DATE: December 4, 2009

In Re:	)	
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-----	)	ISCR Case No. 07-16511
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 16, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 31, 2009, after the hearing, Administrative Judge Mary E. Henry 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 concluding that the Government had not met its burden of production and whether the Judge's application of the mitigating factors was erroneous. Finding error, we reverse.

The Judge made the following findings of fact: Applicant is a data analyst for a federal contractor. He has two sons, ages 16 and 11. He served in the Army from 1994 until 1999.

Applicant began to work for Employer A, a federal contractor, in 2002. During the course of the employment, Employer A counseled Applicant for violating its standards of conduct by engaging in sexual harassment, inappropriate touching, inappropriate comments, etc. Employer A subsequently terminated Applicant based on this conduct.[1]

Applicant then went to work for Employer B, a federal agency. He completed a Declaration for Federal Employment (DFE), which inquired, *inter alia*, whether, within the previous five years, he had ever been fired from a job for any reason. He answered "no." Applicant "rushed through his answers. He thought it meant federal jobs only." Decision at 4. Employer B terminated Applicant "based on unacceptable conduct and performance."[2] *Id.*

In September 2004 Applicant began working for Employer C, also a federal agency. He completed a second DFE in which he again answered "no" to the question about whether he had ever been fired from a job. Applicant stated that he had rushed through the form and believed that he did

[1]Government Exhibit (GE) 14 includes a memorandum by a Senior Vice President of Employer A suspending Applicant without pay for three days for "sexual and other harassment as result of several complaints of inappropriate and unprofessional behavior. These complaints included allegations of inappropriate relationships, as well as inappropriate touching and hugging of female coworkers in the job site." Applicant was informed that subsequent infractions could result in job termination. This exhibit also includes another memorandum by the same person, describing in detail his counseling session with Applicant. This memo describes objectively offensive behavior, including unwanted touching of female workers, sexually suggestive comments, etc. According to this document, Applicant denied being able to recall the incidents alleged against him, nor could he explain why others would make these kinds of accusations against him. "[Applicant] said he was sorry, but there were no obvious attempts to admit any wrong doing[.]"

[2]GE 15 is a memorandum from the Assistant Deputy Administrator of Employee B, advising Applicant that he was being terminated prior to the conclusion of his probationary period. This document states that the reason for the termination was "unacceptable conduct and performance," including "rude and abrupt behavior with coworkers," "continued demonstration of disrespect for coworkers," and unacceptable job performance. It also stated that Applicant had been provided feedback on his poor conduct, without improvement. GE 15 contains a receipt acknowledgment signed by Applicant. In a Personal Subject Interview summary included in GE 7, Response to Interrogatories, Applicant acknowledged having been counseled while working for Employer B because a customer had complained about him. "He stated that the only problems he had at [Employer B] were people demanding things of him that he could not obtain for them, problems with organizing travel and all of the various factors involved in that, and other customer service related problems."

not have to list terminations that occurred during a probationary period.[3] Approximately one year later, Employer C terminated Applicant. Applicant was advised that "he was not meeting the work guidelines for his position."[4] *Id*.

Applicant subsequently began working for Employer D. He resigned from this employment to take a position with his current employer.

In January 2006, Applicant completed his security clearance application (SCA). In answering the question inquiring if he had been fired from a job within the prior seven years, the Judge found that Applicant listed his termination by Employer A, but not B or C. In response to other questions on the SCA, he did not list his two sons, and he denied any outstanding debts.

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

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[3]Both DFEs contain identical language: "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal Agency?" GE 3, 4.

[4]See GE 7, Response to Interrogatories: "[Applicant] admitted that he was terminated from his position at [Employer C] due to unsuccessful completion of the probationary period . . . It was just a bad fit."

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).

The Judge concluded that the Government had not met its burden of production as to the alleged deliberate nature of the omissions. She also concluded that the Government had not met its burden regarding an allegation that Applicant resigned from Employer D in lieu of termination for poor performance. Department Counsel argues that the Judge's conclusions do not take into account significant contrary record evidence. Department Counsel's argument is persuasive.

When an applicant denies an allegation contained in a SOR, the Government must produce substantial evidence of the truth of the allegation. Substantial evidence means "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. In the case of an omission in a SCA or some other document, the Government's burden of production requires more than merely showing that the omission occurred. *See* ISCR Case No. 07-00196 at 2 (App. Bd. Feb. 20, 2009). Rather, the Government must present substantial evidence that the omission was deliberate. In evaluating whether the Government has met its burden of production concerning an omission, the Judge must examine the omission in light of the record as a whole. *See* ISCR Case No. 07-03307 at 5 (App. Bd. Sep. 26, 2008).

In this case, the Judge's decision does not reflect that she took into account record evidence that is not consistent with the view that Applicant's omissions on the SCA and the two DFEs were innocent. For example, the record contains evidence that, as regards Applicant's dismissals from Employers A, B, and C, and his resignation from D,[5] the circumstances underlying these actions include poor job performance, failure to obey standards of conduct, etc. Indeed, the record

[5]In her discussion of Applicant's resignation from Employer D, the Judge noted GE 17, Status Change Notice, which refers to difficulties Applicant was having with his job. Included in this document is an email from an Operations Director at D: "I kindly gave him the option to resign before I fired him for poor performance. After he was fired, an ex-girlfriend of his replied to all on an email he had sent from his [official] account that accused him of some negative things. The man is not to be trusted." The Judge stated that, because this email was sent out after the fact, and was based on hearsay from Applicant's girlfriend, it was entitled to little weight. Accordingly, she concluded that the Government had not met its burden of production as to Applicant's resignation from Employer D. However, GE 7, Response to Interrogatories, includes a summary of an interview in which Applicant addressed this resignation. "Regarding his employment with [Employer D] [Applicant] was confronted with the unfavorable information [obtained during the investigation]. . . He explained that he never knew there was a problem or that his behavior was considered disrespectful (particularly in regards to his contact with female coworkers) until he was spoken to approximately two months after he began working there . . . that his behavior was bordering on sexual harassment . . . Regarding the unapproved email he sent out, he thought that it was acceptable to send out the email without having his worked checked . . ." This interview corroborates the email contained in GE 17 and provides a strong reason to believe that, at the time he resigned from Employer D, Applicant was aware of deficiencies in his conduct and performance. The interview undercuts the Judge's conclusion that the Government had not met its burden of production that Applicant resigned from Employer D under unfavorable circumstances and that he had not intended to deceive when he omitted that incident from his SCA.

demonstrates that Applicant was previously disciplined by Employer A for the same conduct which resulted in his termination. This record evidence supports a conclusion that the circumstances underlying the dismissals from Employers A, B, and C and the resignation from Employer D were not favorable to Applicant. A reasonable person could conclude that they supply Applicant with a motive to prevent their discovery and, therefore, a motive for deliberately omitting them from the Government documents in question. That the Judge did not address this evidence undermines her conclusion that the Government had not met its burden of production.

Additionally, the record contains some apparently inconsistent statements by Applicant, which undermine the credibility of his claims that his omissions were not deliberate. For example, he variously attributed his omissions of the job firings to his having rushed through the documents,[6] to his belief that he did not have to list terminations that occurred during probationary periods,[7] and, regarding the DFEs, to his mistaken opinion that he only needed to address firings from federal jobs.[8] Concerning his having omitted his sons from the SCA, during the hearing Applicant stated that this was a "bone-headed" mistake which shouldn't have happened. However, during a prior interview, Applicant advised the investigator that he did not realize that he needed to list his children, which reasonably implied that he had made a considered decision not to do so.[9] The Judge's decision does not sufficiently address Applicant's inconsistencies, either by attempting to resolve or explain them, or by attempting to demonstrate that they are relatively insignificant. This undermines her favorable estimate of Applicant's credibility. The Board has previously held that when the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, etc.), the Judge should address that aspect of the record explicitly, explaining why he or she finds an 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. *See, e. g.*, ISCR Case No. 03-23504 at 6 (App. Bd. Dec. 12, 2007).

The Judge's decision does not seriously address the extent to which Applicant's explanations for his conduct are contradicted by other evidence. Most significantly, Applicant's claims that his various job firings were due to personality clashes are not consistent with record evidence that he had failed to perform satisfactorily and that he had engaged in acts of sexual harassment while on

[6]*See e.g.*, Tr. at 54-55.

[7]Tr. at 101-102.

[8]*See* Tr. at 80. *See also* Department Counsel Brief at 12: "[A]t the hearing Applicant also claimed, for the first time, that when he read the [DFEs] he misunderstood Question 12 as requiring disclosure of only Federal jobs."

[9]*See* Subject Personal Interview summary included in GE 7: "He did not realize that he needed to list his children (both of whom were born out of wedlock) on the case papers." The implication is that Applicant believed he did not need to list his two children, due to their illegitimacy, which suggests that he gave the question some degree of reflection. This is not totally consistent with his testimony that it was an inexplicable mistake.

the job.[10] Additionally, in a subject interview, Applicant initially denied being able to recall why he was terminated by Employer A, despite his having signed a termination letter which explicitly refers to his prior counselings and other disciplinary action for his misconduct and for job deficiencies.[11] Finally, the Judge does not address the large number of omissions by Applicant and the fact that these omissions, concerning different matters, occurred over a number of years, which in and of itself is a reason to believe that they were deliberate. The Judge's decision does not reflect that she devoted serious attention to the contrary record evidence. This undermines the Judge's conclusions that the Government had failed to produce substantial evidence (1) that Applicants omissions were deliberate and (2) that Applicant resigned from Employer D in lieu of termination. The Judge's conclusions are arbitrary, capricious, and contrary to law.

Despite this, the Judge did conclude that the terminations themselves by Employers A, B, and C raised Personal Conduct security concerns. However, she stated that these concerns were mitigated by the passage of time and improved conduct and job performance. The Judge's decision on this matter is undercut by her failure to consider record evidence discussed above concerning the deliberate nature of Applicant's omissions on the SCA and the DFEs. Neither did she discuss record evidence that Applicant either denied wrongdoing or minimized his misconduct, described, for example, in Footnotes 1 and 10. Such evidence undercuts her conclusion that Applicant had demonstrated rehabilitation. Evidence that Applicant deliberately omitted information on his SCA also undercuts a conclusion that his Guideline E security concerns were not recent. This failure buttresses Department Counsel's argument that the Judge substituted a favorable estimation of Applicant's demeanor for record evidence and that she did not evaluate the evidence in light of the record as a whole. The record, viewed in its entirety, does not support a conclusion that Applicant has met his burden of persuasion under the *Egan* standard.

The errors outlined above are not harmless, in that, had they not been made, the result of the case would likely have been different. The Judge's decision does not consider relevant factors and offers an explanation for the decision that runs contrary to the weight of the record evidence. *See* ISCR Case No. 03-22861, *supra*, at 2-3. The Board concludes that the Judge's decision is not sustainable, in light of the record as a whole.

[10]On his SCA, Applicant stated that he was fired by Employer A due to a disagreement with his supervisor. During his interview included in GE 7, he characterized the reason for his firing as a "verbal altercation." He also stated that, while working for Employer B, he and one of the office managers did not get along. Tr. at 46. Compare these comments with the record evidence discussed in footnotes 1 and 2 above.

[11]GE 7, Response to Interrogatories; GE 15, Termination Letter.

Order

The Judge's favorable security clearance decision is REVERSED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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