

Date: December 21, 2022

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 In the matter of:)
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)
 Applicant for Security Clearance)
 _____)

ISCR Case No. 20-01335

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Angelo Fernandez, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 28, 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 September 15, 2022, 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 issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

In her late 30s, Applicant is married with four children. She has earned a bachelor’s degree and is working on a master’s degree. Since 2015, she has worked for a defense contractor. The SOR contains four allegations.

In 2001, Applicant pled guilty in Federal court to importing cocaine into the United States. This charge arose when authorities discovered 3.1 pounds of cocaine concealed in her suitcase upon her return to the U.S. from a Caribbean country. A charge of possessing cocaine with the intent to distribute was dismissed. In 2002, she was sentenced to 30 months of imprisonment and 4 years of supervised probation. She served 14 months of combined imprisonment and Federal boot camp. Her probation ended in 2004. She attributed this offense to being naïve and ignorant.

In 2011, Applicant was charged with aggravated battery with a deadly weapon (a felony), aggravated assault with a deadly weapon (a felony), and battery. These charges arose from an altercation with other women outside a restaurant/night club. A police report reflects that, during the incident, Applicant intentionally drove at and struck an individual with a vehicle. She claimed she was innocent of the charges because she was acting in self-defense. Based on an attorney's advice, however, she pled guilty to battery and assault. In 2012, she completed a six-month anger management class. Having successfully completed probation, this incident did not result in a conviction. During her background interview, she indicated she bumped the woman when she was backing the vehicle. At the hearing, she denied she struck the women with the vehicle.

The other SOR allegations are related. In January 2019, two public assistance fraud charges (felonies) were brought against Applicant. These involved Applicant receiving (1) food stamps and Medicaid and (2) school readiness services during periods of employment. One charge alleged she committed the offense occurred between December 2015 and December 2016, while the other alleged she committed the offense between April 2015 and December 2016. She pled *nolo contendere* to both charges and received deferred adjudication. In the fall of 2019, she was sentenced to pay about \$5,000 in restitution for one charge and about \$11,000 for the other. She was also sentenced to complete an anti-theft class and was placed on probation until 2024. After completing the terms of her sentence to include restitution, her probation was terminated in 2020.

Applicant's "claim that she would have received the public assistance even if she accurately reported her income is not credible." Decision at 8. She repeated that claim in her security clearance application, background interview, and at the hearing. Such non-alleged conduct could be considered in evaluating the mitigating evidence, in determining whether rehabilitation has been sufficiently demonstrated, and in analyzing the whole-person concept. "Her misstatements about the materiality of her false income information shows her failure to accept full responsibility for her fraudulent behavior, and it shows a lack of rehabilitation." *Id.* at 9. "After careful assessment of Applicant's case in mitigation, her criminal conduct continues to cast doubt on [her] current reliability, trustworthiness, and good judgment. Criminal conduct security concerns are not mitigated at this time." *Id.* at 8.

Discussion

Applicant does not dispute any of the Judge's specific findings of fact, but rather argues the Judge analyzed the evidence in an arbitrary and capricious manner. More specifically, she contends the Judge failed to consider all of the evidence and erred in his analysis of the mitigating conditions and whole-person factors. Her arguments for an alternative interpretation of the evidence do not undermine the Judge's analysis. The weighing of the evidence is a matter within

the special province of the Judge as the trier of fact. *See, e.g.*, ISCR Case No. 18-00857 at 4 (App. Bd. May 8, 2019). In short, none of her arguments, including those based on other Hearing Office decisions, are sufficient to rebut the presumption that the Judge considered all of the record evidence or to demonstrate he weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 21-01169 at 5-6 (App. Bd. May 13, 2022).

Applicant 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 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