KEYWORD: Guideline B; Guideline C; Guideline F; Guideline E

DIGEST: Applicant asserts that the Judge "referenced a 'promise' made by [Applicant] that domestic disturbance situations would not occur in the future. [Applicant] never made a 'promise' that further domestic disturbances would not occur in the future." Applicant called the Judge's conclusion absurd and unrealistic. In the findings of fact, the Judge correctly quoted a pertinent comment in Applicant's SOR Response, i.e., that he and his wife had come out of counseling stronger and closer than ever, and he "can say with the utmost confidence that the behaviors of the past will not recur." From our review of the record, we find no reason to conclude that the Judge's characterization of this comment as a "promise" was either an unreasonable interpretation of the evidence or, more to the point, was a conclusion that was arbitrary, capricious, or contrary to law. Adverse decision is affirmed.

CASE NO: 19-00392.a1

DATE: 03/30/2020

DATE: March 30, 2020

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Winifred R. Eilert, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 10, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline C (Foreign Preference), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 17, 2019, Department Counsel amended the SOR by adding a Guideline E allegation. On January 22, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 was biased against him and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines B, C, and F have not been raised as issues on appeal and are not discussed below. Consistent with the following, we affirm.

The Judge's Pertinent Findings of Fact

Applicant is 45 years old. He served in the U.S. military and received an honorable discharge. He worked as a Federal employee from 2007 to 2017. He later worked for a DoD contractor until he recently became unemployed. He has earned a dual master's degree in two related fields and is working towards a Ph.D. He and his wife each have a child from other relationships.

In 2004, Applicant's wife obtained a domestic violence restraining order against him. He was not convicted of any offense as a result of an altercation with her. At the hearing, he was unable or unwilling to recall the details of this altercation.

In 2007, Applicant's wife was serving in the U.S. military overseas. At that time, he and she had a physical altercation while they were living in Government housing. When questioned by investigators, he stated that his wife tried to push him out of bed with her legs while she was making belittling statements. In trying to stop her from engaging in that conduct, he got on top of her while she was lying face down and grabbed her by the face and head. She was struggling the whole time. He stated that he did not turn or twist her head. He thought that marks on her face documented in photographs were the result of him grabbing her. Knowing that she was going to call security, he unplugged the phone. The investigative report noted that they both sustained bruises during this incident. The military commander ordered him to move out of base housing until further notice. Applicant told investigators that he and his wife had two prior incidents involving the police: a pushing incident in 2004 and a verbal argument in 2006. Applicant was not convicted of any offense as a result of this incident but received marital counseling. At the hearing, he was unable or unwilling to recall details of this altercation.

In responding to the SOR in July 2019, Applicant stated, "[a]fter going to counseling and working together as a team, my wife and I came out strong and closer than ever before. We have

found healthy ways to handle conflict, so I can say with utmost confidence that the behaviors from the past will not recur." Decision at 5, quoting from SOR Response at 6. In August 2019, Applicant was arrested for an altercation with his wife and charged with assault and battery. On that occasion, he became upset with his wife because he believed she was having an extramarital affair. After arguing for several hours, they engaged in mutual shoving. She tried to burn photos of his deceased father. He told a magistrate that "he pushed her by the stove, and also that he may have pulled her hair." Decision at 6, quoting from Government Exhibit 5 at 4. The paperwork concerning the disposition of the charge is not in the record, and Applicant did not understand whether the proceeding included in a guilty plea. He was placed on probation until October 2020 and paid $450 to enable him to begin an 18-week, court-ordered domestic violence course. He may be able to have the charge dismissed.

In 2019, Applicant received an excellent annual performance review. A number of his co-workers and friends indicate that he is trustworthy and diligent. He has contributed significantly to the company's mission accomplishment.

The Judge's Pertinent Analysis

Applicant has engaged in a pattern of domestic altercations that demonstrate questionable judgment, unreliability, untrustworthiness, and unwillingness to comply with rules. None of the Guideline E mitigating conditions fully apply. His most recent domestic altercation occurred after he responded to the SOR by stating future incidents of that nature would not recur. He is on probation and has not completed the rehabilitation process. The personal conduct security concerns are not mitigated.

Discussion

Applicant argues that the Judge's finding that he was unable or unwilling to recall the details of the 2004 and 2007 altercations was "unrealistic, and the implication that [Applicant] was not being cooperative and forthcoming is inflammatory and shows bias against [him]." Appeal Brief at 11. Bias is not demonstrated merely because the Judge makes an adverse ruling, finding, or credibility determination. *See, e.g.*, ISCR Case No. 17-00661 at 5-6 (App. Bd. Sep. 7, 2018). There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *Id* . at 3. In this case, Applicant's arguments fail to establish the Judge was biased against him.

Applicant asserts that the Judge "referenced a 'promise' made by [Applicant] in July 2019, that domestic disturbance situations would not occur in the future. [Applicant] never made a 'promise' that further domestic disturbances would not occur in the future." Appeal Brief at 11. Applicant called the Judge's conclusion absurd and unrealistic. In the findings of fact, the Judge correctly quoted a pertinent comment in Applicant's SOR Response, *i.e.*, that he and his wife had come out of counseling stronger and closer than ever, and he "can say with the utmost confidence that the behaviors of the past will not recur." From our review of the record, we find no reason to conclude that the Judge's characterization of this comment as a "promise" was either an

unreasonable interpretation of the evidence or, more to the point, was a conclusion that was arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

Applicant further contends the Judge did not consider all of the evidence, mis-weighed the evidence, and did not properly apply the mitigating conditions and whole-person concept. In his arguments, he highlights, for example, that two of the three domestic alternations occurred more than ten years ago, that neither of those two incidents resulted in him being charged or convicted of any offense, that his wife instigated the altercations in 2007 and 2019, that he has participated in counseling and rehabilitation, and that he is complying with the existing court-ordered requirements. The Judge, however, addressed most of those matters in his decision. Applicant's arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02488 at 3-4 (App. Bd. Aug. 30, 2018). Additionally, the Judge complied with the requirements of the Directive in his whole-person analysis by considering the totality of the evidence in reaching his decision.

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