

KEYWORD: Guideline E

DIGEST: Applicant was charged with Felony Rape of a Child. He was 22 at the time and the alleged victim was about 16. Applicant pled guilty to a misdemeanor, Communication with a Minor for Immoral Purposes. He maintained his innocence during the hearing. In completing his SCA, Applicant answered “no” to the following question: “Have you EVER been charged with any felony offense.” Decision reversed.

CASENO: 15-07009.a1

DATE: 07/25/2017

DATE: July 25, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 15-07009
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Shane C. Brengle, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 25, 2016, DoD 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 April 5, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative 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.

Department Counsel raised the following issues on appeal: whether the Judge’s conclusion that Applicant’s conduct did not raise concerns under Guideline E was arbitrary, capricious, or contrary to law; whether the Judge erred in finding that Applicant did not deliberately falsify his security clearance application (SCA); and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant was charged with Felony Rape of a Child.¹ He was 22 at the time and the alleged victim was about 16. Applicant pled guilty to a misdemeanor, Communication with a Minor for Immoral Purposes. He maintained his innocence during the hearing.²

In completing his SCA, Applicant answered “no” to the following question: “Have you **EVER** been charged with any felony offense[.]” At the hearing, Department Counsel asked the following: “And in your Answer [to the SOR] you said you just misunderstood. Is that a fair description of what happened? Applicant: Yes. Or, if you like, I misread it. I misunderstood it. I frankly did not—at that point, filling it out, I just did not remember being charged with a felony for, you know, in my recount of the past 12 years before that. It’s always been about a misdemeanor. So, it just – it didn’t occur to me.” Decision at 2, quoting Tr. at 24-25.

The Judge stated that, when considered in conjunction with his character witness and written character references, he found Applicant’s explanation to believable. He found that Applicant had not deliberately omitted the felony charges from his SCA.

The Judge’s Analysis

The Judge stated that, insofar as there was no deliberate omission and the misdemeanor conviction was more than 12 years old, Applicant’s case did not establish a pattern of dishonesty or rules violations. In the whole-person analysis, the Judge noted Applicant’s evidence of good character and of good work performance. He reiterated that the conviction was over 12 years ago.

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*

¹The SOR and evidence state that Applicant was charged in 2004.

²Applicant pled guilty to the misdemeanor offense despite maintaining his factual innocence. Tr. at 20 *North Carolina v. Alford*, 400 U.S. 25 (1979) permits an offender to plead guilty while at the same time maintaining his or her innocence. Before accepting an *Alford* plea, a court must independently determine that it is supported by facts sufficient to sustain a conviction. *See* ISCR Case No. 07-03307 at 7-8 (App. Bd. Sep. 26, 2008) and cases cited therein.

of the Navy v. Egan, 484 U.S. 518, 528 (1988). “Any doubt concerning personnel being considered for national security eligibility be resolved in favor of the national security.” Directive, Encl. 2, App. A ¶ 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).

Department Counsel argues that the Judge erred in concluding that Applicant's conduct did not raise concerns under Guideline E. He argues that the Judge substituted a credibility determination for record evidence. Department Counsel's argument includes an implicit challenge to the Judge's finding that Applicant's omission from the SCA was not deliberate. We examine a Judge's findings to see if they are supported by “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. *See also* ISCR Case No. 14-04435 at 4 (App. Bd. Mar. 13, 2017). When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

Department Counsel cites to record evidence that runs contrary to the Judge's finding of no deliberate omission. He notes, first of all, that the question at issue here is clearly worded, the word “**EVER**” printed in bold-faced capital letters, which would make it less likely that Applicant would have simply misread it, as he claimed. Department Counsel notes that Applicant is well educated, holding an advanced degree, and thereby able to understand the clear meaning of English words. Department Counsel also draws our attention to inconsistent statements that Applicant made, on one hand that he had misunderstood the question, on the other that he has always thought of the offense as a misdemeanor. As Department Counsel argues, the Judge never addressed the apparent inconsistency in Applicant's explanations, which detracts from his overall favorable conclusion. *See, e.g.*, ISCR Case No. 14-01056 at 3 (App. Bd. Aug. 17, 2015) to the effect that inconsistent statements can impugn a witness's credibility.

Even more, Department Counsel cites to evidence concerning the offense itself, much of which was obtained from Applicant at various times during the investigation and adjudication of his case:

- a. Applicant was charged with repeated incidents of sexual misconduct with his cousin, occurring over a period of years from when she was nine years old until she was fifteen. The offense was charged as a felony.³ Tr. at 19; Government Exhibit

³It is unclear from the record and from the Decision whether there was one count of sexual misconduct or multiple counts.

(GE) 2, Interview Summary, at 5-6.

b. Applicant's cousin alleged that the offenses occurred more than 80 times. Tr. at 28.

c. After an inconclusive polygraph examination, Applicant made a statement⁴ to the police and was subsequently charged. Tr. at 18-19, 28; GE 2 at 5-6.

d. Applicant entered into the misdemeanor plea to Communication with a Minor for Immoral Purposes as a form of risk avoidance, because he did not want to risk a jury trial and possible jail time. GE 2 at 6; Tr. at 19-21.

e. Applicant's sentence included 365 days in jail with 335 days suspended; 30 days on a work crew; two years supervised probation; court costs; and restitution. He was also required to undergo six months of sex offender counseling. GE 2 at 6; GE 3, FBI Identification Record.

f. Applicant's cousin, through her relatives, filed a lawsuit against him, which he settled for \$200,000. His father paid the settlement. Tr. at 22.

g. Applicant is listed in the Sex Offender Registry of his state. Tr. at 19-20, 31.

Department Counsel argues that Applicant's explanation for his omission—that he always thought of his case as a misdemeanor and forgot that he had originally been charged with a felony—was unworthy of belief. Department Counsel argues that it is not plausible that Applicant simply forgot that his case began as a felony resulting from the victim's claim that he had raped her over 80 times and that his guilty plea to a misdemeanor was for the expressed purpose of avoiding the quantum of jail time that a felony conviction could well entail. Department Counsel persuasively argues that such charges as were lodged against Applicant would most likely be indelibly imprinted in a person's memory so that, in answering the question at issue, the person would have known that a negative response was not truthful. The Judge did not address why he found Applicant's explanation to be credible, relying instead upon the various character statements that Applicant submitted in his behalf. However, these statements, as well as the witness who provided testimony at the hearing, merely cited to Applicant's general good character and disclosed no reason to believe that the authors or the witness were even aware of the charges against Applicant, much less that they had a considered opinion as to his truthfulness under circumstances such as those at issue here.⁵ Indeed, three of his written references describe him as "law-abiding,"

⁴Applicant testified that the police questioned him for hours. He stated "I never did anything wrong in my life up to that point or been in those kind of positions. And, so, that statement was what both . . . the ones that were alleging this stuff and their team kind of held on to." Tr. at 27-28.

⁵The witness at the hearing described Applicant as "a very genuine person, a polite person, honest, and a very hard worker." The witness testified that he was basing his opinion strictly on Applicant's conduct at work, insofar as he had no interaction with him off-duty. Tr. at 35-36. The witness disclosed no knowledge of Applicant's conviction or of the conduct underlying it.

without any indication that the authors were even aware that Applicant had been convicted of a crime and that he is a registered sex offender. Accordingly, we conclude that the challenged finding of no deliberate omission is not sustainable.

The general security concern raised by Guideline E is that “[c]onduct involving questionable judgment . . . can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” ISCR Case No. 12-01698 at 4 (App. Bd. Jun. 13, 2014). False statements are of special concern under this Guideline, and the Directive provides that such statements made during a clearance investigation will normally result in an adverse decision. Directive, Encl. 2, App. A ¶ 15(b). *See also* ISCR Case No. 13-00502 at 3 (App. Bd. Mar. 7, 2017). Therefore, Applicant’s omission in itself raises a concern that he may lack the requisite trustworthiness. When the omission is considered along with Applicant’s conviction and the circumstances underlying it, the evidence is sufficient to raise security concerns under Guideline E, thereby placing upon Applicant the burden of persuasion that he should receive a clearance. Moreover, given the record that was before the Judge, we conclude that the evidence, viewed as a cumulative whole, is not sufficient to meet Applicant’s burden of persuasion under the *Egan* standard.⁶ The Judge’s analysis fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, we conclude that the decision is not sustainable.

⁶We note Department Counsel’s argument that the whole-person analysis was not sufficient. We believe that a resolution of this issue is implicit in our discussion of the extent to which Applicant’s conduct raises security concerns.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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