Date: July 12, 2022

In the matter of:	)	
-----	)	ISCR Case No. 19-03384
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Nicole A. Smith, Esq., Department Counsel
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Troy L. Nussbaum, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 18, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. The SOR was amended both at the hearing and again after submission of post-hearing evidence. On March 28, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline I, the SOR alleged, as amended, that a licensed psychologist diagnosed Applicant with mental health disorders in December 2021; indicated he has not received appropriate treatment; determined his judgment, reliability, and trustworthiness are questionable;

and gave him a guarded prognosis. Under Guideline E, it alleged, as amended, that Applicant was terminated from a job in 2011 for conducting himself in an inappropriate manner by making comments that caused other employees to feel uncomfortable and that he falsified responses in a 2017 security clearance application and a 2020 background interview. On appeal, Department Counsel does not challenge the Judge's favorable falsification findings but contends the other favorable findings are arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is in his early thirties, is single, and has a bachelor's degree. He has worked for a defense contractor since 2017.

In 2010, Applicant received a two-year appointment as a student trainee at a Federal agency. If he successfully completed the internship, he would be eligible to be hired fulltime. During a conversation at an off-site party in mid-2011, Applicant and his fellow interns discussed the upcoming visit of the President of the United States to a local college. Applicant purportedly stated security at the college would not be adequate to protect the President because there were multiple ways that homemade bombs could be used against him. Using his laptop computer, Applicant proceeded to show the interns a manual on how to make explosives.

Base police where Applicant worked were notified of his comments and initiated an investigation.[1] The U.S. Secret Service was also notified of the incident. Applicant agreed to a forensic examination of his laptop computer. The investigation concluded that no threats or other criminal violations occurred, and the case was closed. In late 2011, Applicant emailed his supervisor about work opportunities during his school's holiday break. The supervisor responded there would not be any work for him this winter, and he would not be able to bring him back in the future. Applicant received a closeout packet with instructions on transferring his thrift saving plan and returning his common access card. The supervisor also called Applicant but did not give him reason to believe he was terminated from his internship for cause or for any reason other than lack of work. During a background interview about six years later, Applicant was confronted about being terminated from the internship for making inappropriate comments that caused other employees to feel uncomfortable. Applicant denied that assertion, claiming he did not recall making inappropriate comments to coworkers and never received follow-up correspondence setting forth the reason why his internship ended. Since then, he has learned the comments that resulted in the investigation contributed to his termination. The Government introduced a termination letter that referenced inappropriate comments, but the receipt block on that letter is unsigned and undated.

During the clearance adjudication process, Applicant has undergone four mental health evaluations. These include evaluations by three licensed psychologists and one licensed clinical social worker. Two years before the hearing, the first evaluation was conducted by a licensed psychologist at DoD's request. At the hearing, this psychologist testified that "a lot can change psychologically in two years." Decision at 5, quoting from Tr. at 43. Post-hearing, two other licensed psychologists evaluated Applicant. One evaluation was conducted at Applicant's request

[1] The investigation was conducted by Naval Criminal Investigative Service (NCIS), not the base police.

(hereinafter referred to as either AE 7 or Psychological Evaluation #3) and the other at the DoD's request (hereinafter referred to as either GE 7 or Psychological Evaluation #4).[2]

Psychological Evaluation #3 was a three-day assessment. It reflects that Applicant was diagnosed with Bipolar II Disorder and Unspecified Anxiety Disorder. The psychologist recommended that he participate in weekly individual therapy for managing depressive episodes and in role playing or practicing conversational skills.

Psychological Evaluation #4 reflects that Applicant was diagnosed with "Social pragmatic communication disorder vs. autism spectrum disorder; Bipolar II disorder . . . ; and Unspecified anxiety disorder. (GE 7 at 6)" Decision at 5. It further stated that Applicant's judgment, reliability, and trustworthiness are questionable, that he posed a risk to national security if granted a security clearance, and that his prognosis was guarded. *Id.*, citing GE 7 at 6. "In reaching this conclusion, [the psychologist] relied, in part, on controverted allegations, not included in the SOR, from unidentified coworkers on a job where he worked more than ten years ago. Moreover, her report does not reflect the conclusion of the base police investigation because she never received it." *Id.* Post-hearing the Guideline I allegation was amended to reflect the results of Psychological Evaluation #4.

The Judge's Analysis

The Guideline E allegation regarding Applicant's job termination is defective because it does not specify the purported inappropriate conduct or comments at issue, and the Government failed to identify the individuals who made these complaints and make them available for cross-examination. Even if this allegation was tenable, it is mitigated because the information is unsubstantiated or from a source of questionable reliability.

Psychological Evaluation #4 is of limited probative value because it relied, in part, on controverted allegations from unidentified coworkers from over ten years ago that were not alleged in the SOR and does not reflect the conclusions of the base police investigation. Applicant has no record of concerning incidents since working at this current job since 2017. He is well respected by his colleagues and clients. He acknowledges his mental health disorder and is in therapy to address this issue. Mitigating Condition 29(e), *there is no indication of a current problem*, applies.

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

[2] The psychologist who prepared Psychological Evaluation #4 reviewed a copy of Psychological Evaluation #3 before preparing her report.

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

Reply Brief

Because Applicant raises a threshold issue in his reply brief, it is addressed first. He argues that Department Counsel's appeal brief should be stricken for failure to comply with Appeal Board guidance, *i.e.*, the Board's handout on "Appeals of Judge's Decisions under DoD Directive 5220.6," which is provided to the parties and is also available on the DOHA website (*see* Appeal Instructions under Industrial Security Program at https://doha.ogc.mil). More specifically, Applicant contends that Department Counsel's brief fails to contain his social security number, mailing address, and his counsel's mailing address and that Department Counsel did not serve him with a copy of her brief. Regarding the latter assertion, we note that Department Counsel provided the Appeal Board with the original and a copy of her brief, and the Board then mailed to Applicant's Counsel the copy of her brief. Over the years, this procedure has developed into a routine practice because it enables the Board to determine when the non-appealing party receives the appeal brief, which, in turn, establishes the 20-day reply brief filing deadline. *See* Directive ¶ E3.1.30. In short, Applicant's arguments to strike Department Counsel's appeal brief are based on procedural technicalities, and his arguments fail to establish any error meriting relief. We resolve this assignment of error adversely to Applicant.

Guideline E Allegation

Department Counsel contends that the Judge's analysis of the Guideline E allegation pertaining to Applicant's internship termination was flawed. We agree with this contention.

In his analysis, the Judge concluded this SOR allegation was problematic for two reasons. He stated,

> First, although SOR allegations do not have to be drafted with the specificity of criminal pleading, they must, at a minimum, be drafted in such a manner that the applicant can prepare a response. (ISCR Case No. 00-0633.a1 (October [24], 2003) at [3-5]) Subparagraph 2.a does not meet this threshold because it does not specify the allegedly inappropriate conduct or comments at issue. [Decision at 7.]

At the hearing, Applicant's Counsel raised no motion or objection challenging the legal sufficiency of this amended SOR allegation. While Applicant denied the allegation as originally

drafted, his attorney stated at the hearing, "we'll admit it, in lieu of denial . . . ." in referring to the amended allegation.[3] Tr. at 11. During his opening statement, Applicant's Counsel stated Applicant was aware that he was terminated from the internship for inappropriate comments. Tr. at 70. Furthermore, Applicant testified that, since his background interview in 2017, he was aware the inappropriate conduct at issue involved his comments about explosives, the President's security, and bomb-making literature at the offsite party. Tr. at 94-99, 109-111, 118-122, and 124-128. When his counsel specifically asked him whether the allegation concerning his job termination for making inappropriate comments was accurate, Applicant responded, "Yes." Tr. at 109-110. From his testimony, it is clear Applicant was aware that his internship termination was based at least in part on the matters NCIS investigated. Given the facts of this case, the Judge erred in concluding that Applicant was not adequately placed on notice of the conduct at issue. [4]

The Judge also stated this SOR allegation was problematic because the Government must identify the witnesses who reported the inappropriate comments and make them available for cross-examination. In support of that proposition, the Judge cites Directive ¶ E3.1.22 and ISCR Case No 05-10921 (App. Bd. Apr. 19, 2007). Based on our review of that cited Appeal Board decision, we conclude it provides no support for the Judge's position on this issue. Quite to the contrary, the Appeal Board has held that Directive ¶ E3.1.22 does not provide a right of cross-examination concerning out-of-hearing statements that are admissible under other provisions of the Directive. *See, e.g.*, ISCR Case No. 11-12461 at 4 (App. Bd. Mar. 14, 2013). In the present case, each of the relevant Government Exhibits (GE)—his adopted personal subject interview (GE 2), the two psychologist's evaluations (GE 3 and 7), the NCIS report (GE 4), and the Government termination letter (GE 5)—are admissible into evidence under Directive ¶ E3.1.20 without authenticating witnesses. *See, e.g.*, ISCR Case No. 18-01755 at 2 (App. Bd. Jul. 11, 2019). The Judge erred in concluding the Government must identify and make available the individuals who reported the inappropriate conduct reflected in those exhibits.

Finally, the Judge concluded that, assuming the allegation is tenable, the security concerns arising from it are mitigated under Mitigating Condition 17(f), "*the information was unsubstantiated or from a source of questionable reliability*." Decision at 8. This conclusion is simply unsustainable in light of the fact that Applicant admitted the amended allegation.

In his reply brief, Applicant argues the Judge's favorable finding regarding this allegation is correct even if his reasoning was not. Reply Brief at 8. Applicant argues the conduct at issue was mitigated due to the passage of time, highlighting his good work performance since 2011. Those were factors the Judge should have considered in his mitigation analysis, but he failed to do

[3] An unequivocal admission by an applicant's counsel is binding on his or her client. *See, e.g.*, DISCR OSD Case No. 87-0955 at 4, n.3 (App. Bd. Jan. 11, 1989).

[4] "An SOR must give an applicant adequate notice of the reasons why the government proposes to deny or revoke access to classified information so the applicant has a reasonable opportunity to respond to the SOR allegation and to present a defense to the government's case against him or her. . . . Accordingly, as long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and should not be concerned with pleading niceties." ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003). An SOR does not have to allege every relevant fact. *See, e.g.*, ISCR Case No. 15-08255 at 3 (App. Bd. Aug. 22, 2017).

so.[5] While a remand may be appropriate to correct the Judge's analytical errors regarding this allegation, his errors regarding the Guideline I allegation, discussed below, warrant reversal.

Guideline I Allegation

The Judge's Guideline I mitigation analysis consists of two paragraphs, quoted below. In apparently referring to Psychological Evaluation #4, the Judge stated:

> In reaching this conclusion, the psychologist relied, in part, on controverted allegations, not alleged in the SOR, from unidentified coworkers on a job where Applicant worked more than ten years ago. Moreover, her report does not reflect the conclusion of the base police investigation because she never received it. Consequently, the probative value of the report is limited.
>
> Applicant has been working for the same employer since 2017. There is no record of any negative job history in that time, and he is, in fact, well-respected by his colleagues and clients. Applicant acknowledges that he has a mental health disorder and is in ongoing therapy to address this issue. Under these circumstances, the mitigating condition set forth in AG ¶ 29(e), "there is no indication of a current problem," applies. [Decision at 9.]

Regarding the Judge's comments about "controverted allegations," it is unclear what he is referring to. Again, Applicant admitted making comments that resulted in the NCIS investigation and admitted engaging in inappropriate conduct. Furthermore, a psychological evaluation is not invalidated because it is based, in part, on "controverted facts, not alleged in the SOR." It is fair to say that psychological evaluations are often based on facts that an examinee may dispute or that are not alleged in an SOR. Additionally, the psychologist who prepared Psychological Evaluation #4 appears to have had a copy of the NCIS report (GE 4). She reported she reviewed the "investigative results report" and referenced the "NCIS report" in her evaluation.[6] GE 7 at 1, 3, 4. We recognize the weighing of the evidence is the special province of the trier of fact. Nonetheless, based on the matters discussed below, the Judge has failed to set forth a reasonable basis for concluding Psychological Evaluation #4 is of limited probative value.

In late 2021, two psychologists evaluated Applicant. AE L (Psychologist Evaluation #3) and GE 7 (Psychological Evaluation #4). Both psychologists reached quite similar diagnoses. Both diagnosed Applicant with Bipolar II Disorder and Unspecified Anxiety Disorder. GE 7 further reflects that Applicant was diagnosed with Social Pragmatic Communication Disorder. AE L does not contain this latter diagnosis, but it does recommend that Applicant receive help to "develop more comfort in social situations by role-playing and practicing conversational skills." AE L at 8. GE 7 concludes with the following paragraph:

[5] In his whole-person analysis, the Judge does mention that Applicant's job termination and the surrounding circumstances occurred more than ten years ago.

[6] The psychologist indicated "the full results of the NCIS report were not available for review." GE 7 at 4. Of note, the copy of the NCIS report in the record does not contain the exhibits listed in it.

> Regardless of the diagnosis in this case, it is clear [Applicant] has a history of mental health issues that have impeded his social and occupation functioning. His mental health treatment, to date, has certainly not been sufficient to address any potential underlying cause for his prior dialogues of inappropriate material leading to rather severe concerns from coworkers and an NCIS investigation. Therefore, his judgment, reliability, and trustworthiness are questionable. He has not had appropriate treatment for any of the potential conditions apparent from the available history and this evaluation (to include mood disorder, autism spectrum disorder or otherwise). Therefore, he does pose a risk to national security if he possesses a security clearance. His prognosis is guarded, given his lengthy history concerning interactions with others and the noted PAI [Personal Assessment Inventory] scale indicating minimal interest in therapy, as well as the lack of mental health treatment to date. [GE 7 at 6.]

Although AE L does not directly address whether Applicant's mental health disorders have an impact on his security clearance eligibility, it states:

> [Applicant] may be unwilling to self-examine his role in difficult situations of prolonged distress and may react externally by behaving erratically. [Applicant] may be easily vivacious, animated, and enthusiastic as he is quickly angered or bored. . . . [T]here is strong suggestion of hypomanic episodes. During these periods, he exhibits an erratic sequence of restlessness and excitability that may be accompanied by hostile behavior. He is likely to be talkative, distractible, subject to tantrums, and interpersonally disruptive. If provoked, he may explode in angry outbursts. [AE L at 6.]

This assessment raises serious questions about Applicant's judgment, reliability, and trustworthiness. The Judge erred in failing to address those comments in his findings of fact and in failing to factor them into his analysis. Those comments undercut the Judge's ultimate conclusion that "there is no indication of a current problem." Decision at 9.

Department Counsel also challenges the Judge's determination that Applicant is "in ongoing therapy" to address his mental health disorders." Decision at 9. She argues persuasively that there is no evidence that Applicant has received meaningful therapy by highlighting the following:

- Psychological Evaluation #1 reflects that Applicant "denied any history of mental health treatment or hospitalizations" and also stated, "I don't need a therapist or anything like that." GE 3 at 3.

- Psychological Evaluation #2 reflects Applicant was tested for Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder while attending college, was directed to see a psychologist and engage in rigorous testing, but "nothing happened after that[.]" AE A at 3.

- Psychological Evaluation #3 reflects that Applicant "largely denied any prior history of mental health treatment" and recommends he "participate in weekly individual therapy that focuses on building awareness of his affective/behavioral cycles, reducing anxiety, and mitigating depressive episodes." AE L at 2 and 8.

- Psychological Evaluation #4 reflects that Applicant "had no mental health history until he enrolled in therapy recently[,]" that his counseling ended after three therapy sessions because his counselor moved to another state, and that, as noted above, his mental health treatment certainly has not been sufficient to address any of the potential underlying causes of his problematic behavior. GE 7 at 3, 4, and 6.

- When asked at the hearing how often he was meeting with a therapist and counselor, Applicant testified, "it **will be** once a week when I resume with the new therapist next month . . . ." Tr. at 103 (emphasis added).

Conclusion

Considering the record as a whole, we conclude that the Judge's decision is arbitrary and capricious. It is not sustainable because it fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's Guideline I security concerns under the *Egan* standard.

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