KEYWORD: Guideline E; Guideline G; Guideline J

DIGEST: Regarding the aggravated assault conviction, Applicant's Counsel argues that Applicant "was operating in self-defense, but went too far when he pushed [the victim] out of the truck and onto the side of the road[.]" She also argues that Applicant "was coerced into the shooting incident through duress/self-defense." Her arguments raising criminal defenses (such as self-defense and duress) are not persuasive. Of note, she has not challenged the Judge's finding that Applicant decided to forego pursing the self-defense claim after consulting with his attorney in the criminal proceeding. While Applicant testified that he shot the victim in self-defense, he also acknowledged that he pled guilty to the aggravated assault offense. The doctrine of collateral estoppel applies in DOHA proceedings. Under that doctrine, Applicant's Counsel is not permitted to contend that her client did not engage in the criminal acts of which he was convicted. Adverse decision affirmed.

CASENO: 18-00857.a1

DATE: 05/08/2019

DATE: May 8, 2019

In Re:	)	
----------	)	ISCR Case No. 18-00857
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Allison R. Weber, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 6, 2018, 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 August 20, 2018, Department Counsel amended the SOR by adding allegations under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). On February 8, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge made findings or reached conclusions that were not supported by record evidence; whether Applicant was denied due process; whether the Judge was biased; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is a 30 year old employee of a defense contractor. He is a high school graduate, has never been married, and has no children. The SOR alleged that Applicant was cited for criminal damage as a result of discharging a firearm into an unoccupied vehicle in the spring of 2012. This matter was resolved through a civil compromise in which Applicant paid for the damage and the criminal case was dismissed. Applicant admitted that alcohol played a role in that incident.

The SOR also alleged that Applicant was charged with attempted first degree murder and aggravated assault for shooting an associate in the face, pushing his body out of a vehicle, and fleeing the scene in August 2012. On that occasion, Applicant and the associate had been drinking alcohol at various locations. Applicant had two handguns in his vehicle. An argument ensued between Applicant and the associate. When the associate grabbed a gun, Applicant reacted by shooting him in the face. After consulting with an attorney, Applicant decided not to pursue a self-defense claim. He pled guilty to aggravated assault and was sentenced to three and a half years in prison. He served 28 months of incarceration for felony aggravated assault and was placed on probation.[1] He successfully completed his probation in 2016 and has had no further involvement with law enforcement. At the hearing, Applicant testified that he was in control of his senses when he shot the associate. He has not received alcohol treatment or counseling and continues to consume alcohol. "The last time he was intoxicated was at a friend's wedding about a year ago." Decision at 3. Witnessed testified that Applicant performs his duties in an outstanding manner.

The Judge's Analysis

[1] Since Applicant was sentenced to, and incarcerated for, more than one-year as a result of his aggravated assault conviction, he is disqualified under the Bond Amendment from being granted or renewed access to Sensitive Compartmented Information (SCI), Special Access Programs (SAP), or Restricted Data (RD). *See*, Directive, Encl. 2, App. B ¶ 2.

Both instances of Applicant's alleged criminal conduct involved the abuse of alcohol. While several years have passed since his criminal acts, it cannot reasonably be determined such conduct is unlikely to recur since he still consumes alcohol. He admitted that he drank to intoxication within the last year. His subsequent success at work does not overcome his callousness in shooting his friend in the face and leaving him for dead. Such conduct casts doubt on his reliability, trustworthiness, and judgment.

Discussion

Unsupported Findings or Conclusions

Applicant's Counsel contends that the Judge erred in concluding that Applicant "admitted that he drank to intoxication within the last year." Appeal Brief at 2, *citing* Decision at 7. We note the Judge first found that Applicant "was intoxicated at a friend's wedding about a year ago" and then concluded this event occurred "within the last year." Decision at 3 and 7. Applicant's Counsel raises two challenges regarding this related finding and conclusion. She first claims the time period referenced in the conclusion is not supported by record evidence. She correctly states that Applicant initially testified the wedding had "probably been over a year" ago and shortly thereafter also stated, "So it's been well over a year[.]" Appeal Brief at 3*, citing* Tr. at 98. While the Judge may have erred in not precisely recounting Applicant's testimony in this regard, this was a harmless error because it likely did not affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). When the wedding occurred is not noted in the record. Consequently, the exact period between the wedding and the hearing is unknown. Since Applicant used phrases such as "probably . . . over a year" and "well over a year" in describing that period, we do not view the Judge's challenged finding or conclusion as a significant deviation from the record evidence.

Applicant's Counsel also challenges the Judge's finding and conclusion that Applicant was intoxicated during that wedding. In doing so, she makes arguments about what constitutes intoxication. However, in testifying about the wedding, Applicant stated, "And over about a five-hour period, I'd say we had about five drinks." Tr. At 100. He further stated, "But I was still coherent enough to walk back to the hotel, go in my room. And I don't know. I guess I didn't think it was an excessive drunk kind of not in control scenario." *Id*. at 100-101. From our review of the record, the Judge's finding and conclusion that Applicant was intoxicated on that occasion was based upon substantial evidence or constituted a reasonable inference that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

In claiming the Government did not prove the SOR allegation involving the criminal damage citation, Applicant's Counsel indicated "the standard for proving an allegation is the preponderance of the evidence[.]" Appeal Brief at 8 and 9. This is incorrect. All that is required in a security clearance proceeding is proof based on substantial evidence, *i.e.*, "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. The substantial evidence standard is less than

a preponderance of the evidence. *See, e.g.*, ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999).[2] We find no reason to disturb the Judge's adverse findings regarding the criminal damage allegation.

Due Process Issue

Applicant's Counsel contends that the Judge violated Applicant's due process rights by creating an arbitrary standard for mitigation that contradicts existing guidelines.[3] She argues that the Judge "cited [Applicant's] lack of abstinence as a significant concern precluding a favorable result" and applied an "abstinence only" requirement when Applicant was never given such a treatment recommendation. Appeal Brief at 3-4. She further asserts that her client was not provided advance notice that such a standard would be applied in the proceeding.[4] *Id.* We do not find these arguments persuasive. First, the Judge's decision correctly quotes applicable disqualifying and mitigating conditions from each of the three alleged guidelines.[5] Second, in referencing Applicant's continued use of alcohol, including to the point of intoxication, the Judge was not applying a new adjudicative condition but merely making findings and drawing conclusions based upon Applicant's testimony. Third, the weight given to Applicant's continued use of alcohol, including to the point of intoxication, was a matter within the Judge's special province. *See*, *Inwood Laboratories, Inc. v. Ives Laboratories Inc.*, 456 U.S. 844, 856 (1982)("Determining the weight and credibility of the evidence is the special province of the trier of fact."). Fourth, the application of the Adjudicative Guidelines for or against a security clearance is not reducible to a simple formula. In analyzing a case, the Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. *See, e.g.*, ISCR Case No. 17-00569 at 4 (App. Bd. Sep. 18, 2018). Applicant's Counsel has failed to establish that her client was denied his procedural due process rights provided in the Directive by the Judge's analysis of his lack of abstinence.

Bias Issue

In her appeal brief, Applicant's Counsel contends the Judge was biased. She argues that bias was demonstrated through the Judge's statements in the decision (Appeal Brief at 14), in his "many errors[,]" and in his "too few references to the mitigating facts provided." Appeal Brief at 17. As

[2] We note that Applicant's Counsel cited the correct standard on Page 1 of her brief.

[3] In this regard, we note the Adjudicative Guidelines are illustrative, rather than exhaustive or exclusive, lists of conduct and circumstances. *See, e.g.*, ISCR Case No. 12-01698 at 4 (App. Bd. Jun. 13, 2014). Use of the terms "could . . . include" in the introductory phrase for each set of disqualifying and mitigating conditions highlights that they are non-exclusive lists.

[4] DOHA is not required to provide applicants with notice of the specific provisions in the Adjudicative Guidelines that they might be entitled to invoke in extenuation or mitigation. The concept of due process does not obligate DoD to provide an applicant with a road map on how he or she can develop or present evidence that might extenuate or mitigate conduct or circumstances that raise security concerns. *See, e.g.*, ISCR Case No. 03-06174 at 7-8 (App. Bd. Feb. 28, 2005).

[5] A Judge is not required to discuss all of the analytical factors set forth in the Directive. *See, e.g.*, ISCR Case No. 17-02236 at 2 (App. Bd. Jul. 2, 2018).

we have stated previously, there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 17-02391 at 2-4 (App. Bd. Aug. 7, 2018). Of note, Applicant's Counsel did not raise the issue of bias during the hearing. Moreover, the Judge made various rulings in favor of Applicant during the hearing. *See, e.g*, Tr. at 82, 86-87, 91, and 92. The issues raised by Applicant's Counsel on appeal do not rise to the level that might lead a reasonable person to question the Judge's impartiality. While Applicant is no doubt dissatisfied with the Judge's decision, an adverse adjudication, in and of itself, is not enough to rebut the presumption that the Judge was impartial. *See, e.g*., ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017), *citing Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010)("Adverse rulings alone do not demonstrate judicial bias.").

Other Appeal Issues

Applicant's Counsel contends that the Judge did not consider evidence presented to mitigate and extenuate Applicant's alleged conduct. In making this argument, she points to evidence or facts regarding the alleged criminal conduct that the Judge did not discuss. She has not, however, rebutted the presumption that the Judge considered all the evidence in the case. It is well-established that a Judge is not required to discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 08-01616 at 2 (App. Bd. Jul. 7, 2009).

Regarding the aggravated assault conviction, Applicant's Counsel argues that Applicant "was operating in self-defense, but went too far when he pushed [the victim] out of the truck and onto the side of the road[.]" Appeal Brief at 5. She also argues that Applicant "was coerced into the shooting incident through duress/self-defense." Appeal Brief at 7. Her arguments raising criminal defenses (such as self-defense and duress) are not persuasive. Of note, she has not challenged the Judge's finding that Applicant decided to forego pursing the self-defense claim after consulting with his attorney in the criminal proceeding. While Applicant testified that he shot the victim in self-defense,[6] he also acknowledged that he pled guilty to the aggravated assault offense.[7] Tr. at 62 and

[6] An Administrative Judge is not required to accept an applicant's testimony merely because it is unrebutted. Indeed, it would be arbitrary and capricious for a Judge to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other record evidence. *See*, *e.g.*, ISCR Case No. 05-03554 at 5 (App. Bd. Aug. 23, 2007). In this case, Applicant testified:

> So the shooting itself was not what the issue was. Where I made a mistake and I didn't do the right thing was I left [victim]. I pushed [him] out of the seat of my truck in fear. I can't say that I know what I was thinking, but I was scared. And I drove away. And for that, and as far as I understand, is the charge that the grand jury added for me leaving him was aggravated assault, serious physical injury, was something that was wholly my fault. [Tr. at 65-66].

Later, he testified that he believed the victim was dead when he pushed him out of the vehicle. Tr. at 84. It is not clear how an individual could commit an aggravated assault on a person who the individual believed was dead.

[7] Government Exhibit (GE) 2 reflects that Applicant was found guilty of the felony charge of Aggravated Assault - Serious Physical Injury. A police report, GE 4, reflects that the victim was shot in his left eye and the bullet lodged in the back of his head. It also indicated that the police took photographs of the victim's face, hands, knees, pelvic area, right hip area, and right arm but did not describe the severity of the non-bullet wound injuries.

65-66. The doctrine of collateral estoppel applies in DOHA proceedings.[8] Under that doctrine, Applicant's Counsel is not permitted to contend that her client did not engage in the criminal acts of which he was convicted. *See, e.g.*, ISCR Case No. 11-06937 at 3 (App. Bd. Jan. 10, 2013). Applicant's Counsel has not established that the Judge erred by either finding that Applicant was convicted of aggravated assault or by considering all of the facts and circumstances surrounding that crime.

As a related matter, Applicant's Counsel contends that the Judge exceeded his authority by not allowing Applicant to describe events surrounding the shooting. This issue arose during the redirect examination of Applicant. While Applicant was testifying about the victim yelling at him while the victim had a gun, Department Counsel objected, stating " We're getting into the details of the case." The Judge responded by saying, "Yes, I think I've heard enough about the gun incident. Let's move on."[9] Tr. at 93. Applicant's Counsel then continued to ask Applicant questions about making amends with the victim. She continued questioning Applicant without any further objections or interruptions until she had no further questions. Tr. at 101. Although Applicant had the right to offer evidence in extenuation or mitigation of his felony criminal conviction,[10] he was not at liberty to seek to relitigate the issue of his guilt of the crime for which he was convicted. *See, e.g.,* ISCR Case No. 94-1213, *supra*, at 4. In this case, Applicant explained in detail his self-defense theory in his SOR response, during his personal subject interview (GE 5), and during his direct examination at the hearing. Applicant's Counsel has not made a proffer of what testimony Applicant would have provided that was not already in evidence had he been allowed to continue testifying about the shooting incident on redirect examination. From our review of the record, the Judge did not commit harmful error in telling Applicant's Counsel to "move on" at that point in the proceeding. The Judge apparently made this ruling in the interests of judicial economy to exclude cumulative evidence from the record.[11] *See, e.g.*, ISCR Case No. 14-02207 at 3 (App. Bd. May 27, 2015).

The balance of Applicant's brief amount to a challenge to the way in which the Judge weighed the evidence. However, a disagreement with the Judge's weighing of the evidence is not sufficient to establish error. *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

Conclusion

[8] There are exceptions to the doctrine of collateral estoppel. *See, e.g.*, ISCR Case No. 94-1213 at 3-4 (App. Bd. Jun. 7, 1996). None of the exceptions apply in this case. For a greater exposition of the role of collateral estoppel in DOHA proceedings, *see* ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006).

[9] The Judge also advised Department Counsel to "Let's move on." during her cross-examination of Applicant. Tr. at 82.

[10] Even though the doctrine of collateral estoppel may apply to a criminal conviction, an applicant must be given the opportunity to explain the conduct in question, present it in a meaningful context, and ultimately to mitigate it, if that is what the facts support. *See, e.g.*, ISCR Case No. 11-00180 at 7 (App. Bd. Jun. 19, 2012).

[11] Directive ¶ E3.1.10 provides that the "Administrative Judge may rule on questions of procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner." Within the parameters set forth in the Directive, the Judge has leeway on how he or she conducts a hearing.

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

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