



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: May 21, 2024

<p>In the matter of:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 22-01851</p>
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Scott D. Walters, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 14, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline E (Personal Conduct) and 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). Applicant requested a hearing which was held on February 27, 2024. On March 6, 2024, Defense Office of Hearings and Appeals Administrative Judge Carol G. Ricciardello denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we affirm the Judge’s decision.

The SOR alleged two concerns under Guideline J which were cross-alleged under Guideline E and pertained to arrests in 2013 and 2020. In his SOR answer and in his hearing testimony, Applicant admitted the allegations and provided additional information. The Judge found against him on each of the allegations.

On appeal, Applicant challenges the Judge's characterization of his arrests and the results of the ensuing legal proceedings. He also alleges that the Judge was biased against him. Our review of the decision confirms that the Judge considered all relevant issues and properly applied the mitigating conditions in a fair and neutral manner.

Judge's Findings of Fact and Analysis

Applicant is 44 years old and has two children from a previous marriage and another from a previous relationship. He served in the military from 1999 to 2020 and retired honorably in the paygrade E-7, having earned the Bronze Star, among other awards. He is currently employed by a federal contractor. Applicant submitted, and the Judge considered, evidence of his military career as well as character letters which described Applicant as "an asset, an exemplary noncommissioned officer, professional, stellar, conscientious, flexible, open-minded, efficient, detailed-oriented, extremely competent, likable, knowledgeable, loyal, honest, compassionate, disciplined, hardworking, trustworthy, and a person of integrity." Decision at 6.

In June 2013, Applicant was arrested and charged with assault causing bodily injury/family member; criminal mischief between \$50 and \$500; and interfering with an emergency call. He entered pleas of guilty to those charges and received a deferred disposition for 18 months, contingent upon completion of 120 hours of community service and 18 months of probation. Applicant complied with these requirements, after which his pleas of guilty were amended to not guilty and the charges were dismissed. Tr. at 85-90; GE 4, 7, 8. Applicant addressed this matter in his September 2021 security clearance application, disclosing that he "was charged with [d]omestic violence to ex-girlfriend to whom we did not live together nor share children. The charges were later dismissed." He identified the offense as a misdemeanor and that the "[c]ase went before judge and charges were dropped," but he did not disclose information about his guilty pleas, deferred disposition, and probation.

In his SOR answer, Applicant provided an explanation of the incident, denied wrongdoing, and stated that "[t]he charges against me were dismissed and I agreed to perform 100 hours of community service, which I completed." When interviewed by a Government investigator in conjunction with his clearance investigation, Applicant addressed the incident by providing some additional details while omitting others. Decision at 3; GE 3, 7. At his hearing, Applicant stated "the case was dismissed after completion of a class and 100 hours of community service," but that he did not remember whether or not he had pleaded guilty to the offenses. Tr. at 84-85.

In April 2020, Applicant was involved in an automobile accident in which he hit a stopped truck. He left the scene of the accident and walked to a friend's house, after which he was taken to a hospital and diagnosed with a concussion. Applicant also testified that while at the hospital he contacted the police advising them that he had been involved in a vehicle accident. He was later charged with felony failure to stop/accident and following too closely. He also was charged with possession of marijuana based upon items that were found at the scene of the accident.

Pursuant to a plea agreement, Applicant pled guilty to misdemeanor failure to stop/accident and the other charges were dismissed. He was sentenced to six months in jail, five and a half

months of which were suspended "for a period of five years conditions upon being of good behavior, keeping the peace, obey this order, and paying fines and costs." He was also placed on probation for five years. He remains on probation and under a suspended sentence until September 2025. In his September 2021 security clearance application, Applicant described this event as having been charged with a misdemeanor in March 2021 for failure to stop. He described his sentence as "Judge sentenced me to 5 days in jail." (GE 1) Despite his guilty plea, at his DOHA hearing, Applicant denied wrongdoing because he "unknowingly" left the scene of the accident. Tr. at 62. He testified that he was unaware how long the sentence suspension was for and that he did not know he was on probation because it was unsupervised and his attorney did not tell him he was on probation. Tr. 42-44, 51, 62 69, 81-83; GE 3, 5, 8.

The Judge found that Applicant was not credible, had minimized his culpability and the gravity of his criminal conduct, and had not taken full responsibility for his actions. Decision at 6, 8-10. The Judge also noted that Applicant remains on probation and under a suspended jail sentence until September 2025.

Discussion

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Bias

Applicant argues that the Judge was biased against him, however we do not find his argument persuasive. 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. *E.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes that the Judge was biased or prejudiced against him but, rather, whether the record "contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge." ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003).

Applicant's initial assignment of error is that the Judge did "not appear to have much in common with [me] with respect to demographics," because Applicant is "a person of color, a retired Army noncommissioned officer, a decorated combat veteran, a gun owner, and a single parent." However, Applicant's bare assertion is wholly inadequate to overcome the rebuttable presumptions of good faith, impartiality, and lack of bias. Absent evidence of discriminatory words or conduct, the type of argument advanced by counsel in this case has no legitimate place in these proceedings. It fails to raise any colorable claim of bias or the appearance of bias and goes beyond the pale of permissible zealous advocacy. Claims of error should be based on arguments

having a reasonable basis in the record evidence and procedural history of a case, not innuendo or insinuation. *See* ISCR Case No. 03-14052 at 3 (App. Bd. Sep. 28, 2005); *see also* ISCR Case No. 01-04713 at 2 (App. Bd. Mar. 27, 2003).

Additionally, Applicant alleges that the Judge “engaged in an excessive cross-examination” that “cast aside her mantle of impartiality.” This assertion is being raised for the first time on appeal; Applicant’s counsel at the hearing did not object to the Judge’s questions or the manner in which she conducted the hearing. Having had the opportunity to object at the hearing, Applicant cannot now object merely because the Judge rendered an unfavorable decision. ISCR Case No. 14-03569 at 3 (May 31, 2016).

However, even if an objection had been timely raised, having examined the entirety of the record rather than excerpts cited out of context, we find that Applicant’s concerns are insufficient to overcome the rebuttable presumption that the Judge acted in an impartial and unbiased manner. Judges in DOHA hearings are tasked with conducting the proceedings in a fair, timely, and orderly manner. Directive ¶ E3.1.10. While the Judge actively participated in the examination of Applicant during both direct and cross examination, there is nothing in the record that can reasonably be seen as reflecting bias. The tone and focus of the Judge’s questions were either administrative in nature or concentrated on clarifying Applicant’s testimony. This is permissible under the Directive because as finder of fact, the Judge “enjoys considerable latitude in conducting the proceedings, to include asking questions to clarify the record.” ISCR Case No. 11-08844 at 3 (App. Bd. Jan. 10, 2013).

The transcript in this matter reflects that the Judge’s questions were often pointed; however, they were targeted to the issues to be determined at hearing. Even where a Judge’s manner may be deemed “inconsistent with the decorum normally anticipated in the courtroom,” – which in this instance it was not – that alone is insufficient to rebut the presumption that the Judge decided the case on the record evidence. ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006) (no bias where the Judge’s comments were “gratuitous and at times harsh”). *See also* ISCR Case No. 15-03162 at 3 (App. Bd. Jul. 25, 2017) (no impartiality although the Judge “questioned Applicant sharply at times); ISCR Case No. 16-03451 at 2-3 (App. Bd. Dec. 26, 2017) (no bias although Judge “conveyed a certain testiness”); ISCR Case No. 20-02787 at 4 (App. Bd. Mar. 9, 2022) (no impartiality where the Judge’s “questioning and comments were occasionally sharp”). We find no bias or harmful error in the manner in which the Judge conducted the hearing.

Errors in Findings of Fact and Failure to Apply Mitigating Conditions

Applicant asserts that the Judge erred because she referred to him as being “convicted” in the assault case. He argues that although in other parts of the decision the Judge correctly states that his pleas of guilty were amended to not guilty and the charges dismissed after meeting the deferred sentencing terms, the erroneous use of the word “convicted” constitutes harmful error. It is correct that Applicant was not convicted in the assault case. However, we do not evaluate a Judge’s decision based on isolated words or sentences but, rather, on the decision viewed as a whole. ISCR Case No. 20-00204 at 4 (App. Bd. Feb. 2, 2022). The security significance of this incident does not hinge on a conviction because even if criminal charges are reduced, dropped, or

resulted in an acquittal, a Judge may still consider the underlying conduct in evaluating an applicant's security clearance eligibility. *E.g.*, ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018). Thus, the focus of a security clearance adjudication under Guidelines J and E includes assessing the underlying conduct and whether Applicant has been forthright and taken responsibility for his actions. We agree that the Judge made a factual error, however it is clear from a reading of the entirety of the decision that the Judge understood that there was not a conviction in the assault case and focused only on relevant matters. The error is harmless as it does not likely affect the outcome of the case. ISCR Case No. 19-01431 at 4 (App. Bd. Mar. 31, 2020).

Applicant also takes issue with the Judge's credibility determination and argues that the Judge erroneously "made this case about [Applicant's] integrity." This is an unusual and meritless argument inasmuch as an applicant's integrity is at the heart of a security clearance adjudication. Although the deference given a judge's credibility determination is not absolute, "a party challenging a Judge's credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005). In this case, the Judge had the opportunity to personally observe Applicant's demeanor during his testimony and to weigh his testimony in light of the record evidence as a whole. The evolving nature of his explanations of the events surrounding his arrests undermines the persuasiveness of his arguments and supports the Judge's conclusions. *See* ISCR Case No. 16-01645 at 4 (App. Bd. Mar. 19, 2018). Applicant has failed to establish the Judge's conclusion as to his credibility was arbitrary, capricious, or contrary to law.

The remainder of Applicant's brief advocates for an alternative weighing of the evidence. An applicant's "disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, 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." ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Moreover, there is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and a bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *E.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020).

In conclusion, Applicant has not identified any harmful error in the Judge's handling of this case or in her decision. We have considered the entirety of Applicant's arguments. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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). "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: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board