are listed in Applicant’s Criminal History Record (GE 3 at 4-5), which set forth no underlying facts regarding them. In January 2017, a failure to appear warrant was issued. *Id.* In March 2017, the charges were dismissed. *Id.* Applicant testified he could not recall these charges. Tr. at 28-29 and 76. The Judge found that no facts regarding them were submitted. Decision at 4. In the Appeal Brief at 6-7, Department Counsel contends that these charges arose from the mother’s report to police about the unlawful entry into her apartment in late 2015, but that link has not been sufficiently established.

stairs. He claimed he never put his arms around her neck. GE 7 at 6-26. The charge of second degree assault against Applicant was later dismissed. GE 3 at 4; Applicant's Exhibit (AE) D at 10; Tr. at 28-30, 41-43, and 75-76; Decision at 3-4.

During Mardi Gras in 2017, Applicant drove a vehicle after consuming too much alcohol. He was stopped by police and administered a breathalyzer, which registered 0.98. He pled guilty to operating a vehicle while intoxicated, was fined \$900, and ordered to perform 40 hours of community service. Tr. at 28, 35, 42-43, 69-70, and 76-77; GE 3 at 2.

In the fall of 2018, Applicant and his wife met with the child's mother and her boyfriend in a mall to transfer custody of the child. After the exchange of verbal comments and gestures, "a mutual physical assault occurred." Decision at 4. The child's mother claimed Applicant strangled her and allowed his wife to scratch her face. Photographs were taken of Applicant's and the mother's injuries. An independent witness reported that all four individuals were involved in a brawl, but did not recall Applicant choking the child's mother. *Id.* The following day, Applicant was arrested and charged with assault and reckless endangerment. All charges were later dismissed. GE 6; GE 8 at 8-18; AE D at 3; Tr. at 27-28, and 43-44.

While Applicant had custody of his child in early 2019, he learned the child received a referral at school for striking another child and for not listening. He disciplined his 6½ year old child by smacking her bottom with a cloth belt. He claimed he did not bruise the child. When the child was returned to the mother's custody about four days later, she learned of the spanking and noticed bruises on the child's thigh and wrist. The police and Child Protective Services were notified. The child was placed in the mother's emergency protective custody. A warrant was issued for Applicant's arrest. He was charged with child abuse and reckless endangerment. Applicant admits using corporal punishment to discipline the child but denies abusing the child. In mid-2019, the charges were placed on the inactive docket. Applicant was required to attend anger management and avoid unlawful contact with the child. GE 5 at 1-17; Tr. at 27, 36, 45-50, 52-56, 65-66; Decision at 4-5.

In early 2019, Applicant was arrested for six counts of violating release conditions and one count of failure to obey court order. GE 4 at 4. Applicant testified these were related to the child abuse charge. Tr. at 50. The Judge found these arose from alleged violations of release conditions for charges discussed above. Decision at 5. In mid-2019, all of these charges were placed on the inactive docket. GE 3 at 6-7; Tr. at 23-24, 26-27, 50-52, 65-66, and 68-69.

During a custody transfer in the parking lot of a state police barracks in the summer of 2020, Applicant removed a watch that had a GPS tracking capability from the child's wrist. He testified that he did not want the child to have the watch and did not

want to be responsible for the child losing it. Tr. at 31 and 78. The mother claimed he scratched the hood of her vehicle when he placed the watch on it. He denied doing so. Tr. at 53. The mother attempted to returned the watch to the child who was in Applicant's car. As the mother was holding the handle of the door to Applicant's vehicle, he proceed to drive away, almost running over the mother's foot. Applicant then threw the watch from the vehicle and drove off. Applicant was charged with malicious damage to property for defacing the mother's vehicle. Applicant testified that the mother kicked his vehicle and reached inside hitting him in the face. This charge is pending. GE 9 at 4; GE 10 at 1-7; Tr. at 30-32, 52-55 and 77-78; Decision at 5.

Applicant denied losing control or escalating the situation during these incidents and denied having anger issues. Tr. at 56-57.

As Department Counsel contends, the Judge's analysis of the evidence is flawed. In this regard, it first merits noting the Judge's generalized conclusion that "AG ¶¶ 32(a), 32(c), and 32(d) fully or partially applied" (Decision at 10) is defective because it leaves the Board guessing the degree to which particular mitigating condition applied to specific allegations. As we have previously stated, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 17-03026 at 4, n.4 (App. Bd. Jan. 16, 2019).

In the mitigation analysis, the Judge concluded that Mitigating Condition 32(c), *no reliable evidence to support that the individual committed the offense*, applied. He reasoned there was little or no independent evidence to show the mother's accusations were truthful and referred to the evidence as "sketchy." Decision at 11. He also stated that the decisions of law enforcement authorities to dismiss the charges based on the mother's accusations leads to the conclusion that Applicant's explanations of those events are essentially true. Such reasoning is not sustainable for various reasons. First, absent record evidence of the specific reasons why criminal charges are not pursued, a Judge cannot legitimately make assumptions or draw inferences about the reasons state authorities dropped the charges. *See, e.g.*, ISCR Case No. 99-0360 at 4 (App. Bd. Sep. 25, 1997). Second, the charges against Applicant for failure to obey a reasonable and lawful order to exit the mother's apartment building and trespass on private property are not based on the mother's statement but instead on the police officer's interactions with him. Third, the contradictions between Applicant's and the police officer's version of that incident raise questions about his credibility. While the Board is required to give deference to a Judge's credibility determinations (Directive ¶ E3.1.32.1), the Judge is expected to explain why an applicant's version of an event is worth of belief when it is contradicted by other evidence. Failure to do so suggests that the Judge merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 18-01926 at 4 (App. Bd. Sep. 20, 2019). Fourth, there is record evidence corroborating aspects of the mother's accusations, such as photos of her injuries, the statement of the neighbor who saw Applicant on top of the mother in the stairway of the apartment building, the statement of the independent witness who observed them brawling in the mall, and the statement of the child about Applicant hitting her with the belt. The Judge ignored these multiple examples of corroborating

evidence in his analysis of the case. Fifth, a DOHA Judge must consider the evidence as a whole, rather than in a piecemeal manner, in rendering a decision. Directive ¶ 6.3. When viewed in its entirety, the evidence in this case does not support a conclusion that Applicant was an innocent victim who was merely acting in self-defense during the incidents involving the child's mother. Instead, the evidence shows that he repeatedly participated in, or instigated, arguments with the mother that escalated into what can be fairly described as mutual assaults. The Judge even described one of the alleged incidents as a "mutual physical assault." Decision at 4. Applicant's pattern of engaging in such confrontations and assaults sufficiently establishes he engaged in conduct raising security concerns under Guidelines J and E.

In apparently concluding Applicant's criminal conduct is not recent, the Judge noted Applicant's DWI conviction occurred four years ago and his most recent alleged criminal conduct occurred two years ago. He also stated "[a] person should not be held forever accountable for misconduct in the past." Decision at 11. In that analysis, however, he ignored that Applicant was charged with malicious destruction of property in 2020 and that charge has not yet been resolved. Additionally, while recognizing "other criminal complaints will probably be filed against [Applicant] by the same woman[.]" the Judge inexplicably concluded there is "no realistic concerns about future criminal conduct" and his past criminal conduct no longer casts doubt on his reliability, trustworthiness, and good judgment. *Id.* Furthermore, the Judge's conclusion that Mitigating Condition 32(d), *there is evidence of successful rehabilitation . . .*, applied in this case is undercut by Applicant's denials of committing most of the alleged offenses, his failure to accept responsibility for them, and his failure to refrain from engaging in such conduct for any meaningful period. In short, the Judge's mitigation analysis is not a reasonable interpretation of the evidence. Rather, the record as a whole supports Department Counsel's argument that the Judge appears to have substituted a favorable impression of Applicant's demeanor for record evidence.

We conclude that the Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law. It fails to consider important aspects of the case and runs contrary to the record evidence. The record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.



**Order**

The Decision is **REVERSED**.

Signed: Michael Ra'anan  
Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

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

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board