Date: June 9, 2022

In the matter of:	)	
-------	)	ISCR Case No. 20-01450
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 16, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 16, 2022, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

In his appeal brief, Department Counsel raised the following issues: whether the Judge's analysis is unsupported by the record evidence, whether he substituted a credibility determination for record evidence, and whether his decision is arbitrary, capricious, and contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact: The Judge's factual findings are summarized below:

Applicant is 64 years old. Divorced, he has two adult children, ages 26 and 29. He has held a security clearance intermittently since 1985 and has been employed in his current defense contractor position since September 2018. From 2003 until 2009, Applicant owned a firm at which he worked as a software engineer. He employed his children, who were minors at the time, paying them about $20,000 a year. When his company failed in 2009, Applicant filed for unemployment benefits on behalf of his minor children. The benefits ran for 99 weeks, ending in mid-2011. Upon receipt of the unemployment checks, Applicant placed them into his children's bank accounts.

In December of 2015, Applicant was charged with five felonies: two counts of False Statement, Representation, or Concealment, two counts of Identity Theft – Obtain Credit with Other's Identity, and Grand Theft. Applicant denies that he committed the felonies, but pled guilty to a misdemeanor —Failure to Post Benefit Rights in his work place. Applicant was placed on probation until March 2022 and was ordered to pay $45,000 in restitution, which he states has been paid and is currently in civil litigation.

The Judge's Analysis: The Judge's substantive analysis is quoted below, in its entirety:

> Applicant was convicted of a misdemeanor offense in 2017. He was placed on probation for five years, which ends this month, March of 2022. The evidence establishes three [Guideline J] disqualifying conditions.[1]
>
> . . .
>
> More than ten years have passed since the Applicant's alleged felonious conduct, and his admitted misdemeanor conduct. Within the month of this writing, his probation is ending. He provided evidence of successful work with his employer. (citations omitted.) The evidence does establish mitigation under [Adjudicative Guideline ¶¶ 32(a) and 32(d)].[2] Criminal Conduct is found for Applicant.

[1] AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and AG ¶ 31(c): individual is currently on parole or probation. Directive, Encl. 2, App. A.

[2] AG ¶ 32 (a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement. Directive, Encl. 2, App. A.

. . .

> I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is well respected in the workplace and in his community. (citations omitted.) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the Criminal Conduct security concerns. [Decision at 4–5.]

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.

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, 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. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998). This decision fails in each of these regards. We focus on the most dispositive below.

Failure to Examine Relevant Evidence

The documents of record and Applicant's testimony at hearing contained relevant evidence that the Judge failed to examine in his findings of fact and his analysis, to include:

In 1999, Applicant started his own firm, which "hire[d] professional engineers and contract[ed] out their expertise to various aerospace companies working with the government on their own defense contracts." AE A at 1. In 2002, when his children were about six years old and nine years old, Applicant listed them as employees of the firm. At hearing, he stated that he

initially drew a salary for each of them of approximately $100/week and admitted that they performed no duties for his firm. Tr. at 28, 29, 31. Instead, Applicant states, they were to do their chores at home. "Basically, it was an allowance, but it was structured through a . . . company." *Id*. at 29. Applicant's statement that he consulted with his accountant prior to putting his children on his firm's payroll is uncorroborated. Tr. at 28.

From at least 2003 through 2009, Applicant's company worked on a government contract with a major defense contractor and "employed" his two minor children. GE 1 at 9–10; Answer to SOR at 2–3. Under cross-examination at hearing, Applicant acknowledged that he wrote off the children's salaries as a business expense of the company. Tr. at 29–30. The record is unclear as to whether the children actually received any weekly stipend or whether giving them a salary on his company's account was done for the sole purpose of writing off a business expense. Applicant's statement that he initially paid them a salary of $100/week is uncorroborated. Elsewhere in the record evidence, he stated that he gave the older child $175/week, and there is some evidence, discussed further below, that he was writing off a much larger salary for each of them. GE 2 at 15.

Applicant stated that, in December 2008, he increased his children's salary from approximately $5,200/year paid weekly to $20,000/year, paid annually. Answer to SOR at 3. The children were about 13 and 16 at the time. It is unclear from the record whether the children actually received that payment or whether it was purely a faux deduction for a business expense. At hearing, Applicant testified that he "changed their . . . pay scale on advice of [his] accountant." Tr. at 30. This testimony is uncorroborated.

The following summer, in August 2009, Applicant's firm went out of business, having lost the government contract it had held since 2003. GE 1 at 9–10. In addition to filing his own claim for unemployment benefits, Applicant filed unemployment claims online in his children's names. The online filing system calculated benefits based on the highest wages in the previous five quarters, and both children initially received the state's maximum unemployment benefits, based upon the reported wages of $20,000 in a single quarter in late 2008. Answer to SOR at 3. Shortly thereafter, the state unemployment office (UEO) contacted Applicant to inquire whether the older child's salary should have been entered as a quarterly payment of $5,000, as the annual salary was $20,000. Although Applicant declined to modify his claim, the UEO reduced the child's benefits to align with a salary of $5,000 per quarter, rather than $20,000 per quarter. The UEO did not inquire into the younger child's claim, and those unemployment benefits remained at the maximum level. *Id.*

The UEO paid unemployment benefits for both children for the maximum period of 99 weeks. The unemployment checks were mailed to Applicant's residence, which Applicant testified was the children's "legal residence." Tr. at 33–35. That testimony is contradicted by his 2012 security clearance application (SCA), in which Applicant reported his children's address to be the same as their mother's. GE 1 at 14, 19–20.

In his Answer to the SOR, Applicant stated that he "helped his two sons manage their unemployment benefits" and that the benefits "were used toward their living expenses and allocated to them with the supervision of [Applicant.]" Answer to SOR at 3. At hearing, Applicant testified that he deposited the unemployment checks in his children's personal bank accounts. Tr. at 15, 33–34. Both of those uncorroborated claims are contradicted by considerable evidence, including other statements by Applicant. In his clearance interview, discussed further below, Applicant stated that his wife was surprised in 2013 to discover that he was collecting unemployment benefits in the children's name, that she reported him to state authorities, and that he has had no contact with his ex-wife or children since 2013. GE 2 at 9, 11, 15. In his hearing testimony, Applicant stated again that his wife was surprised to discover that he was collecting benefits in the children's name and that she and the children reported him. Tr. at 15–19. "This entire case was brought against me by my ex-wife and my sons . . . because they believed that I was doing something that was illegal." Tr. at 15. Moreover, the state charged him with identity theft, false representation, and grand theft, charges that are inherently inconsistent with his representation that he was giving the funds to the children. The weight of the evidence of record supports a conclusion that Applicant's children did not know that he was receiving unemployment benefits in their name and that his family reported him to authorities when they discovered the fraud.

Under cross-examination at hearing, Applicant steadfastly refused to acknowledge that any of his admitted behavior—putting young children on payroll, writing off their salaries as a business expense, and drawing unemployment benefits in their names—was fraudulent. Instead, he repeatedly asserted that he relied upon advice of unidentified accountants and UEO personnel. Only at the conclusion of the hearing, after Department Counsel's closing argument, did Applicant waver. He requested to go back on the record and acknowledged that he "should never have attempted to defraud the U.S. Government" by "employing [his children] and paying them a salary and calling it a business deduction." Tr. at 44. He did not address the allegation in the SOR—that he also improperly drew state unemployment benefits in their names.

The Judge's brief recitation of facts and briefer analysis entirely ignored the innumerable security concerns raised by this long, complex pattern of fraudulent conduct that culminated in the state charges alleged on the SOR. For example, the Judge found as fact that Applicant employed his children and paid them about $20,000/year, but neglected to mention that the children did no work for the firm, which was on a government contract, and that their salaries were written off as business expenses for seven years. Additionally, the Judge found that Applicant filed for unemployment benefits on behalf of his minor children, but neglected to mention that the children had never been bona fide employees and were not entitled to the benefits. In omitting virtually all details of Applicant's fraudulent scheme, the Judge rendered findings of fact that are, at best, incomplete.

Moreover, the Judge found as fact that Applicant, upon receipt of the unemployment checks, placed them into his children's bank accounts, accepting without explanation Applicant's implausible testimony on this fundamental issue. "When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make

findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence." ISCR Case No. 99-0435 at 3 (App. Bd. Sep. 22, 2000). Here, the Judge failed to acknowledge the conflicts, failed to weigh the evidence, and failed to make findings that took into account any evidence beyond Applicant's testimony. In sum, our review of the record convinces us that the Judge failed to examine and consider relevant evidence.

Failure to Consider Important Aspects of the Case

Additionally, the Judge neglected to consider a critical aspect of the case—Applicant's inconsistent statements throughout the security clearance process. We focus below specifically on his inconsistent statements regarding how his unemployment fraud was discovered.

Subject Interview: In his adopted September 2018 clearance interview, Applicant told the government investigator the following regarding his state criminal charges and related matters.

In 2013, Applicant's ex-wife came to live temporarily at his home. While there, she gained access to his home computer and collected personal and business information without his knowledge. Two years later, she provided inaccurate information to the state unemployment office (UEO) and coerced their children to do the same. Applicant is unaware of the specific false information his ex-wife provided. The UEO contacted Applicant, but Applicant declined to be interviewed because the UEO would not provide him the questions beforehand. GE 2 at 11.

In December 2015, the local district attorney's (DA's) office brought five felony charges against him, including identity theft, false representation, and grand theft. Applicant does not know why the DA brought those particular five felony charges, but the DA mentioned that Applicant paid his children $100,000 and $175,000 while they were purportedly employed at his company. *Id*. at 11, 15.

Since 2013, Applicant has had no contact with his ex-wife or his children and was unable to provide their address. *Id*. at 9. From this chain of events, Applicant "learned a valuable lesson and has password-protected all his personal electronic devices." *Id*. at 11.

Answer to the SOR: In December 2020, Applicant provided the following answer, in pertinent part, to the SOR, through his attorney.

While Applicant was unemployed from 2009–2011, he was also involved in a "dissolution" with his ex-wife, and "it was contentious at times."[3] Answer to SOR at 3. In about June 2010, his ex-wife was at Applicant's home and saw the June 2010 unemployment check statement for their younger child. Applicant's ex-wife demanded that Applicant turn over all the monies directly to her and threatened that she would seek to have criminal charges filed if he did not comply. Applicant did not give in to "this extortion" because he did not believe he was doing anything inappropriate. *Id*.

[3] Applicant has been divorced since 1997. GE 1 at 14.

His ex-wife went to the DA and/or the UEO in late 2014 and falsely reported to them that Applicant "had been paying his sons $175,000/week and $150,000/week, respectively, through his company"; that he was keeping all of the funds for himself; that he was engaging in unemployment benefits fraud; that he was fraudulently failing to report income; and that he perpetrated identity theft on the sons. *Id*. at 3–4.

Testimony at Hearing: At his hearing, Applicant testified in pertinent part as follows:

In 2009, his company lost its contract. He filed for unemployment benefits for himself and, after checking with the UEO, filed for benefits for his children. All three of them collected benefits from 2009 until 2011. The children's checks were sent to his residence, which was also their residence, and he would "cash them in their behalf and put them into their bank accounts." Tr. at 15.

> In 2010, my ex-wife discovered what I was doing and said to me, "Give me these funds or I will turn you in to the [UEO] for doing something you shouldn't be doing." So I turned and told her to go ahead and call the [UEO], which she did in 2010, and presented all the evidence she had at the time about me collecting or the boys collecting funds that I was – I was cashing and putting into their account. [*Id*. at 16.]

Applicant heard nothing from the UEO. In June 2011, he stopped receiving the unemployment checks and later discovered that his ex-wife had changed the address of the children, so that the final checks for the children went to her house. *Id*. at 16–17, 35.

In January of 2012, the UEO sent 1099 forms to Applicant and the children to claim the unemployment benefits as income, but his ex-wife did not believe that she or the children owed any taxes. A year later, the children received a letter from the IRS regarding the underpayment of taxes. His ex-wife attempted to contact the UEO and the IRS to report that she was knew nothing about these unemployment benefits, but received no response. *Id*. at 17.

When the IRS pursued payment of income taxes on the unemployment benefits, his ex-wife filed another complaint with the UEO, this time in the form of a whistleblower complaint that Applicant had applied for unemployment on behalf of the children and stolen the money. After Applicant declined to meet with the UEO and that UEO's inquiry stalled, his ex-wife took the complaint to the local DA's office. The DA then filed the felony charges against Applicant. *Id*. at 17–18.

Inconsistencies: In reviewing Applicant's varying accounts, what is immediately apparent is his major shift in timeline. When first interviewed in September 2018, Applicant placed the discovery of fraud by his ex-wife in 2013, when she was staying at his home. By the time he answered the SOR in December 2020, Applicant had shifted the discovery by his ex-wife back in time to June 2010, which allowed him at his hearing to paint his children and ex-wife as complicit:

> [The children] did not say anything at the time even though they were well aware of all of this – these actions, because my ex-wife had already told them about it in 2010. They knew all about this and took no actions. [Tr. at 32.]
>
> What happened was in 2010, she discovered that there was a – that checks were being sent and she threatened me. And then in June or maybe April, she changed the address and the final three checks of – to (the children) went to her at her address, which they cashed. . . . But the point what you're making there is that they committed the same crime, though. They cashed the checks that apparently they were not supposed to be getting. [*Id*. at 35.]

From the conflicting, confusing, and contradictory versions of events offered by Applicant, it is impossible to discern the truth even on this one issue—that is, how and when was Applicant's fraud discovered. However, the criminal and dishonest conduct in which Applicant engaged over many years raised questions about his honesty and integrity that required the Judge to engage in a critical evaluation of Applicant's statements and denials. *See, e.g.*, ISCR Case No. 99-0005 at 3–4 (App. Bd. Apr. 19, 2000). The Judge may ultimately have been unable to resolve the inconsistencies. At a minimum, however, the Judge needed to acknowledge those inconsistencies and weigh them in assessing Applicant's candor, integrity, and reliability.

Of note, even a brief review of the record reveals that Applicant's testimony at hearing about his ex-wife's discovery of the fraud was not credible. The only SCA in the record is from February 2012. On that SCA, Applicant lists his ex-wife as a reference on three different sections: in §11 - Where You Have Lived as a reference for his long-term residence; in §13A – Employment Activities as a reference for the 2009 – 2011 period of unemployment in issue; and in §16 – People Who Know You Well. GE 1 at 8, 9, 12. His February 2012 SCA clearly signals that he and his ex-wife were on amicable terms in early 2012 and that he was confident she would be a positive reference when questioned by the government investigator. Moreover, in his 2018 clearance interview, Applicant disclosed that he and his ex-wife entered into a financial real estate venture together in September 2012 and that she was living in his home in 2013. GE 2 at 11, 13. Taken together, this evidence effectively rebuts Applicant's hearing testimony that his ex-wife confronted him in 2010 about his unemployment fraud and that she reported him the same year to state authorities. Tr. at 16.

The Judge erred in failing to address this critical aspect of the case—Applicant's inconsistent statements, aspects of the record that undermine his credibility, and the resulting impact on any assessment of his credibility.

Failure to Articulate Explanation for Conclusions

Before concluding that Applicant had mitigated the security concerns, the Judge cited just three facts: that "[m]ore that ten years have passed since the Applicant's alleged felonious conduct, and his admitted misdemeanor conduct"; that his probation was ending; and that Applicant had submitted evidence of successful work with his current employer. Decision at 4.

In his succinct analysis, the Judge failed in his obligation to articulate a satisfactory explanation for his conclusion that Applicant had mitigated the security concerns raised by his lengthy course of fraudulent conduct. Instead, his cursory reference to Applicant's "alleged felonious conduct, and his admitted misdemeanor conduct" demonstrates that the Judge failed to examine the underlying conduct at issue in the SOR, but rather relied in error upon two factors: the state's failure to prosecute the felonies and his credibility determination of Applicant. *Id*.

Failure to Prosecute

In 2015, Applicant was charged with five felonies, to include charges of false representation, identity theft, and grand theft. In 2017, he was permitted to plead instead to one misdemeanor, and the felonies were dismissed. That decision by a state prosecutor should not have ended the Judge's inquiry into the nature of the underlying conduct. "[T]he reasons why a state prosecutor and a state court decide to handle a criminal matter within their jurisdiction and authority in a particular manner are logically, legally, and practically based on various considerations having little or no relevance to a security clearance adjudication." ISCR Case No. 03-07245 at 5 (App. Bd. May 20, 2005). The Directive itself highlights that a security concern may arise from "evidence . . . of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted." Directive, Encl. 2, App. A ¶ 31(b). Moreover, it is well-established under Appeal Board precedent that a failure to prosecute is not tantamount to a determination of innocence and does not resolve the Government's security concerns about the underlying conduct.

Regardless of the dismissal of the felony charges, the evidence before the Judge was sufficient to constitute substantial evidence that Applicant engaged in long-term fraudulent behavior by, *inter alia*: listing his children as employees when they were not, filing for unemployment benefits in his children's names to which they were not entitled, receiving those benefits over a period of 99 weeks, and converting the funds to his own use. Applicant's sentence alone—60 months' probation and $45,000 restitution—confirms the gravity of his underlying conduct. The Judge erred in failing to examine the serious criminal nature of Applicant's conduct.

Credibility Determination

In his findings of fact, the Judge—without explanation—adopted Applicant's testimony on material issues, without acknowledging and reconciling contradictory evidence. We give deference to a Judge's credibility determinations, but that deference is not unfettered. As we have previously held, when the record contains a basis to question an applicant's credibility (*e.g*., prior admissions, inconsistent statements), the Judge should address that aspect of the record explicitly, explaining why he found the Applicant's version of events to be worthy of belief. "Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence." ISCR Case No. 15-07539 at 4 (App. Bd. Oct. 18, 2018). In this regard, the Judge failed on at least two levels. First, he failed to discuss evidence of Applicant's lengthy pattern of fraud that culminated in the state charges; and, second, he failed to explain why he found Applicant's contradictory in-hearing narrative to be more worthy of belief than other evidence of

record. We are persuaded that the Judge merely substituted a favorable impression of Applicant's demeanor for record evidence and allowed this favorable impression to distort his findings of fact, his analysis, and his evaluation of the whole person criteria.

Conclusion

After considering Department Counsel's arguments in light of the entirety of the record, we conclude that the Judge failed to address important aspects of the record. Consequently, his findings of fact are incomplete, conclusory, and not based upon consideration of all relevant and material evidence. Directive ¶ 6.3. The Judge failed to articulate an explanation for his conclusions and rendered a decision that runs contrary to the weight of the record evidence. His conclusions reflect a clear error of judgment and are so implausible that they cannot be ascribed to a mere difference of opinion. In sum, the Judge's conclusion that Applicant mitigated the Guideline J security concerns is arbitrary and capricious. Accordingly, the favorable security clearance determination cannot be sustained.

Order

The Decision of the Judge 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