

DATE: October 17, 2023

In the matter of:)
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Applicant for Security Clearance)

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ISCR Case No. 22-02391

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jason R. Wareham, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 19, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline J (Criminal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On July 18, 2023, Defense Office of Hearings and Appeals Administrative Judge Robert E. Coacher denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant was arrested in October 2020 and charged with felony assault, misdemeanor assault, false imprisonment, two counts of child abuse, harassment, and criminal mischief. Applicant pled guilty to misdemeanor assault in March 2021 and received a deferred judgment with two years of supervised probation. The Judge found against Applicant on the single allegation.

On appeal, Applicant asserts that the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law, and failed to properly apply the mitigating conditions and Whole-Person Concept. For the reasons set forth below, we affirm.

Judge's Findings of Fact and Analysis

Applicant, in his mid-forties, was married in 2001 and has three children. He served on active duty in the U.S. military from 2001 through his honorable discharge in 2005. Applicant has held a security clearance for approximately 20 years and has worked for his current defense contractor employer since 2008.

In October 2020, one of Applicant's teenage daughters contacted police to report a domestic violence incident between Applicant and his wife. Officers arrived at the home and knocked several times before Applicant answered, at which time the officers explained that they were responding to a reported domestic disturbance and needed to enter the residence because of the nature of the report. Applicant reportedly refused the officers' entry and told them they needed a warrant. The officers entered the home despite Applicant's attempts to keep them out, and he further resisted being handcuffed. Once inside, the officers went to the basement and found Applicant's wife and daughter locked in a bedroom, the door of which was damaged on the outside such that it could not be opened from the inside. An officer opened the door and observed Applicant's wife to have a cut lip, swelling on the side of her face, a bruised eye with blood in it, and red marks on her neck. The wife reported that she and Applicant had an argument that escalated, and she was hit in the head and believed Applicant tried to drag her down the stairs by her neck. One daughter reported that her mother told her multiple times that Applicant hit her on the head when she was upstairs. Applicant's wife and daughter barricaded themselves in the bedroom by locking and placing a wooden desk against the door. One daughter corroborated that Applicant tried to break down the bedroom door.

Following the incident, Applicant was arrested and charged with the offenses listed in the SOR. In March 2021, he pled guilty to one count of misdemeanor assault and received a deferred judgment, under which he was placed on supervised probation for two years and ordered to complete domestic-violence and substance-abuse evaluations and comply with all treatment recommendations from the evaluations. Applicant complied with the evaluations and subsequently participated in domestic violence and anger management treatment from May 2021 to February 2022. His treatment provider believed that Applicant was intoxicated during the incident and that alcohol contributed to his actions, and she opined that Applicant was at the low-to-medium end of the scale regarding recidivism. Applicant successfully completed all terms of his deferred sentence in March 2023 and his record concerning the case was sealed by the court.

In a response to Government-issued Interrogatories and in his hearing testimony, Applicant provided a conflicting version of the incident. He expressed that he was cordial and non-resistant to the officers and complied with their request to enter the residence. Applicant testified that he did not attempt to break the bedroom door down and that it was damaged weeks before by his nephew. He asserted that he had only one glass of champagne that evening and was not drunk. He also claimed he did not strike or strangle his wife. Similarly, Applicant's wife testified at his security clearance hearing and provided conflicting information about the incident, including that the incident was partially her fault because she became intoxicated that evening and threw and broke objects in their home, this was a one-time incident that had not happened before, and she did not believe Applicant assaulted her but was rather trying to deescalate the situation. Regarding

this conflicting evidence, the Judge found that the information contained in the police report was more credible than Applicant's and his wife's subsequent accounts.

The Judge found that Applicant continues to minimize his actions that contributed to his arrest and domestic violence charge by denying assaulting his wife, denying damaging the door in his home, and denying the extent of his alcohol use, all despite contrary evidence reported by his wife, daughters, responding police officers, and Applicant's treatment provider. While Applicant "has made positive strides toward rehabilitation by successfully completing his domestic-violence and anger-management therapy," and "[t]here is no evidence of any subsequent violent behavior towards his family," the Judge was cautious about the credit to afford Applicant's subsequent clean record because he was still under the terms of his probation through March 2023. Decision at 6. The Judge concluded that it was too soon to tell if Applicant "will continue to abstain from domestic violence incidents without the threat of a probation violation hanging over him," and therefore his actions continue to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. *Id.* at 6, 7.

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred by not considering all the evidence, and by not properly applying the mitigating conditions and Whole-Person Concept.

Oral Argument Request

Applicant requests oral argument before the Appeal Board. The Board's authority is derived from the Directive, which does not authorize the Board to hold oral arguments. *See, e.g.*, ISCR Case No. 09-01321 at 2 (App. Bd. Feb. 17, 2010).

Conflicting Police Reports and Failure to Apply Mitigating Condition 32(c)

Applicant primarily challenges the weight that the Judge gave to police reports from the incident. For example, Applicant argues that the Judge erred in failing to address contradictions between the more summary Initial Case Report (Government Exhibit (GE) 2 at 12)) and the more robust Case Supplemental Report (GE 2 at 15-17). Applicant asserts that the former report "throws out blanket assertions that both daughters witnessed [Applicant] strike [his wife] and strangle her with both hands," which is rebutted by the latter report. Appeal Brief at 14.

Our review of the evidence reflects only one *potential* conflict between the two reports. Specifically, the Initial Case Report states that both daughters "witnessed [Applicant] strike [his wife] in the face . . . and strangle her with his hands," while the Case Supplemental Report states that neither daughter saw the "incident upstairs between [Applicant and his wife]." GE 2 at 12, 16. As an initial matter, these accounts are not obviously conflicting because it is unclear that they refer to the same portion of the incident. The police reports show that Applicant and his wife's altercation continued across multiple floors, some upstairs away from the daughters and some downstairs with the daughters present. Additionally, the record is clear that both daughters

witnessed their parents' fight become physical and that one daughter (D1) even physically intervened in the altercation, resulting in her own sustained injury.

Police reports, which are admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8), are presumed to be reliable by virtue of the government agency's duty for accuracy and the high probability that it has satisfied that duty. *See, e.g.*, ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017); ISCR Case No. 16-03603 at 4 (App. Bd. May 29, 2019). With respect to the reports contained in GE 2, there are no other potential inconsistencies between them to suggest that either lacks credibility. For example, both reports reflect that Applicant's daughters reported the incident to police, Applicant repeatedly refused the police entry into the house and he was subsequently handcuffed, and D1 suffered a small laceration to her nose from trying to break up the fight between her parents. *Id.* at 12. The Case Supplemental Report provided additional, but not conflicting, details, including that the daughters reported both Applicant and the wife had been drinking that night, and that D1 initially did not check on her parents when she heard loud bangs because it was a fairly regular occurrence for her parents to drink a lot of alcohol when they go out and then get into arguments. *Id.* at 15-16. Officers observed Applicant to have bloodshot and watery eyes, slurred speech, and difficulty with balance. Officers also observed the wife to have a laceration on her lip, severe swelling to the right side of her face, a bruised right eye with blood in it, and red marks on her neck consistent with strangulation. D1 witnessed Applicant restrain the wife from coming down the stairs and later grab the wife's arms to try and pull her out of a bathroom with increasing aggression. The other daughter (D2) witnessed Applicant follow the wife to a bedroom and continue to try and pull her out. After locking him out of the room, D2 heard Applicant attempting to break into the room where she and her mother were barricaded, which D1 also heard from her own locked room down the hall. The wife told D2 multiple times that Applicant hit her on the head while they were upstairs. Even if the Judge had discounted the Initial Case Report's account of the daughters witnessing Applicant hitting and strangling his wife, none of the facts contained in the Case Supplemental Report, which Applicant claims is more accurate, support a case for mitigation.

Applicant also contends that his and his wife's consistent hearing testimonies should have been given greater weight than both police reports. Appeal Brief at 17. Both Applicant and his wife testified that Applicant only drank a glass of champagne with dinner that night and he was not intoxicated. Tr. at 45-46, 74-78. The wife disagreed with D1's report to police that it was a common occurrence for both Applicant and the wife to drink a lot and get into fights, and asserted that Applicant only ever has two drinks, at most, and never becomes aggressive. Tr. at 40, 47, 49, 52. Both testified that Applicant was not aggressive that night and the red marks on the wife's neck and cut lip resulted when Applicant tried to restrain her from breaking things and swinging her arms. Tr. at 36, 48, 52, 75. The wife did not recall how D1 sustained the injury to her nose, how she and D2 came to be barricaded in the bedroom, telling D2 multiple times that Applicant struck her on the head, or Applicant trying to break into the room and damaging the door. Tr. at 48-49. Although the wife claimed to not recall the foregoing details, she affirmatively testified that Applicant did not strike or strangle her that night. Tr. at 38, 52. Applicant also testified that he did not strangle his wife, and that the damaged bedroom door was caused by his "rambunctious" nephew and friends who were visiting several weeks earlier. Tr. at 78, 84.

It is well-established that “[d]etermining the weight and credibility of the evidence is the special province of the trier of fact.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982). While the Judge had to consider the foregoing hearing testimony, he was not bound by it. Indeed, it would be arbitrary and capricious to uncritically accept witness testimony without considering whether it is plausible and consistent with other evidence. *See, e.g.*, ISCR Case No. 01-07292 at 4 (App. Bd. Jan. 29, 2004). When conflicts exist within the record, a judge must weigh the evidence and resolve conflicts based upon a careful evaluation of factors such as the evidence’s “comparative reliability, plausibility and ultimate truthfulness.” ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). Here, when weighed against the observations made by police and accounts provided by the daughters as recorded in the contemporaneous police reports, the Judge reasonably found Applicant’s and his wife’s testimony lacking credibility. Decision at 3-4. We find no reason not to give deference to the Judge’s negative credibility determination.

Lack of Evidence of Rehabilitation

Applicant next contends that the Judge “failed to properly account for, explain, or credit [Applicant’s] mitigating conduct,” including that he excelled and fully engaged in treatment and has remained sober. Appeal Brief at 22-23. Contrary to this assertion, the Judge did consider these facts in potential mitigation, but was unable to find them fully mitigating due to the recency of Applicant’s probationary status, which ended a month before Applicant’s security clearance hearing and has obvious relevance to any analysis of whether his efforts at rehabilitation warrant application of mitigating condition AG ¶ 32(d). *See, e.g.*, ISCR Case No. 96-0710 at 3 (App. Bd. Jun. 20, 1997) (Where an applicant engaged in rehabilitative conduct under compulsion of a court order, that fact may reduce the mitigating weight of the conduct because a reasonable mind could not conclude that it is really voluntary in nature.).

The Judge also declined to apply AG ¶ 32(d) to the facts of this case because of concerns that Applicant “continues to minimize his actions that contributed to the domestic violence charge the night of his arrest,” including by denying assaulting his wife, damaging the door inside the home, and the extent of his alcohol use that night, all despite the wife’s conflicting physical injuries, statements made to the police by the wife and daughters, and observations of responding officers. Decision at 6. An applicant’s unwillingness or inability to accept responsibility for his own actions detracts from a finding of reform and rehabilitation. *See, e.g.*, ISCR Case 96-0360 at 5 (App. Bd. Sep. 25, 1997). Considering the record as a whole, the Judge’s determination that Applicant has not demonstrated rehabilitation sufficient to mitigate the Government’s concerns is reasonable and sustainable.

Applicant’s argument in this regard relies on hearing-level decisions in unrelated Guideline J cases to argue that the Judge erred in his analysis of this case.¹ Applicant’s reliance on those decisions is misplaced. The facts and concerns at issue in the cited cases are distinguishable from the instant case. Moreover, how particular fact scenarios were decided at the hearing level in other cases is generally not a relevant consideration in the Board’s review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021). The decisions that Applicant cites have no direct relationship or unique link to Applicant’s case to make them relevant here.

¹ *See* Appeal Brief at 23. Applicant cites these cases as Appeal Board decisions; however, they are actually hearing-level decisions.

Application of Whole-Person Concept

Finally, Applicant argues that the Judge “summarily ignored much of the evidence and analysis warranted under the whole person concept.” Appeal Brief at 25. The decision reflects that the Judge considered the evidence favorable to Applicant, including five reference letters from coworkers and former coworkers who universally laud Applicant’s trustworthiness, work ethic, and reliability, and testimony from two witnesses that Applicant is a peaceful person, that they have never seen him abuse alcohol, and that they would trust him holding a security clearance. Decision at 4. The Judge found that Applicant made “positive strides toward rehabilitation by successfully completing his domestic-violence and anger-management therapy” and there was “no evidence of any subsequent violent behavior towards his family.” *Id.* at 6. The Judge also considered Applicant’s military service, including combat deployments. *Id.* at 7. When weighed against the nature and seriousness of the incident and Applicant’s continued minimization of his actions that night, however, the Judge concluded that the record left questions and doubts about Applicant’s eligibility and suitability for a security clearance.

Applicant’s arguments regarding the Judge’s application of whole-person factors amounts to a disagreement with the Judge’s weighing of the evidence, which is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-07292 at 4.

Bias and Due Process

Applicant contends that the Judge was “biased” against him. Appeal Brief at 28. He argues that the Judge “appears to have approached this case with a predetermined narrative” and “selectively chose evidence from the record to fit this narrative.” *Id.* As a related argument, Applicant asserts that his due process rights were “unfairly violated by an analysis only working [to] inculcate but not exculpate.” *Id.* at 27. These arguments are not persuasive. Mere dissatisfaction with the Judge’s decision does not establish bias. 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. *See, e.g.*, ISCR Case No. 20-03167 at 2 (App. Bd. Jul. 5, 2023). We examined the entire record and decision, paying particular attention to the transcript of the hearing. We find nothing therein that would cause a reasonable person to question the Judge’s impartiality in this case. Applicant has neither rebutted the presumption that the Judge was unbiased nor established that he was denied any due process afforded him under the Directive.

Conclusion

Applicant has not established that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, and the record evidence supports that the Judge’s findings and conclusions are sustainable. “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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board