

KEYWORD: Guideline J

DIGEST: In early 2019, Applicant had a fight with his ex-girlfriend. The argument escalated. She pushed him on the chest. At some point, he threatened to use a taser on her if she did not leave the house. While he was removing her items from a dog run in the yard, she attempted to stop him by pinning him in the dog run.

Applicant then put his hands on [the ex-girlfriend] repeatedly in an attempt to push her out of his way so that he could leave the dog run. He admitted that he pushed her on the chest, choked her, pushed her jaw back and eventually gouged her in the eye with his thumb, though he claims the last was accidental. He stated that he was afraid of [the ex-girlfriend] because of her training He also stated that he used the minimum amount of force to get her to back away. Favorable Decision Reversed.

CASE NO: 20-00331.a1

DATE: 08/02/2021

DATE: August 2, 2021

_____)	
In Re:)	
)	
-----)	ISCR Case No. 20-00331
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B Norman, Esq., Chief Department Counsel
Andrew Henderson, Department Counsel

FOR APPLICANT

Sean M. Bigley, Esq.
Jeffery D. Billett, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 24, 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 February 9, 2021, the Government amended the SOR by rewriting the sole Guideline J allegation. On May 5, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross 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 issue on appeal: whether the Judge erred in his analysis of the evidence. Applicant submitted a cross appeal contending the Judge erred in making certain findings of fact. Applicant and Department Counsel submitted a reply briefs in response to the others appeal. For the reasons stated below, we reverse.

The Judge’s Findings of Fact

Applicant, who is in his 50s, works for a defense contractor and is seeking to retain his security clearance. He has a bachelor’s degree and is divorced. As amended, the SOR allegation asserts that, in 2019, Applicant was arrested for domestic violence charges against his then-girlfriend, and he pled guilty to possession of an illegal assault weapon for which he was placed on probation for five years, fined, and barred from possessing any firearms for five years.

As of early 2019, Applicant had been dating his ex-girlfriend for about two years, and she had been living at his house for several months. She held a county law enforcement position. During an evening in which both had been drinking, they had an argument about whether she would reimburse him for several thousand dollars he lent her for veterinary care of her deceased dog. The argument escalated. She pushed him on the chest. At some point, he threatened to use a taser on her if she did not leave the house. While he was removing her items from a dog run in the yard, she attempted to stop him by pinning him in the dog run.

Applicant then put his hands on [the ex-girlfriend] repeatedly in an attempt to push her out of his way so that he could leave the dog run. He admitted that he pushed her on the chest, choked her, pushed her jaw back and eventually gouged her in the eye with his thumb, though he claims the last was accidental. He stated that he was

afraid of [the ex-girlfriend] because of her training He also stated that he used the minimum amount of force to get her to back away. [Decision at 3.]

Applicant thereafter went into the house, while his ex-girlfriend remained outside. Both called the sheriff's department. "Allegedly [the ex-girlfriend] told the deputies that Applicant said he would use one of his firearms to kill her and any responding officers." *Id.* Applicant denied making the threat. Nine deputies, plus a police dog, responded. Applicant stayed in the house for over a half-hour before responding to the deputies requests to come out. Applicant claims he used that time in an attempt to find a lawyer to assist him.

Applicant was taken into custody and initially charged with various domestic violence offenses. The district attorney's office decided not to prosecute those charges due to the lack of physical evidence supporting the ex-girlfriend's story. Applicant Counsel argued the ex-girlfriend had falsely concocted similar domestic violence case against a former boyfriend, which led to her being placed on a list of law enforcement personnel whose credibility has been officially questioned. As part of his plea agreement to the assault weapons charge (discussed below), Applicant was ordered to stay away from the ex-girlfriend for five years.

While Applicant was in custody following his arrest, sheriff's deputies executed a search warrant for weapons and other evidence in his house. When they arrived, Applicant's sister and one of his friends were removing weapons for storage in his mother's house. The deputies took the weapons and determine several were illegal under state law. Under state law, statutorily designed "assault weapons" were required to be removed from the state, disassembled, registered online with the state, or modified to no longer constitute assault weapons. Applicant stated that he attempted to register them but was unsuccessful before the deadline, which appears to have been a common problem that owners experienced. He purchased the kit to modify them so that he did not need to register them but "simply forgot" to take that action because he "got caught up in other activities of life." Decision at 5. In early 2019, Applicant pled guilty to one count of unlawful possession of an assault weapon and was sentenced as reflected in the SOR allegation.

Applicant's current girlfriend testified the incident in question is completely out his character. He also submitted letters of recommendation from coworkers and friends describing him as friendly, helpful, and hardworking. None of them had ever seen him act in the way he did on the night in question.

The Judge's Analysis

"Applicant admitted that the argument [with the ex-girlfriend] turned physical on both their parts, though he denied being the aggressor." *Id.* at 8. Her conduct in falsifying information of a prior domestic violence incident compromises her credibility. "Applicant's conduct on the night in question is an aberration in his normal conduct. The testimony of his current girlfriend, who admitted that she had been in an abusive marriage before dating Applicant, is particularly important in showing the singularity of the incident." *Id.*

Applicant was obviously negligent in not modifying the weapons after he was unable to access the state website. Although still on probation, “Applicant has an outstanding and unblemished personal and professional record, as shown by the testimony of his witness and the voluminous documentary evidence in the record.” *Id.* “Applicant has mitigated the concerns regarding his isolated and out-of-character domestic violence incident in 2019, and his failure to modify several firearms in accordance with state law at the same time.” *Id.* at 9.

Discussion

Background

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 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 being considered for national security eligibility will 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* ISCR Case No. 17-03229 at 4 (App. Bd. Jun. 7, 2019).

In the appeal brief, Department Counsel argue that the Judge erred in his analysis of the evidence. They contend the Judge failed to consider important aspects of the case and his mitigation analysis is unsupported by a reasoned reading of the record evidence as a whole. We find these arguments persuasive.

The SOR allegation

“Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness.” Directive, Encl. 2, App. A ¶ 30. At the hearing, Applicant, through Counsel, admitted the amended SOR allegation. Tr. at 8-9. Having admitted the SOR allegation, the burden was on Applicant to mitigate the resulting security concerns and, as always, he had the ultimate burden of persuasion to obtain a favorable clearance decision. Directive ¶ E3.1.15. The Judge was required to consider all relevant and material information in issuing the clearance decision. Directive ¶ 6.3.

In the cross-appeal brief, Applicant contends that Judge erred in making some key findings of facts. We examine challenged findings to see if they are supported by substantial evidence, that is, “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. Applicant argues,

for example, the Judge erred in finding, “He admitted that he . . . choked [the ex-girlfriend] . . .” Cross-Appeal Brief at 2, quoting from Decision at 3 (full quote set forth above). He asserts this finding “is completely and outrageously unsupported by ANY record evidence.” *Id.* The sheriff’s report reflects that the ex-girlfriend told an investigator that Applicant grabbed her throat by one of his hands, while holding a taser in the other, and squeezed her throat causing her to be unable to breathe. SOR Response, Applicant’s Exhibit (AE) A at 26.¹ During his interview, Applicant was asked, “Did you put your hands around her neck? [Applicant] responded, ‘.. uh .. equally she did it to me ..’ I [the deputy] asked [Applicant] who put hands on the neck first? [Applicant] responded, ‘.. I’m gonna say .. she uhhmm .. I’m trying to remember a sequence of events .. because I know this is going to be held against me.’” *Id.* at 25. While Applicant is technically correct the evidence does not support that he “admitted . . . he choked her[,]” he admitted to putting his hand or hands on her neck. None of his challenges in the cross appeal establish harmful error, *i.e.*, one that, had it not occurred, the case might have been decided differently. *See, e.g.*, ISCR Case No. 14-05005 at 8 (App. Bd. Sep. 15, 2017).

A review of the record reveals that the Judge did not address important aspects of the case in his analysis of the evidence. These includes:

a. 911 Call. The sheriff’s report states that, at about 10:00 p.m., Applicant “called the sheriff’s department and stated he and [the ex-girlfiend] were in a verbal argument and he has no weapons in the residence” but confirmed he had a taser in his pocket. AE A at 22. Applicant testified that he never said there were no weapons in the house. Tr. at 66-68.

b. Circumstances of the Arrest. While on the 911 call, Applicant learned the sheriff’s department was already responding to his residence because the ex-girlfriend had called. He terminated the call and attempted to call an attorney. *Id.* at 68. On direct examination, he testified his attempts to contact an attorney were unsuccessful and the implication in the sheriff’s report that he refused to come out of his house is untrue. *Id.* at 42-43. On cross-examination, he was asked, “But when you were actually asked to leave [the house], you did as directed. Is that correct?” He responded, “Yes immediately.” *Id.* at 70. The sheriff’s report contradicts that testimony.² It reflects:

At about 2220 hours, I [the deputy] contacted [Applicant] via his cellphone. After several attempts with [Applicant] not answering his cellphone, he eventually answered the phone calls. The first time I spoke to [Applicant] he told me he was not comfortable to exiting the house without speaking to legal counsel. I thoroughly explained to [Applicant] the process and necessity for him to exit the home and speak to me in person. [Applicant] refused to exit his home and insisted to (sic) he needed

¹ Subsequent citations to AE A are to this exhibit rather than to the exhibit similarly designated offered at the hearing.

² In the decision, the Judge noted Applicant presented evidence establishing the primary responding deputy had been the subject of discipline for lying on the job in an unrelated matter. Applicant argued that the ex-girlfriend and the deputy had conspired to “frame” him. Decision at 4. The Judge concluded, however, there was no evidence of such a conspiracy.

to ask legal counsel. I provided him the opportunity and told him I would call him back.

* * *

I called [Applicant] a second time, he told me again in a long telephone conversation that he did not feel comfortable exiting the home without speaking to legal counsel. I explained to [Applicant] the reason for his safety and deputies safety to exit the house with nothing in his hands. [Applicant] refused and told me he was going to try again to contact his attorney. [Applicant] was concerned that due to his position the outcome of the incident would be difficult.

At about 2246 hours, I contacted [Applicant] a third time to have him exit the residence. There was a total of about 46 minutes before [Applicant] to (sic) exited the house. A total of nine deputies and a sergeant were at the scene during this event. [Applicant's] actions caused a lack of services to the community of [location] as deputies were tied up on this event. Deputies from [another] station were requested to assist with other priority calls for service during this time.

At about 2250 hours, [Applicant] exited the home.

* * *

[Applicant] appeared intoxicated and was slurring his speech [AE A at 23-24.]

c. Reporting Arrest to Employer. At the beginning of the hearing, Applicant testified that he promptly reported his arrest to his employer. Tr. at 17. Later in the proceeding, Department Counsel cross-examined Applicant regarding a Joint Personnel Adjudication System (JPAS) document. This document reflects that, when Applicant did not show up for work or call-in the day following his arrest, a manager requested he be given a wellness check. A Human Resources representative called Applicant's house and left a message. Applicant's sister called back stating he was on a special assignment.³ After conducting a further inquiry, Applicant's management chain learned of his arrest and detention. The JPAS document reflects that Applicant did not notify the company's security office of this incident even though he holds a security clearance. Government Exhibit (GE) 4 at 1 and 2. In his testimony, Applicant claimed the JPAS document is inaccurate but also noted the first time he had an opportunity to speak to someone at the company was not until after his release from custody, which occurred on March 5th—five days after his arrest. Tr. at 62-64.

d. Attempted Removal of the Firearms. While Applicant was still in custody on March 4th, deputies executed a search warrant of his residence. When they arrived on the scene, the deputies discovered Applicant's friend and sister collecting his firearms in the house for transportation to his

³ Applicant testified that he did not talk to his sister before she called his company. Tr. at 100.

mother's house. The friend had removed Applicant's firearms from safes and placed them in boxes, cases, or protection socks. The deputies informed Applicant's friend and sister that they could not remove the firearms. This occurred about two hours before Applicant's preliminary hearing and the day before his release from custody. AE A at 42. At the hearing, Applicant testified that he contacted his friend and sister to request them to move the firearms. When asked why he did so, he first responded, "Just hearing the horror stories of this litigious state and how anti-gun this state is, I was just concerned that having them in the house would be a bad thing and until everything blows over. And I thought that was probably a good legal thing to do just to get them away." Tr. at 80. Such testimony tends to indicate that Applicant had requested removal of the weapons to conceal them from the sheriff's department. Shortly after Applicant made that quoted statement, the Judge asked him directly if the firearms were being removed because some of them were illegal. Applicant then stated he was removing them to protect them from being damaged or destroyed by the sheriff's department. *Id.* at 81. At the very least, the evidence reflects that Applicant understood the sheriff's department would be searching his house, he knew there were illegal assault weapons present in the house, and he was attempting to have his friend and sister remove the weapons before the deputies conducted the search.

The above listed circumstances raise significant questions about Applicant's judgment, reliability, trustworthiness, and credibility. The Judge failed to factor these aspects of the case into his mitigation analysis. Although the Board is required to give deference to a Judge's credibility determinations (Directive ¶ E3.1.32.1), the Judge is expected to explain why an applicant's version of the events is worth of belief when it is contradicted by other evidence. Failure to do so suggests that the Judge merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.,* ISCR Case No. 18-01926 at 4 (App. Bd. Sep. 20, 2019).

In his mitigation analysis, the Judge concluded the domestic violence incident was as "an aberration of [Applicant's] normal conduct" and highlighted the "singularity of the incident." Decision at 8. He concluded Applicant's assault weapons conviction was mitigated due to his character evidence and previous "unblemished personal and professional conduct" *Id.* Although the domestic violence incident and assault weapons conviction were separate and distinct offenses, they should not have been considered in a piecemeal manner.⁴ Instead, they should have been analyzed together for what they reveal regarding Applicant's security clearance eligibility. *See Raffone v. Adams*, 468 F. 2d 860, 866-867 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

The evidence establishes both offenses occurred recently. Neither occurred under circumstances showing they were unlikely to recur. For example, while the Judge noted Applicant's unsuccessful attempts to comply with the assault weapons law, the record reflects that Applicant had seven assault weapons that he was required to remove from the state, register online, disassemble,

⁴ The better practice would have been to allege the domestic violence and assault weapons offenses in separate SOR allegations. In this regard, it merits noting that it may be difficult to discern exactly which offense(s) a Judge has concluded an applicant committed when he or she has found against the applicant on a single SOR allegation that alleges multiple offenses.

or modify before the mid-2018 statutory deadline. AE A at 53 and Tr. at 53-54. He failed to meet that deadline and was in noncompliance with the law for approximately six or seven months before the assault weapons were seized. Tr. at 85. In short, his possession of the assault weapons was a course of unlawful conduct that spanned a number of months. His explanation for failing to comply with the statute—that he simply forgot because he got caught up in other activities—offers little to demonstrate his noncompliance of a known legal requirement was a unique event that is unlikely to recur. Moreover, he essentially testified that he was the victim of the domestic violence, and his failure to take any responsibility for that incident undercuts a conclusion of reform and rehabilitation. Overall, the Judge did not provide a meaningful analysis of important aspects of the case. Applicant’s security-significant conduct, when viewed cumulatively, has not been mitigated. We conclude that the record as a whole supports Department Counsel’s argument that the Judge appears to have substituted a favorable impression of Applicant’s demeanor for record evidence.

The State’s Assault Weapon Law

After the Judge issued his decision but before the appeal became ready for the Board’s review, a U.S. District Court declared unconstitutional sections of the state’s penal code that were the basis of Applicant’s assault weapon conviction.⁵ Applicant’s reply brief contains his Petition for a Writ of Habeas Corpus based on the district court’s decision. The petition seeks to have a state court vacate his conviction, set aside his guilty plea, and discharge him from all restraints arising from the conviction.

We are generally prohibited from considering new evidence, such as the petition, on appeal. Directive ¶ E3.1.29. However, we have considered new evidence insofar as it bears upon questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 17-01472 at 2 (App. Bd. Aug. 6, 2018). In this regard, we have also stated that we cannot simply ignore new evidence that raises questions about the fairness of DOHA proceedings. *See, e.g.*, ISCR Case No. 99-0462 at 2 (App. Bd. May 25, 2000). The petition that Applicant has presented falls into this latter category and raises mixed questions of law and fact.⁶

In the decision, the Judge noted the pending challenge to the assault weapons law and concluded that, until the law was “changed or declared unconstitutional[,]” Applicant was obligated to follow it. Decision at 5 and 8. We find no error in that conclusion. We also note that, on June 21, 2021, the U.S. Court of Appeals for the Ninth Circuit issued an order staying the district court’s judgment until resolution of another pending appeal and further order of the court.⁷

⁵ *See Miller v. Bonta*, __ F. Supp. 3d __, 2021 WL 2284132 (S.D. Cal. Jun. 4, 2021).

⁶ When an appeal issue raises a question of law, the Board’s scope of review is plenary. *See, e.g.* ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005).

⁷ <https://1.next.westlaw.com/Document/I486D2E8ACA4511EBBA4BCF1253044EF3/View/>.

In light of our resolution of the other issues in this case, we conclude that the ultimate disposition of the controverted statute is of no moment in adjudicating Applicant's security clearance. Even if the statute is determined to be unconstitutional and, furthermore, even if we were to disregard all of Applicant's conduct that was contrary to the statute, his security-significant conduct regarding his ex-girlfriend—including his other questionable conduct, discussed above, during that incident—renders the Judge's favorable decision unsustainable.

We note that Department Counsel submitted a request to file a Supplemental Brief in response to Applicant's Reply Brief. We see no need for such a supplemental filing and hereby deny that motion.

Conclusion

Given the record before us, we conclude that the Judge's favorable decision does not meaningfully address all the relevant evidence and runs contrary to the weight of the record evidence. The record as a whole does not support the Judge's favorable decision.

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