Date: June 15, 2022

In the matter of:	)	
-----	)	ISCR Case No. 20-01097
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel
Aubrey M. De Angelis, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 27, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On February 9, 2022, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Wilford H. Ross 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 an evidentiary ruling, 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 is in his mid-forties. Married with three children, he has received a GED and has attended a community college, from which he received a certificate in Critical and Creative Thinking. He has worked for a Defense contractor since 2018.

Under Guideline J, the SOR alleged that Applicant was arrested for and charged with numerous criminal offenses, some of which resulted in convictions. In 1994, he was charged with Felony Grand Theft Vehicles and convicted of Receiving Known Stolen Property. The court sentenced him to a day in jail and 36 months of probation. That same month, Applicant was charged with Battery, to which he admitted in his Answer to the SOR. "The record is bereft of any documentary evidence supporting this allegation. Under the particular circumstances of this case, this allegation is found for Applicant due to lack of evidence." Decision at 3.

In August 1996, Applicant was charged with Receiving Known Stolen Property. Applicant stated to his clearance interviewer that he was not aware that he had been charged with a felony. One year later, Applicant was charged with Rape by Force or Fear, Felony Rape Drugged Victim, Escape or Attempt to Escape, and two counts of Sexual Intercourse with a Minor. Following conviction for the latter two types of offenses, Applicant was sentenced to 365 days in jail and 36 months of probation. Applicant advised the clearance interviewer that he had not disclosed this offense on his security clearance application (SCA) because he "was initially charged with felony rape but the later outcome was a misdemeanor[.]" Decision at 3.

In March 1999, Applicant was charged with Driving When Privilege Suspended. Applicant admitted this allegation in his Answer to the SOR. The Judge found in Applicant's favor "due to lack of evidence." Decision at 3. In September of that same year, Applicant was charged with Falsely Representing Self to a Peace Officer, Driving When Privilege Suspended, and Failure to Provide Evidence of Financial Responsibility. Applicant admitted this allegation in his Answer to the SOR. Again, the Judge found this allegation in Applicant's favor "due to lack of evidence." Decision at 4. He was arrested in February 2003 on one count of Force/Assault with a Deadly Weapon Not a Firearm. The Judge found that no further information was available regarding this allegation. Applicant was arrested in October 2008 for Inflict Corporal Injury on Spouse/Cohabitant. Applicant did not know he had been charged with an offense. In March 2009 Applicant was charged and convicted with Manufacture or Possession of a Dangerous Weapon and sentenced to sixteen months in prison, serving eight. He stated in his security clearance application (SCA) that the weapon was a souvenir baseball bat. The Judge found a similar alleged offense in June of that year was a duplicate of the previous allegation.

In December 2012, Applicant was charged with DUI and was sentenced to 36 months of probation following conviction. In April of the next year he was arrested and charged with DUI, Driving While License Suspended, and Driving Without an Interlock Device. He was sentenced to thirty days in jail and 36 months of probation. In December 2014 Applicant was charged with Driving While License Suspended or Revoked for DUI, Speeding, and Operating Vehicle Without Interlock Device. In March 2015, Applicant was again arrested and charged with DUI, Driving While License Suspended, etc. He was sentenced to 90 days work release, a suspended jail

sentence, and probation.[1] Finally, in April 2016, he was arrested and charged with Driving Suspended License.

Applicant competed his SCA in January 2019. The SCA inquired if Applicant had been involved in criminal conduct within the previous seven years. He disclosed his arrests in December 2012, April 2013, and March 2015 but did not disclose the 2016 charge. The SCA also inquired if Applicant had (1) "EVER been convicted in any court of the United States of a crime, sentenced to imprisonment for a term exceeding a year, and incarcerated as a result of that sentence for not less than a year" and (2) if he had "EVER been charged with any felony offenses." Applicant disclosed the March 2009 dangerous weapon charge but did not disclose the 1994 charge of grand theft or the 1997 charge of rape. The Judge found that Applicant had not listed the rape charge because it ultimately resulted in a misdemeanor conviction.

The Judge's Analysis

The Judge stated that Applicant's arrests after 2009 were limited to alcohol offenses. Since 2015 he has returned to school, changed careers, and "moved on with his life." Decision at 9. He stated that he had entered favorable findings for several allegations due to lack of evidence. Regarding the omissions from the SCA, the Judge stated that Applicant should have disclosed the 1996 charge of receiving stolen property and the 1997 rape. He did not discuss Applicant's failure to disclose the 1994 grand theft charge and stated that Applicant did not believe that he had to report the 1996 and 1997 felonies. He concluded that Applicant's omissions met the criteria for Directive, Encl. 2, App. A ⁋ 16, "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire[.]" He went on to state that Applicant's omissions were not done with the "intent to deceive[.]" Decision at 11. Under Guideline G, the Judge found that Applicant had abstained from alcohol since 2015 and has changed his life.

Discussion

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. 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 national security eligibility 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, we will review the 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

[1] "Sentencing entailed: 90-days jail time, fines of about $2500, and either a three or five year DUI probation. He was able to convert the jail time to a work release program[.]" Item 5, Interview Summary, at 2.

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. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Evidentiary Ruling

Department Counsel argues that the Judge erred in his ruling regarding Item 5, a summary of Applicant's clearance interview. We evaluate a Judge's rulings regarding the admission of evidence to see whether the rulings were arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017).

The Judge addressed Item 5 in this manner:

> Item 5 is inadmissible. It will not be considered or cited as evidence against Applicant's interests in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management on March 22, 2019. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation (ROI) summary is inadmissible against Applicant's interests in the absence of an authenticating witness . . . In light of Applicant's admissions, Item 5 is also cumulative. *I reviewed the ROI for any potentially mitigating information that Applicant might have thought would be considered*. Any such mitigating information will be set forth in this decision. Decision at 2 (emphasis added).

We construe this to mean that, despite characterizing the document as inadmissible, the Judge nevertheless admitted it for the limited purpose of considering whatever mitigating information it might contain.

We agree with Department Counsel that the Judge erred in his treatment of this document. We note that the File of Relevant Material (FORM), in a paragraph printed in boldface type, advised Applicant that he could object to Item 5 as being unauthenticated. However, "[i]f no objections are raised in your response to this FORM, or if you do not respond to this FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case." Applicant did not make a response to the FORM, and the Judge erred by not addressing whether Applicant had waived his objection to Item 5.[2]

More to the point, however, the Judge erred by considering Item 5 solely to the extent that it could be viewed as favorable to Applicant but not otherwise. In a recent decision we addressed a similar such ruling. In concluding that the Judge in that case erred by admitting an interview

[2] *See United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001) ("A party may manifest adoption of a statement in a number of ways, including [through] words, conduct, or silence."). As an example of adoption by silence, *see* ISCR Case No. 15-05252 at 3 (App. Bd. Apr. 13, 2016) (remanding a decision in which an applicant on appeal challenged the Judge's exclusion of her unauthenticated background interview from evidence. In the FORM, she was informed she could object to its admission into evidence, but neither objected to that document nor addressed it.).

summary only as to potentially mitigating evidence, we cited to Directive, Encl. 2, App. A ¶ 2(a), which requires that:

> All available, reliable information about the person, past or present, favorable and unfavorable, should be considered in reaching a national security determination . . . Once the background interview was admitted into the record, it should have been considered for all pertinent purposes. It was arbitrary and capricious to exclude derogatory information in the background interview from being considered for disqualifying purposes. The Judge's challenged evidentiary ruling is a clear error in judgment and contrary to law. [ISCR Case No. 19-01174 at 3-4 (App. Bd. Feb. 6, 2020)]

In the case before us, the Judge committed a similar error. Directive ¶ E3.1.20 provides that an unauthenticated ROI is inadmissible. It does not provide that an unauthenticated ROI is inadmissible only against an applicant's interests, and even less does it provide that a Judge can admit only portions of an unauthenticated ROI to fulfill whatever uncommunicated expectation the Judge believes that the applicant may have held regarding consideration of that document's contents. The Judge neither cites authority nor articulates a satisfactory legal basis for considering only the portions of the interview favorable to Applicant.[3] Having effectively chosen to admit it, the Judge was required to consider the document as a whole. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017) (A Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision). By only considering the favorable aspects of Item 5, the Judge's analysis of the evidence was unfairly skewed. As it stands, the Judge's selective consideration of Item 5 was arbitrary, capricious, and contrary to law.

Guideline J Allegations

In claiming the Judge failed to consider all relevant evidence, Department Counsel contends the Judge erred in concluding there was insufficient evidence to establish the incidents alleged in SOR ¶¶ 1.b, 1.e., 1.f, 1.j, 1.l, 1.m, and 1.n because Applicant admitted those allegations. These allegations asserted Applicant was arrested and charged with various offenses. Department Counsel argues "as a matter of law, the Administrative Judge cannot find these allegations to be unproven." Appeal Brief at 21. These arguments are not persuasive.

We find no error in the Judge's favorable findings regarding SOR ¶¶ 1.b, 1.e, 1.f, and 1.n. First, we note the paucity of supporting evidence in the record. The record evidence consists of Applicant's SOR Response, his 2019 SCA, his background interview (which the Judge effectively admitted into evidence, see discussion above), and a FBI Identification Record (*i.e.*, criminal record). Second, there is no record evidence, except for Applicant's admissions, supporting SOR ¶¶ 1.b, 1.e, 1.f, and 1.n. Of note, those alleged arrests or charges are not listed in the FBI criminal record, and Applicant was not questioned about them during his background interview. Third, in responding to the SOR, Applicant merely stated, "I admit" to these allegations without providing any further comments. Fourth, an applicant's admission merely to being arrested or charged with

[3] In certain circumstances, evidence may be admitted for limited purposes, *e.g.*, Federal Rules of Evidence (FRE) 105 and 402. Reliance on such authority is not applicable here.

an offense is not sufficient to prove he or she committed that offense. *See, e.g.*, ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999) ("The fact that an applicant has been arrested or otherwise charged with a criminal offense, standing alone, does not constitute proof that the applicant engaged in criminal conduct. *See, e.g.*, ISCR Case No. 98-0424 at 4 (App. Bd. Jul. 16, 1999). Accordingly, the fact that an applicant has been arrested on several occasions does not prove that he engaged in criminal conduct with which he has been charged."). Under the specific facts of this case, the Judge's favorable findings on each of these allegations "due to lack of evidence" was not arbitrary, capricious, or contrary to law. Decision at 3-4.

Next, Department Counsel contends the Judge erred in concluding SOR ¶¶ 1.j and 1.m were duplicates of 1.i and 1.l, respectively. Department Counsel notes the entries in the FBI criminal report for the purported duplicate allegations reflect different law enforcement agencies as well as distinct arrest and fingerprint dates. These arguments fail to consider relevant and material evidence. The FBI entries in question reflect that Applicant was "arrested or received," list identical offenses, and indicate the length of time between the entries in both instances is about three months. Government Exhibit 6 at 3-5. The entries supporting SOR ¶¶ 1.i and 1.j both reflect that Applicant was sentenced to 16 months in prison, and the second entry reflects the law enforcement agency is the "Dept of Corr[,]." *i.e.*, the Department of Corrections. For the other purported duplicate allegations, one entry reflects Applicant was sentenced to 30 days in jail, while the second indicates the law enforcement agency is the "Sheriff's Office." *Id.* It was not unreasonable for the Judge to conclude that each set of entries related to the same offense, and one entry pertains to Applicant's incarceration for that offense. The Judge committed no error in concluding the allegations in question were duplicates.

Falsification Allegation

The falsification allegation is troubling. As written, it alleged that Applicant falsified his SCA by failing to disclose 12 instances in which he was either arrested for, charged with, or convicted of criminal offenses. This allegation asserted Applicant failed to disclose three arrests or charges (SOR ¶¶ 1.i, 1.k, and 1.o) that he actually did disclose in his SCA. It also alleged five other failures-to-disclose (SOR ¶¶ 1.b, 1.e, 1.f, 1.g, and 1.h) that either do not fall within the scope of the SCA questions at issue or for which there is no supporting evidence. For example, the SOR alleges that Applicant failed to disclose an arrest in 1999 for traffic offenses. No question in the SCA requires an applicant to disclose 22-year-old traffic offenses. Additionally, Applicant denied SOR ¶¶ 1.g and 1.h, and there is no evidence in the record concerning those allegations.

In the File of Relevant Material (FORM), Department Counsel noted that Guideline E allegations contain "a number of minor typos" pointing out Applicant disclosed his interactions with law enforcement authorities that were alleged in SOR ¶¶ 1.i, 1.k, and 1.o. We recognize that typographical errors may occur in drafting SOR allegations, but the identified errors in this SOR allegation go well beyond "minor typos." Department Counsel's disclosure is, at best, an inaccurate and glaring understatement. Without much scrutiny of the record, it is apparent that aspects of the falsification allegation are either baseless or not supported by any evidence. Surprisingly, Department Counsel did not withdraw in the FORM those problematic aspects of the falsification allegation. Security clearance adjudications must be conducted in a fair manner. *See* Directive ¶¶ 4.1 and E3.1.10. Requiring Applicants to respond to SOR allegations that are, in

whole or in part, baseless or not supported by any record evidence raises fairness and due process concerns.

In responding to the SOR, Applicant neither admitted, denied, nor addressed the falsification allegation.[4] We agree with the Judge's conclusion that Applicant failed to disclose three reportable events (SOR ¶¶ 1.a, 1.d, and 1.p) in his SCA. These included two arrests/charges for felony offenses that occurred more than 20 years ago and an arrest/charges for DUI and Driving Suspended License in 2016. In his SCA, Applicant disclosed three DUI convictions and a felony conviction for possession of a deadly weapon. These disclosures put the Government on notice of his criminal conduct. We also note that Applicant is a machinist with a GED, that he was applying for a security clearance for the first time (GE 1 at 41), and that, in responding to the SOR, he admitted to at least two allegations (¶¶ 1.j and 1.m, duplicate allegations (the incarcerations)) that he could have legitimately denied. In his background interview, Applicant indicated that he did not report the rape charge because he was convicted of misdemeanors. The Judge concluded Applicant did not have the requisite intent to deceive in failing to make the required disclosures. The arbitrary and capricious review standard is highly deferential. *See, e.g.*, *ATT Corp. v. FCC*, 220 F.3d. 607, 616 (D.C. Cir. 2000). An Appeal Board member need not agree with a Judge's conclusion in order to find it sustainable. *See, e.g.*, ISCR Case No. 11-13965 at 3 (App. Bd. Aug. 6, 2013).

Guideline G Allegations

Department Counsel contends that the Judge erred in his analysis under this guideline. Between 2012 and 2016, Applicant was convicted of alcohol-related offenses on three occasions and was also arrested for or charged with offenses of that nature on another occasion.[5] The Judge concluded that such conduct was unlikely to recur because Applicant indicated he has abstained from alcohol use for over five years. We do not find that conclusion to be arbitrary, capricious, or contrary to law.

Guideline J Analysis

We find persuasive Department Counsel's arguments that the Judge's analysis of the Guideline J allegations is flawed. Although the SOR overstates Applicant's criminality in several regards, the record establishes that he engaged in criminal conduct for a period of over 20 years. He has been convicted of offenses on six occasions. These include being (1) charged with Grand Theft Vehicles in 1994, convicted of Receiving Known Stolen Property, and sentenced to one day in jail and 36 months of probation; (2) charged with Rape by Force or Fear, Rape Victim Drugged, Escape Attempt Special Circumstances, and two counts of Sexual Intercourse with a Minor Special

[4] Directive ¶ E3.1.4 provides that applicants must admit or deny each listed SOR allegation. The Government should require applicants comply with the Directive by ensuring they respond appropriately to SOR allegations. Suspected falsifications merit special consideration. "Any incident of intentional material falsification . . . is of special concern. Such conduct raises questions about an individual's judgment, reliability, and trustworthiness and may be predictive of their willingness or ability to protect the national security." Directive, Encl.2, App. A ¶ 2(i). *See also Id.* at ¶ 15.

[5] Besides these four incidents, Applicant also admitted to an allegation (SOR ¶ 1.n, discussed above) for which there was no other supporting evidence and the Judge's favorable finding regarding it was not arbitrary, capricious, or contrary to law.

Circumstances in 1997, convicted of the Escape charge and two counts of Sex with a Minor, and sentenced to 365 days in jail and 36 months of probation; (3) convicted of Manufacture or Possession of a Dangerous Weapon in 2009 and sentenced to 16 months of confinement; (4) convicted of DUI Alcohol/0.08 Percent in 2012 and sentenced to 36 months of probation, 10 days in jail (suspended), fined, and ordered to pay restitution; (5) charged with DUI Alcohol/Drugs, Driving While License Suspended, Driving Without Interlock Device in 2013, convicted of DUI and Driving While License Suspended, and sentenced to 30 days in jail (suspended), and fined; and (6) charged with two counts each of DUI Alcohol/Drugs, DUI Alcohol/0.08 Percent, Driving While License Suspended in 2015, convicted of DUI, and sentenced to 90 days in jail (converted to work release), $2,500 fine, and three to five years of probation. GE 1, 5, and 6. He was also arrested for and charged with Driving While License Suspended and DUI in 2016, but the record evidence reflects no disposition of those offenses. GE 6. In short, Applicant has a lengthy history of criminal behavior that includes the commission of serious crimes for which he was incarcerated for significant periods. Applicant had the burden of mitigating the security concerns arising from that behavior.

The lack of mitigating evidence in the record is notable. In responding the SOR, Applicant provided no evidence or explanations beyond admitting to all but two of the Guideline J allegations, and he failed to submit any response to the FORM. Applicant failed to provide evidence to corroborate his claims of a changed life, participation in AA, work performance, etc. The Judge's favorable findings were based upon portions of Applicant's SCA and a selective consideration of Applicant's 2019 interview summary. Beyond this, there is no evidence of any kind in the record, and certainly none from Applicant, that bears favorably on the issues of mitigation or rehabilitation.

In his Guideline J analysis, the Judge placed great weight on an absence of evidence of criminal conduct since 2016. However, there is no hard and fast rule that can be applied to the question of the recency of security-significant matters. As we observed in a prior similar case, the extent to which criminal conduct has been attenuated by the passage of time must take into account the extent of that activity and its inherent seriousness. In reversing a favorable decision, we stated that the Judge "fail[ed] to explain why a pattern of arrests that spans a period of over twenty years and includes carrying a dangerous weapon, domestic disturbance, assault on a minor, communicating threatening language . . . and DUI" is not recent simply due to the lapse of time between the date of the last offense and the close of the record. ISCR Case No. 05-00448 at 4-5 (App. Bd. Oct. 1, 2007). We reach a similar conclusion in the case before us. Given the paucity of mitigating evidence, it was error for the Judge to conclude that the mere passage of time was sufficient to mitigate Applicant's serious misdeeds over a period of more than twenty years. Indeed, Applicant went from 2003 until 2009[6] without arrests or charges after which he resumed committing offenses, including a felony. This vitiates the Judge's conclusions about how much time should pass before Applicant's offenses lose their significance due to age, and it undermines a determination that Applicant's history of misconduct does not cast doubt on his current trustworthiness and reliability.

[6] The FBI record reflects that Applicant was "arrested or received" in 2008 for "inflict corporal inj spouse cohab" and further indicates "released/detention only." GE 6 at 3. In his background interview, Applicant indicated he learned of a warrant for his arrest and turned himself in at the police station. It is possible Applicant was merely detained for that suspected offense, fingerprinted, and then released.

As Department Counsel asserts, "sentencing for each of the convictions afforded Applicant ample opportunities to learn . . . in the form of jail time, probation time, alcohol classes, and fines, yet . . . he continued to repeat the same behaviors[.]" Appeal Brief at 32. It is not enough that the record contains some evidence that a person might find favorable. *See, e.g.*, ISCR Case No. 20-02990 at 5 (App. Bd. Jan. 19, 2022) ("The presence of some mitigating evidence does not compel a Judge to make a favorable security clearance decision"). To the contrary, the national security interest requires that an applicant must meet the standard set forth in *Egan*, and all doubt as to the applicant's eligibility for a clearance be resolved in favor of the national security. The Judge's decision fails on this score.

Given the totality of the record evidence, such favorable, uncorroborated, information as the Judge selectively drew from Item 5, was not sufficient to meet Applicant's burden of persuasion under the *Egan* standard. The Judge's favorable decision contains significant analytical errors. It fails to articulate satisfactory explanations for its conclusions and fails to consider important aspects of the case. The Judge's favorable security clearance decision is not sustainable.

Order

The Decision is **REVERSED**.

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

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board