



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: July 6, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 20-03142
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 15, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline H (Drug Involvement and Substance Misuse) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 11, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Gregg A. Cervi denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant used marijuana from about 1993 to about 2019 and used cocaine from about 2008 to about 2019. Under Guideline G, the SOR alleged two DUI arrests, the first in 2004 and the second in 2017. Under Guideline J, the SOR cross-alleged the Guideline G and H allegations and separately alleged an arrest for trespassing in 2015 and a domestic battery in 2016. At hearing, the SOR was amended to cross-allege most of these

allegations under Guideline E and to modify the allegation of domestic battery. The Judge found adversely to Applicant on all allegations.

Judge's Findings of Fact

Applicant is in his mid-forties and currently employed as a laborer. He has previously worked as a security officer and in executive protection (bodyguard) positions for various companies. As an independent contractor, Applicant continues to work as a bodyguard. Divorced from his first wife, he remarried in February 2022.

Applicant admitted to using marijuana regularly from 1993 to 2019. He purchased it approximately twice per month from 1998 to 2016 and approximately once per month from 2016 to 2019. In response to Government interrogatories of January 2021, Applicant adopted the summary of his personal subject interview (PSI) that was conducted in December 2019 and declared its accuracy. In that interview by a Government investigator, applicant denied purchasing marijuana.

Applicant testified that he used cocaine about once every six months from 2008 to 2019, but also testified that he only used cocaine three to four times. In his PSI, he stated that he used cocaine with his ex-wife weekly to quarterly while at nightclubs. During this period of illegal drug use, Applicant worked in security and bodyguard positions, purchased firearms, and held a concealed firearm permit. Applicant testified that he stopped using marijuana and cocaine in January 2019, in part as a new year's resolution. Applicant has submitted a notice of intent to abstain from all drug involvement.

In 2004, Applicant was arrested for DUI, convicted, and placed on probation. In 2017, he was again arrested for DUI and having an open container of alcohol after he drove into a tree. He refused a breathalyzer test and ultimately was found guilty of having an open container of alcohol.

In 2015, Applicant was charged with trespassing. He testified that he was at a casino, had a disagreement with a card dealer and management, and refused to leave when directed to do so. During his PSI, Applicant stated that he was drinking while playing, without incident, and that he was unfairly asked to leave.

In 2016, his then-wife reported Applicant to the police, accusing him of assaulting her on two occasions while they were visiting family out of state. Additionally, she described an incident in which he assaulted her, then drew his firearm, pointed it at himself, and threatened to kill himself. Applicant admitted that he was drinking on that evening and confirmed the firearm incident, but denied assaulting her on that occasion or any other.

Applicant's supervisor testified on his behalf, as did a relative of his wife who serves in the military. Neither was aware of the SOR allegations. Applicant also submitted character letters

that attest to his work ethic, positive attitude, and reliability. Neither letter mentioned specific SOR allegations.

Judge's Analysis

Applicant has a long history of illegal drug use. Despite his statement of intent to refrain from further drug use, he has not shown sufficient evidence of disassociation, a changed environment, or action to overcome his drug use history. He continues to work bodyguard contracts, which appear to be the environment in which he used drugs before. None of his witnesses were able to discuss his past drug use or any changes he may have made to his lifestyle.

Applicant's drug use while working in security positions and carrying a firearm is cause for concern. Additionally, Applicant falsely denied purchasing marijuana in his background interview. "While not alleged in the SOR, this conduct may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstances, or as part of a whole person analysis." Decision at 8.

Applicant has two alcohol related driving incidents. His involvement in an argument with his former spouse after drinking, drawing a firearm and threatening to kill himself, a trespassing arrest after drinking, and his alleged spousal abuse are not alleged in the SOR under this guideline. However, this conduct may be considered to decide whether a particular adjudicative guideline is applicable, to evaluate evidence of extenuation, mitigation, or changed circumstance, or as part of a whole-person analysis. "I have considered Applicant's conduct where alcohol was involved to any degree for these limited purposes." Decision at 9. Based on his alcohol-related driving offenses and the other incidents where alcohol was involved, significant doubts remain about his judgment.

I found his testimony to be at times elusive, evasive, and unconvincing, especially when it involved allegations of spousal abuse, and the degree to which drug involvement and alcohol contributed to noted incidents.

Based on the totality of the SOR allegations, inconsistent testimony, and recurring inappropriate or illegal conduct, Applicant's judgment continues to be questionable. . . . The allegations are not minor, nor did they occur in unique circumstances where they are not likely to recur. He has not accepted full responsibility for his conduct, and appears to downplay the gravity of his conduct or the extent of his involvement. . . . I continue to question his past judgment and I am not convinced it is appropriate at this time to mitigate his history of poor decision making and misconduct. [Decision at 12-13.]

Discussion

On appeal, Applicant asserts that the Judge improperly relied upon “things that are not alleged or specified in the SOR” Appeal Brief at 1. Although Applicant does not cite to any specific matters, the Judge explicitly stated that he was considering certain matters for a limited purpose: Applicant’s false statement to the government investigator regarding purchasing marijuana; Applicant’s adoption of the PSI as accurate; and the fact that certain events alleged under Guideline J were also alcohol-related. A Judge is precluded from raising security concerns outside the scope of the SOR without amending the SOR and giving the parties a reasonable time in which to prepare to address the amendment. However, it is well established that a Judge may consider unfavorable non-alleged matters for those limited purposes to which the Judge cites in his decision. *See, e.g.*, ISCR Case No. 15-07369 at 3-4 (App. Bd. Aug. 16, 2017). Our review of the decision reveals that the Judge only considered the non-alleged issues for authorized purposes. We find no basis for concluding that the Judge considered matters not alleged in the SOR in an inappropriate manner.

Applicant alleges that the Judge misconstrued his testimony or took evidence out of context to “paint a more negative picture of events.” Appeal Brief at 3. For example, Applicant points out the Judge failed to note that his comment in the PSI about use of cocaine weekly or quarterly with his former spouse was qualified by the word “sporadically.” *Id.* at 1, citing Government Exhibit 2 (PSI at 4). None of his arguments, however, establish that the Judge committed any harmful error. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020), noting an error is harmless if it did not likely affect the outcome of the case. To the extent that Applicant is alleging bias, we are not persuaded. Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 16-03451 at 3 (App. Bd. Dec. 26, 2017). 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.* The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). We have examined the entire record and decision. We find nothing therein to suggest that the Judge lacked impartiality or that he entered the hearing with an inflexible predisposition against Applicant. The findings of fact are grounded in evidence of record. The transcript does not support any claim of bias. Applicant has directed our attention to nothing that would likely persuade a reasonable person that the Judge was lacking in the requisite impartiality.

Finally, Applicant contends that the Judge gave insufficient weight to the mitigating evidence. None of Applicant’s arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has failed to establish the Judge committed any harmful errors. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board