

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 20, 2007, DOHA 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 May 30, 2008, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in concluding that the Government had not met its burden of production under two of the Guideline E allegations; whether the Judge’s application of the Guidelines E and J mitigating conditions was unsupported by record evidence; and whether the Judge’s whole-person analysis was unsupported by record evidence. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant is an electronics laboratory technician for a Defense contractor. He is a veteran of the U.S. Marine Corps. He married his first wife in 1986, divorcing her 18 months later. They have a daughter from the marriage (Daughter), of whom the wife was awarded custody in the divorce settlement. Applicant is currently married to his second wife, with whom he has two children.

In 1986 Applicant was arrested and charged with DUI. In November 1998, Daughter was visiting Applicant at his home. Applicant denied Daughter’s request for a friend to visit her, which Applicant believed upset Daughter. Applicant stated that Daughter and his previous wife did not get along with his current wife. Applicant’s memory of the events is “not completely clear.” Decision at 3. However, shortly after her visit with Applicant, Daughter “called Applicant and told him she knew what he had done—that he touched her in the wrong places. He denied any wrongdoing and told her he was sorry she was upset. The police report indicates that [Daughter] told the police about this alleged conduct and that Applicant also improperly touched his other daughter at the same time. It also shows that, at around 1:30 a.m., with the police on the telephone line, [Daughter] called Applicant . . . The report states that Applicant denied improperly touching his younger daughter and that he admitted his conduct with [Daughter]. Applicant, however, denies that this conduct occurred with [Daughter].” *Id.*

The police arrested Applicant on November 16, 1998, charging him with sexual assault on a child by a person in a position of trust, a felony. Following a *Miranda* warning, Applicant was questioned by the police. After being informed that he had failed a polygraph examination,

Applicant acknowledged that he committed the conduct with Daughter. For six months or more Applicant lived with his parents. The State Department of Social Services convened a panel, which concluded that Applicant could not return to live with his wife and their two children. Consistent with State law, Applicant requested a jury trial on this matter and was permitted to return to his home.

Subsequent to that, Applicant entered an *Alford*¹ plea to third degree assault. Applicant did not want to put his family through another trial and he had exhausted his financial resources. If he litigated the case and were found guilty, Applicant could have been sentenced to ten years in jail. Following Applicant's plea, the court sentenced him to two years probation and a fine. He was ordered to undergo a psychological examination. In addition, the court issued a permanent restraining order requiring him to stay away from Daughter. He has had no contact with his daughter or ex-wife since November 1998.

When completing his security clearance application (SCA), Applicant checked "not applicable" in reply to the question inquiring about whether he had a former spouse. When answering the question about his other relatives, he listed his parents and siblings but he did not list any of his children, including Daughter. To the question as to whether he had ever been charged with or convicted of a felony, he answered "no." These answers were not factually correct. Applicant did not list his first marriage because "it was a long time ago, his first wife is not a part of his life and he is trying to put his contacts with her behind him." He did not list the arrest for sexual assault on Daughter because he believed he only had to list offenses less than seven years old. "In explaining his reason for not listing his former wife and oldest daughter, he said '[he] did not consider those two people part of my life anymore.'" *Id.* at 5. Applicant stated that he did not take the security clearance process seriously and was not thorough when completing his SCA.

Applicant's wife and family are aware of his arrest and the circumstances surrounding it. His boss is also aware of his arrest and plea.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

¹*North Carolina v. Alford*, 400 U.S. 25 (1970).

The Board will address whether the Judge's decision is supported by substantial record evidence in the course of the discussion below.

Whether the Record Supports the Judge's Ultimate Conclusions

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). 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The 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. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Whether the Judge erred in her conclusion that the Government had not met its burden of production under two of the Guideline E allegations.

The SOR contains three allegations under Guideline E. The first is that Applicant falsified his SCA by omitting his former spouse. The second is that he falsified the SCA by omitting Daughter. The third is that he falsified the SCA by omitting his felony arrest for sexual assault on Daughter. The Judge concluded that the Government had satisfied its burden with regard to the former spouse. The Judge stated, "[Applicant] acknowledged that he realized that he thought about

his first wife, but decided that the information was not necessary. His decision not to acknowledge his first marriage was deliberate.” Decision at 9. This conclusion is sustainable.

However, the Judge concluded that Applicant’s failure to list Daughter was not deliberate, on the ground that he failed to name any of his children through a simple mistake. *See* Tr. at 47. (“I don’t understand how I missed that, Your Honor. I really don’t. There’s no reason I would deliberately leave my current children off.”) The Judge does not explain why she finds this to be a credible explanation for the omission, given the fact that the SCA explicitly requires an applicant to name any and all children he or she may have. Be that as it may, the Judge’s conclusion that Applicant did not deliberately omit Daughter’s name is not even consistent with her own finding that he omitted both his former wife and Daughter *for the same reason*. That reason is that they were a part of his life that he wished to put behind him. The Judge’s finding is consistent with a portion of the record evidence. “Judge: Is there a reason you would leave [Daughter] out? Witness: Yes, Your Honor. Judge: Why would you leave her out? Witness: Same reason. It’s sad to say, but I disowned her after this incident and did not consider those two people part of my life anymore.” Tr. at 47. “Department Counsel: . . . [I]t occurred to you to list your daughter and your wife, but you chose not to. A: Right. I believe that’s correct.” Tr. at 50.² In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the Judge must examine the statement or omission in light of the record as a whole. When an applicant claims that a false answer to a SCA question is not deliberate, the Judge should address explicitly any contrary evidence in the record. In this case Applicant’s desire to relegate to the past two people who had accused him of sexual assault is, in and of itself, not surprising. However, insofar as that is a reason to believe that his omission of the former wife was deliberate, it is, *a fortiori*, a reason to believe the same thing about Daughter. The Judge’s decision does not provide a rational basis for distinguishing between these omissions. The Judge’s conclusion that the Government had not presented substantial evidence regarding the deliberate nature of Applicant’s omission of Daughter’s name is arbitrary, capricious, and contrary to law.

The Judge also concluded that the Government had not met its burden of production as to the deliberate nature of Applicant’s omission of his felony arrest for sexual assault on Daughter. Department Counsel’s argument that this conclusion is unsupported by record evidence is persuasive. Applicant stated that he believed the question asked only for convictions during the prior seven years. Applicant’s explanation that he answered hurriedly and without reading the question closely, while testimony the Judge had to consider, should have been balanced against other matters in the record which point to a deliberate omission. The Judge reproduced this question verbatim in her findings of fact: “Have you ever been charged with or convicted of any felony offense?” The question is clear and unambiguous, containing no time limitation. Given the fact that all three factual omissions at issue in this case relate to Applicant’s prior conviction arising from an allegation of sexual assault on his biological daughter, a reasonable person could infer that Applicant was omitting from his SCA any facts that would lead to discovery of that misconduct. His testimony that

²In Government Exhibit (GE) 2, Subject Interview, dated December 2006, Applicant offered a different set of explanations for his omissions.

he failed to take the security clearance process seriously does not contravene such an inference. Tr. at 20, 46. The Judge's own conclusion that one of the omissions was deliberate is a matter which she should have addressed in evaluating his state of mind regarding the other two. Indeed, the multiple nature of the omissions, and the fact that they were made contemporaneously, as well as his varying explanations for the omissions, are matters which the Judge should have discussed. Viewed as a whole, the record demonstrates that the Government presented substantial evidence of the deliberate nature of Applicant's omission of his felony arrest. The Judge's contrary conclusion is arbitrary, capricious, and contrary to law.

Whether the Judge's application of the mitigating conditions was unsupported by record evidence.

The Judge properly concluded that the incident with Daughter raised security concerns under Guideline J. Government Exhibit (GE) 6 includes a Probable Cause affidavit, which contains a description of the incident. It includes information apparently provided by Daughter to the police. The document states that Daughter

visited her father . . . for a regular visit. She said that at bedtime she was sharing a bedroom with her half-sister . . . who is 7 years old. She said her and [sister] were also sharing a bed. [Daughter] said that she was asleep when her father entered the room and woke her up, by touching her on the leg. [She] further stated . . . that her father rubbed up her leg, resting his hand on her vagina. [She] believed her father rubbed her vagina, with one finger, in a circular motion. [She] stated that her father continued to rub her vaginal area and legs for approximately five to ten minutes.

GE 6 also contains a description of a pretext phone call Daughter made to Applicant. "During the pretext phone call the suspect . . . did not . . . deny touching [Daughter]. He did extend to [her] an apology for his actions." During a subsequent interrogation by the police Applicant admitted that he had "sexually molested [Daughter] by fondling her vagina on the night in question." Tr. at 68. *See also* Decision at 3. The record, and the Judge's findings, demonstrate that as a consequence of his actions, Applicant was charged with sexual assault and entered a plea of guilty to a lesser included offense in order to avoid the consequences to his family and to himself of a litigated trial.³ The Judge's conclusion that this matter is covered by two Guideline J disqualifying conditions⁴ is

³Applicant testified as to advice he had received from his attorney. "He told me that we could take it to trial, criminal trial, that it was going to be very costly, and if I was found guilty, then I could spend up to ten years in prison. And at that point, I was out of money. I didn't want to drag my family back through all the proceedings again, and so I pled to assault to end everything." Tr. at 42.

⁴Directive ¶ E2.31(a): "a single serious crime or multiple lesser offenses[.]" Directive ¶ E2.31(c): "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted[.]"

sustainable. Additionally, the Judge's similar conclusion under Guideline E about Applicant's omission of his former wife is also sustainable.⁵

However, Department Counsel persuasively argues that the Judge erred in her analysis of the pertinent mitigating conditions. Regarding Guideline J, the Judge concluded that Applicant had met his burden of persuasion under three provisions in the Directive. Criminal Conduct Mitigating Condition (CCMC) 32(a) mitigates security concerns when "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 individuals's reliability, trustworthiness, or good judgement[.]" Directive ¶ E2.32(a). CCMC 32(c) mitigates criminal conduct when there is "evidence that the person did not commit the offense[.]" Directive ¶ E2.32(c). CCMC 32(d) does so when "there is evidence of successful rehabilitation[.]" Directive ¶ E2.32(d). Department Counsel argues that the Judge's analysis is not supported by record evidence. The Board notes, for example, GE 2, a record of Applicant's subject interview conducted as part of his security clearance investigation. This document describes Applicant's explanation to the investigator, taken under oath and concerning, among other things, the assault allegation. In this document Applicant appears to claim that, as a consequence of Daughter's allegation, he was taken to trial by a jury and found to be not guilty.⁶ Although Applicant later stated that this was a reference to the civil hearing concerning his efforts to return home to his current wife, the statement itself, read in its entirety, could lead a reasonable person to believe that Applicant was claiming to have been acquitted of the criminal charge of sexual assault. There is nothing in the statement about his plea of guilty to the lesser included offense of assault. Such a statement is consistent neither with the other record evidence nor the Judge's own findings about the criminal trial in Applicant's case. Furthermore, in this document Applicant attributes Daughter's assault accusation to her having been manipulated by the former wife, whom Applicant described as "evil" and jealous of Applicant's current spouse. This is not totally consistent with other evidence provided by Applicant, the implication of which is that Daughter reported Applicant to the police because she was angry that Applicant would not permit her to have an overnight guest. Additionally, the Judge does not discuss the credibility of Applicant's testimony that his confession, following a polygraph, was actually false and that he had confessed merely due to having been tired. Tr. at 68. These matters, especially when read in light of the omissions on the SCA, are not consistent with a view that Applicant has demonstrated reliability and good judgement, or that he has been rehabilitated. The Judge does not adequately explain why she discounts the record evidence that impeaches Applicant's credibility and is contrary to her favorable resolution of the case.

⁵Directive ¶ E2.16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities[.]"

⁶"Subject in 11/98 was arrested and charged with sexual assault on his daughter . . . Subject after being charged had his attorney request this case to be heard in a court by a jury. Several months after 11/98, this case went to trial. Subject testified and had other character witnesses testify on his behalf. Subject recalls his ex-wife and daughter also testified against him. Subject recalls that once this case went to the jury, they only took less than one hour to reach a verdict. Subject . . . stated that during this [trial] he was found to be not guilty by a jury." GE 2 at 5.

The Judge also concluded that Applicant had met the requirements of CCMC 32(c) by providing evidence that he did not commit the offense. Under the facts of this case, this appears to be at odds with the Judge's other conclusions that Applicant had established that the offense would not recur and that he had shown rehabilitation. In any event, the Judge appears to conclude that Applicant's *Alford* plea to a lesser included offense and his denials of criminal conduct demonstrate that the offense in question did not occur. While the Judge framed her discussion in terms of sexual assault, it should be noted that Applicant has denied any criminal activity with Daughter, sexual or otherwise. The Judge does not explain why she finds this denial credible in light the record evidence as to the facts underlying Applicant's arrest; his admission to the police that he assaulted Daughter after having been advised that he failed a polygraph examination; and his apparent inconsistent and/or meretricious statements concerning the incident and its aftermath. The Judge appears to have given weight to the fact of the *Alford* plea, in which a defendant consents to the imposition of a sentence despite a denial of actual guilt. However, a court cannot accept such a plea unless it also finds that it is supported by facts sufficient to sustain a conviction.⁷ Under the facts of this case, such a plea, in and of itself, is entitled to minimal favorable weight viewed in light of Applicant's otherwise uncorroborated claims of innocence. The record, viewed as a whole, will not sustain a conclusion that Applicant has met his burden of persuasion as to the Guideline J mitigating conditions.

The Judge also concluded that Applicant has successfully mitigated the Guideline E allegation.⁸ The Judge stated that Applicant's failure to list his previous wife "is not significant because the usual criminal background investigation in the security clearance process would and did reveal his first marriage and the arrest. His 1998 arrest is his only criminal arrest.⁹ There are no other allegations of sexual misconduct involving his younger daughter. Since he has no contact with [Daughter] or her mother, there is little likelihood of a reoccurrence. His failure to acknowledge his first marriage does not cast doubt upon his reliability, trustworthiness, and good judgement." Decision at 9. The Board finds this analysis problematic for a number of reasons. First, the Judge evaluated Applicant's case for mitigation in light of only one of the three Guideline E allegations. Her failure to consider the totality of Applicant's conduct impairs her analysis. Second, the Judge's discussion focuses not only on his falsification but is based to a large extent on the fact that

⁷See *Crofoot v. U.S. Government Printing Office*, 761 F.2d 661 at 665, n. 1, (Fed. Cir. 1985) (A court that receives an *Alford* plea "must independently determine that the plea has a factual basis"); *U.S. v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (A court accepting an *Alford* plea must "be convinced that there is sufficient evidence to justify" a conclusion that an accused is guilty beyond a reasonable doubt); *People v. Birdsong*, 958 P.2d 1124 (Colorado 1998); *Wirsching v. Colorado*, 360 F.3d 1191 (10th Cir. 2004). See also 21 Am. Jur. 2d ¶ 665 ("in order to accept a guilty plea by a defendant who continues to maintain his or her innocence, the court must determine that a strong factual basis exists establishing defendant's actual guilt.")

⁸See Directive ¶ E2.17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgement[.]" Directive ¶ E2.17(e): "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]"

⁹Compare this the Judge's own finding that Applicant had also been arrested for DUI.

Applicant has not been accused of further sexual misconduct. This does not logically mitigate security concerns arising from record evidence of three different omissions on his SCA. That is, the gravamen of the Guideline E allegations is that Applicant did not provide correct responses to three separate questions on the SCA. Evidence that he has not been accused of other sexual misconduct does not demonstrate that the omissions in question are minor, are not recent, or are not likely to recur. Third, Applicant's apparent false statement in GE 6 about an acquittal, made after he completed his SCA, further undercuts a conclusion that his false statements are not likely to recur. Fourth, the Judge's analysis does not explain what Applicant has done to reduce or eliminate the possibility of duress arising from these omissions. The record, viewed as a whole, will not sustain a conclusion that Applicant has met his burden of persuasion under the Guideline E mitigating conditions.

Neither will the record sustain a favorable whole-person analysis. In that section of her decision, the Judge states that the allegation of sexual misconduct "arose out of a problematic family situation and one particular weekend. In this case, the allegation arose after a difficult weekend visiting with his oldest daughter. A jury of his peers, however, concluded that he should return to his home to live with his family after hearing days of testimony from all persons involved. The jury considered balanced testimony and ultimately overruled a negative determination by a social services panel. Moreover, the jury found him not to be a threat to his younger daughter. I infer from the decision of the jury that the evidence failed to establish sexual misconduct by Applicant." Decision at 10. The trial to which the Judge refers was the previously-mentioned civil hearing on the question of whether Applicant should be permitted to live with his current wife and children. The only evidence in the record about this hearing comes from Applicant himself. Even assuming that the evidence is correct, it establishes nothing more than Applicant's fitness to live with his second family. It provides no basis for the Judge's conclusion that Applicant did not commit misconduct involving Daughter, or to undermine the court's order in the criminal trial that Applicant have no further contact with her. Neither does it provide a reason to mitigate Applicant's omissions on the SCA. The Judge stated that Applicant "recognizes his responsibilities and accepts them. There is no apparent link between an alleged incident of sexual assault in 1998 and Applicant's ability to protect classified information." *Id.* It is not clear why the Judge concludes that Applicant accepts responsibility, or for what, in light of his denial of having committed any misconduct with Daughter at all and his insistence that she and/or his ex wife fabricated the basis for his arrest and subsequent assault conviction. To sum up, the record contains substantial evidence that Applicant was accused of felony sexual misconduct involving Daughter; that he admitted the misconduct to the police following a polygraph; that consistent with his plea the court found him guilty of a misdemeanor assault on Daughter; that the court ordered him permanently to stay away from Daughter; that he omitted any reference to these matters in his SCA; and that he made inconsistent statements concerning these matters. The Judge's conclusion that Applicant has met his burden of persuasion under the *Egan* standard, either regarding the mitigating conditions or the whole-person factors in the Directive, is not sustainable. Accordingly, the Judge's favorable decision is arbitrary, capricious, and contrary to law.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffery D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
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