



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
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Date: October 12, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 20-01699
)	
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 July 15, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 2, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline J, the SOR alleged that: ¶ 1.a.: in April 2014, Applicant was arrested and charged with Kidnapping, Carrying or Use of Firearm in Commission of Felony, and Abuse of Family/Household Members; that he was found guilty of Unlawful Imprisonment-Second Degree and Abuse of Family/Household Member; and that the conviction was overturned due to prosecutorial misconduct during closing arguments; ¶ 1.b.: in August 2014, Applicant was arrested and charged with violating a temporary restraining order; ¶ 1.c.: in March 2015, Applicant was arrested and charged with Abuse of Family/Household Members; ¶ 1.d.: in April 2015, Applicant

was arrested and charged with Abuse of Family/Household Members and Interference of Reporting Emergency; and ¶ 1.e.: in November 2015, Applicant was discharged from the military under other than honorable conditions due to commission of a serious offense. Under Guideline E, ¶ 2.a., the above incidents were cross-alleged. Additionally, the SOR alleged that: ¶ 2.b.: in October 2015, Applicant received nonjudicial punishment for violating his command's no-contact order; and ¶ 2.c.: in about 2014, Applicant emailed nude pictures of a female to other people without her permission. The Judge found favorably for Applicant on one of the Guideline J allegations, ¶ 1.b., and on two of the Guideline E allegations, ¶¶ 2.b. and 2.c. He found adversely to Applicant on four remaining Guideline J allegations and the Guideline E allegation that cross-alleged them.

On appeal, Applicant challenges the Judge's determination that he committed any of the offenses for which he was arrested. Consistent with the following, we affirm.

The Judge's Findings of Fact: The Judge's findings of fact are summarized below, in pertinent part.

Applicant is 40 years old. Divorced in 2012, he married his current wife in 2019. Applicant served on active duty from 2000 until he was discharged in 2016 for misconduct due to commission of a serious offense. That discharge, as well as the other allegations in the SOR, arose "from a tumultuous relationship with an ex-girlfriend (Ms. X)." Decision at 2.

In April 2014, Applicant and Ms. X lived together in an apartment, and Ms. X's sister was staying with the couple. That month, Ms. X called the police to report that Applicant had just assaulted her, to include pushing her down, dragging her by her legs, throwing items at her, and pointing a handgun at her head. In the sister's statement to police, she corroborated some of the details Ms. X provided and generally corroborated that Ms. X was frightened as they fled the apartment and told her that Applicant had held a weapon to her head. The sister had seen the handgun in the apartment that morning, but she was outside the apartment when the weapon incident allegedly occurred. Ms. X and her sister went to a friend's house, where Ms. X shared some of the details about the morning's altercation with the friend. Both the sister and friend made statements to the police.

Police searched the apartment and found an unregistered semi-automatic pistol in the nightstand drawer, as well as a magazine with nine rounds of ammunition. The police took pictures of what they described as bruises or abrasions on Ms. X's right calf and knee. Applicant was arrested and charged with kidnapping, carrying/use of a firearm in commission of a felony, and abuse of family/household members. He was also issued a restraining order prohibiting him from contacting Ms. X.

In early March 2015, Ms. X was at the prosecutor's office, preparing for the trial on the earlier charges, when a member of the prosecution team noticed bruising on her arms and legs. Upon questioning by police, Ms. X related that she was in a relationship with Applicant, that she was at Applicant's apartment the prior day, that an argument turned physical, and that Applicant pushed her and punched her in the thigh. The police officer reported bruises on Ms. X's arms and legs. Applicant was charged with abuse of a family/household member.

In March 2015, Applicant pled not guilty to the April 2014 charges. Ms. X's testimony was similar in some regards to her statement to the police but altered in some specifics in a manner arguably favorable to Applicant. She testified that she and Applicant had been in contact on multiple occasions in an attempt to work things out in their relationship and that they talked about her upcoming testimony, but she could not remember the specifics. She testified that they were no longer in a relationship but that she still loved him and wanted what was best for him. Her sister's testimony was largely consistent with her statements to the police, although she too testified in a manner somewhat more favorable to Applicant.

In March 2015, Applicant was convicted of the lesser offense of unlawful imprisonment-second degree and abuse of family/household member and found not guilty of the firearm offense. Sentencing was set for May 2015.

In April 2015, Ms. X called the police from a location near Applicant's apartment. She told the police that Applicant was her boyfriend, that they had lived together for the past five months, that he pushed her, threw her phone in the toilet, and punched her in the face. The police took photos of her injuries, which included abrasions on her face and a severely swollen eye. Applicant was arrested for abusing a family member, criminal property damage, and interference with reporting of an emergency.

In May 2015, Applicant was sentenced for the April 2014 charges. His sentence included probation for two years, with imprisonment for seven days. In September 2015, Applicant was found not guilty of the April 2015 charges. In October 2015, the March 2015 charges were dismissed.

In May 2018, the convictions for the April 2014 incident were overturned on appeal based on improper closing argument by the prosecutor, in which he suggested that Applicant's attorney attempted to induce Ms. X to give false testimony. The April 2014 charges were eventually dismissed without re-trial.

In March 2015, Applicant was issued a military protective order (MPO) by his commander to not initiate any contact with Ms. X and to not come within 500 feet of her. In October 2015, he received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice for violating the order on multiple occasions from March to April 2015 by coming within 500 feet of Ms. X and by contacting her. Applicant stated that he accepted the nonjudicial punishment and an other than honorable discharge to avoid court-martial.

Applicant denied that he ever assaulted Ms. X. He stated that their relationship was already over in April 2014, that she attacked him, and that he only grabbed her arms to protect himself. He admitted that he had an unregistered firearm but denied that he picked it up that day. He denied any further romantic involvement with Ms. X after the April 2014 incidents. He testified that Ms. X essentially stalked him over the next year. He submitted a muster report showing he was on duty on the day in March 2015 on which she alleged that he assaulted her.

Regarding the April 2015 allegation, Applicant asserted that Ms. X came to the apartment to retrieve personal items, somehow forced her way in, and attacked him. He testified that he showed the police everything but that they would not take a report from him. The police report indicates that Applicant was advised of his right to remain silent and elected to exercise it. “I did not find his testimony credible.” Decision at 5.

Except for the incidents involving Ms. X, Applicant had an excellent military career. Several military members believe that he was set up by Ms. X and treated unfairly by the command. In Security Access Eligibility Reports submitted by his command following the April 2014 and April 2015 incidents, the command reported favorably on his character, stability, and performance.

The Judge’s Analysis: The Judge’s analysis is quoted below in pertinent part:

Applicant denied that he ever assaulted Ms. X. In some instances, two or more witnesses can provide completely opposite descriptions of the same event, but none of the witnesses are lying. That is not the case here. Either Applicant or Ms. X lied about what happened in April 2014, March 2015, and April 2015. However, in order to accept Applicant’s version of the 2014 incident, I have to believe that not only did Ms. X lie, but her sister either also lied or was lied to by Ms. X. I would also have to find that their friend also lied or was lied to by Ms. X and possibly her sister. Additionally, the physical evidence, including photos of Ms. X’s injuries, supports her version. I find by substantial evidence that Applicant committed the criminal conduct alleged by Ms. X. (internal footnote omitted)

. . . .

All of the criminal conduct in one way or another involved Ms. X. . . . Any involvement with Ms. X appears to be in the past. The most recent criminal conduct happened more than seven years ago. There are no bright-line rules for when conduct is considered recent. As discussed above, I have found that Applicant has been untruthful about the criminal charges throughout the security clearance process. Without complete candor, I am unable to determine that criminal conduct is unlikely to recur. . . . I find that criminal conduct security concerns remain despite the present of some mitigation.

. . . .

The analysis under Guideline J applies equally [to Guideline E]. Personal conduct security concerns are not mitigated. [Decision at 8–10.]

Discussion

On appeal, Applicant restates in detail his version of what happened during the incidents in April 2014, March 2015, and April 2015. He asserts that Ms. X stalked him, instigated the physical altercations, and falsified allegations against him. Applicant denies that he assaulted Ms.

X on any occasion and argues that the Judge failed to consider all the evidence prior to concluding that Applicant lied about assaults. We are not persuaded.

At hearing, Applicant testified at length about his relationship with Ms. X and the three alleged assaults in issue, presenting to the Judge essentially the same narrative recited on appeal. The Judge had the opportunity to observe Applicant's demeanor during his hearing testimony, assess the credibility of Applicant's testimony on the matter, and weigh Applicant's denials of wrongdoing in light of the record evidence as a whole. He concluded that Applicant was untruthful regarding the criminal conduct at the core of this case. The Directive requires the Appeal Board to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. Moreover, the Judge was well within his authority to consider that determination in assessing whether Applicant successfully rehabilitated himself and in evaluating whether he mitigated the Guideline J and Guideline E security concerns. *See, e.g.*, ISCR Case No. 20-01577 at 3 (App. Bd. Jun. 6, 2022). When an applicant is unwilling or unable to accept responsibility for his own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation. *See, e.g.*, ISCR Case 21-00321 at 3 (App. Bd. Sep. 8, 2022).

Although Applicant argues that the Judge did not consider all the evidence, he points to no specific evidence that the Judge failed to address in his decision. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and Applicant's bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *See, e.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020). Upon our review, the Judge's findings are supported by substantial evidence of record, 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 also contends that the Judge erred in considering the statement made by Ms. X's friend, as it "is hearsay and should not be considered." Appeal Brief at 1. The friend's statement is contained in Government Exhibit 4, a police report that was admitted without objection by Applicant. Putting aside Applicant's failure to object at hearing, this exhibit is admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8). *See, e.g.*, ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017).

Applicant alleges that the Judge erred in finding that he has no college degree, stating that he has earned an associate's, a bachelor's and a master's degree since 2017. The Judge's finding reflects the educational information in Applicant's 2016 security clearance application, which was neither inquired into nor updated at hearing. Any error is harmless as it likely had no effect on the Judge's decision. *See, e.g.*, ISCR Case No. 18-02581 at 3 (App. Bd. Jan. 14, 2020).

Applicant requests reconsideration of his case. The Directive does not empower the Board to weigh the record evidence *de novo* and make its own findings and conclusions about the case. Rather, the Board addresses the material issues raised by the parties to determine whether the Judge has made factual or legal error. Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent

with 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 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