



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: June 13, 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. 22-00761</p>
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Tara Karoian Esq., Department Counsel

FOR APPLICANT

Daniel S. Conway, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 8, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guidelines E (Personal Conduct) and J (Criminal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision based upon the written record, however the Government requested and was granted a hearing. On March 11, 2024, Defense Office of Hearings and Appeals Administrative Judge Robert Tuider granted Applicant’s security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline J, the SOR alleged that Applicant was arrested on three occasions and charged with crimes related to domestic violence/abuse. It was alleged that in two of those instances, Temporary Restraining Orders (TRO) were issued against him. The Guideline J allegations were cross-alleged under Guideline E. In his response to the SOR, Applicant admitted the allegations but asserted that he did not commit the underlying offenses. The Judge found in favor of Applicant as to all allegations under both Guidelines.

The essence of the Government’s appeal is that the Judge made an erroneous factual finding – “that Applicant did not abuse his two ex-wives” – after “substitute[ing] a favorable credibility determination of Applicant for record evidence.” Brief at 9. Consistent with the following, we remand.

Judge’s Findings of Fact and Analysis

Applicant is a cyber-operations analyst in his mid-thirties who has been employed by a defense contractor since September 2022. He served on active duty in the U.S. military from 2009 to 2017, and in the Reserve from 2017 to 2020. He was honorably discharged. Applicant was twice married and twice divorced as a result of proceedings that he initiated. In 2017, while married to his first wife, he was charged with domestic abuse. The criminal charges were dismissed when she did not appear at the hearing. In 2019 and 2020 Applicant was charged with domestic abuse/violence as a result of alleged altercations with his second wife. The criminal charges were dismissed after she did not appear at the hearings. Applicant testified that the charges were dismissed because his former spouses failed to appear and that, "I just didn't do the crime" and that "there wasn't any proof that I actually did these (offenses)." Decision at 3. All three arrests were subsequently expunged under a state statute that provides for expungement upon written application if the individual was arrested or charged, but not convicted of a crime.

Concurrent with the 2017 arrest, Applicant’s then-wife sought a Protective Order. She was granted a TRO that was later vacated at her request. After the 2020 arrest, Applicant’s second wife sought and was granted a TRO that was later vacated at her request. In November 2021, Applicant sought a TRO against his second wife. It was granted, followed by an 8-year Protective Order, which was granted in an uncontested proceeding.

The Judge concluded that the Government had established possible concerns under Disqualifying Conditions ¶¶ 31(a) and 31(b) under Guideline J.¹ He also concluded that the record evidence established possible concerns under Disqualifying Condition ¶ 16(c) of Guideline E.² Addressing potential mitigation, the Judge found that a review of the facts supported partial application of Guideline J Mitigating Condition ¶ 32(a) and full application of ¶¶ 32(c) and 32(d).³

¹ AG ¶¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

² AG ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

³ AG ¶¶ 32(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (c) no reliable evidence to support that the individual committed the offense; and (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity,

Under Guideline E, the Judge also found that Mitigating Conditions ¶¶ 17(c), (d), and (e) partially applied and that ¶ 17(f) fully applied.⁴

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. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

In this case, the SOR alleged that applicant was arrested on three separate occasions and charged with domestic violence/abuse offenses and that two TROs were granted against him. Applicant admitted to the arrests and TROs thus relieving the Government of producing additional evidence as to the specific allegations. Directive ¶ E3.1.14. ISCR Case 07-13766 at 3 (App. Bd. Nov. 12, 2008). Although the SOR did not detail the language of the charges or the specific conduct that resulted in the arrests or TROs, implicit in allegations of this nature is that there is evidence of underlying conduct that would elaborate on the circumstances and detail why the conduct is disqualifying under the Guidelines. Therefore, because Applicant denied any wrongdoing in his answer to the SOR, it was incumbent upon the Government to present evidence of specific conduct.

In instances in which cases do not proceed to trial, a police report typically provides insightful information regarding circumstances surrounding arrests, both from the standpoint of complainants and from the neutral observations of law enforcement officers or witnesses. *See* ISCR Case No. 20-00347 at 7 (App. Bd. Aug 11, 2021); ISCR Case No. 07-10158 at 4-5 (App. Bd. Aug. 28, 2008). Although the Government did not submit any law enforcement records in support of its case, the Government's evidence included detailed petitions for TROs/Protective Orders submitted under penalty of perjury by both of Applicant's former wives. GE 5 & 6; AE E & F. Thus, there was evidence that Applicant committed various specific acts of domestic violence. The decision briefly references this evidence but summarily dismisses it because the former spouses did not testify at the hearing. Decision at 8-9.

The dismissal of charges against an applicant does not preclude a Judge from finding that the underlying conduct occurred. Indeed, it can be error for a Judge to conclude that the dismissal

restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

⁴ AG ¶¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and (f) the information was unsubstantiated or from a source of questionable reliability.

of charges means that the defendant was innocent inasmuch as there are many reasons why a prosecution might not go forward. A dismissal or expungement does not eliminate the security concerns arising from disqualifying conduct because the evidentiary standard in a DOHA proceeding is entirely different from that in a criminal proceeding. DOHA security clearance adjudications are administrative proceedings, and the “beyond a reasonable doubt” burden of proof associated with criminal proceedings is not applicable. ISCR Case No. 98-0761 at 2 (Dec. 27, 1999). Similarly, the “preponderance of the evidence” standard in civil proceedings such as a TRO is not applicable. The correct assessment of the underlying facts must be made within the context of the substantial evidence standard in DOHA proceedings – such relevant evidence as a reasonable mind might accept as adequate to support conclusions in light of all contrary evidence in the same record.

Charges can be dismissed for any number of reasons that are consistent with guilt, and the mere fact that a court dismisses charges does not in and of itself justify a conclusion that an applicant did not commit the conduct in question. *See* ISCR Case No. 18-02018 at 4 (App. Bd. Nov. 4, 2021) (“[T]he decision by the law enforcement authorities in this case not to pursue criminal charges against Applicant due to the mother's decision not to let her daughter testify does not amount to a finding of “not guilty” or a determination of innocence.”); ISCR Case No. 14-02567 at 5-6 (App. Bd. Oct. 5, 2015). A disqualifying condition at issue in this case specifically highlights this point. Under Disqualifying Condition ¶ 31(b), a security concern could arise from “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, *regardless of whether the individual was formally charged, prosecuted, or convicted.* (Emphasis added). *E.g.* ISCR Case No. 18-02018 at 4 (App. Bd. Nov. 4, 2021). Similarly, under the applicable state statute, expungement is not a reflection of innocence as it is mandatory in cases in which charges are dismissed. Absent record evidence of the specific reasons why criminal charges are not pursued, a judge cannot legitimately make assumptions or draw inferences about the reasons state authorities dropped the charges. ISCR Case No. 20-00347 at 7 (App. Bd. Aug 11, 2021), *citing* ISCR Case No. 99-0360 at 4 (App. Bd. Sep. 25, 1997). Therefore, it was incumbent upon the Judge to have weighed the entirety of the evidence independent of the outcome in any criminal or civil proceeding.

A security clearance decision must be based upon a reasonable interpretation of the record evidence viewed as a cumulative whole, and a judge is presumed to have considered all of the evidence in the record. A judge is not required to discuss each and every piece of record evidence in making a decision, but the judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. ISCR Case No. 21-01551 at 4 (App. Bd. Jul. 20, 2022) Simply because an applicant offers an explanation of events, an administrative judge should not accept this explanation without considering evidence that fairly detracts from it. *E.g.* ISCR Case No. 97-0184 at 2 (App. Bd. Dec. 8, 1998).

After concluding that the evidence established “possible concerns” under Guideline J Disqualifying Conditions ¶¶ 31(a) and 31(b), and under Guideline E Disqualifying Condition ¶ 16(c), the Judge addressed mitigation and found that there was “...not reliable evidence to support a finding that the allegations occurred as alleged. In short, Applicant refuted the allegations.” Decision at 6. The Judge reached this conclusion by focusing on Applicant’s claims of innocence,

the dismissal of the charges, and the expungement of the arrests without addressing or considering the substance of the allegations in the women's TRO petitions. In doing so, he relied upon a favorable credibility determination that ignored contradictory record evidence.

While the Board is required to give deference to a judge's credibility determinations, deference is not absolute. Directive ¶ E3.1.32.1. A judge is expected to explain why an applicant's version of an event is worthy of belief when it is contradicted by other evidence. Failure to do so suggests that the judge merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 18-01926 at 4 (App. Bd. Sep. 20, 2019). A credibility determination may be set aside or reversed if it is unreasonable, contradicts other findings, is based on an inadequate reason, is patently without basis in the record, or is inherently improbable or discredited by undisputed fact. *See* ISCR Case No. 97-0184 at 5 (App. Bd. Dec. 8, 1998). "When a witness's story is contradicted by other evidence or is so internally inconsistent or implausible that a reasonable fact finder would not credit it, we can find error despite the deference owed a Judge's credibility determination." ISCR Case No. 10-03886 at 3 (App. Bd. Apr 26, 2012), *citing Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). When the record contains a basis to question an applicant's credibility, including contrary record evidence, the judge should address that aspect of the record explicitly, explaining why he finds an applicant's version of events to be worthy of belief. *See, e.g.*, ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016). In this instance, the Judge's perfunctory mention of the former spouses' allegations in the TRO petitions, which independently reflect similar allegations of domestic violence, constitutes a failure to adequately consider significant evidence contrary to Applicant's assertions. This error is harmful because it undercuts the Judge's conclusion that Mitigating Conditions ¶ 32 (c) and ¶ 17(f) apply. Decision at 6, 7. *C.f.* ISCR Case No. 20-00347 at 7 (App. Bd. Aug. 11, 2021).

Moreover, a DOHA judge must consider the evidence as a whole, rather than in a piecemeal manner, in rendering a decision. In terms of corroboration and credibility of the contrary evidence, the Judge took a piecemeal approach and failed to address the significance of the fact that similar allegations were lodged by two different women, years apart.. Directive ¶ 6.3. Similar allegations made against an applicant by different accusers may add weight to the validity of those accusations. *See* ISCR Case No. 14-01763 at 3-4 (App. Bd. Nov. 3, 2015) (pattern of domestic violence allegations). While the former spouses were not present at the hearing to provide testimony, their statements given under penalty of perjury in a civil judicial proceeding are entitled to significant weight and cannot be ignored simply because the proponents of those statements are not present at the hearing. The Judge did not assess the contents of those statements individually and in context with each other, nor did he explain why he discounted evidence which, on its face, would suggest that Applicant's version of events was self-serving. *See* ISCR Case No. 14-02567 at 5-6 (App. Bd. Oct. 5, 2015); ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). Moreover, his comment that the TRO obtained by applicant "is quite an extraordinary outcome in today's environment" is unsupported by any evidence and appears to reflect a personal mindset that, in part, may have formed the basis for the Judge's favorable credibility determination.

Although he found Applicant's assertions of innocence to be credible – albeit based upon an incomplete assessment of the evidence – the Judge also applied other Mitigating Conditions in a manner that is inconsistent with his conclusion that Applicant had refuted the allegations. If the assaults did not occur, it is incongruous to find that they happened under such unusual

circumstances that they are unlikely to recur and that Applicant has shown evidence of successful rehabilitation. It is particularly erroneous to find that Applicant has rehabilitated himself inasmuch as he denies any wrongdoing. An applicant's refusal to acknowledge his misconduct or accept responsibility for it seriously undercuts a finding that the applicant has mitigated his misconduct. ISCR Case No. 03-01009 at fn. 7 (Mar. 29, 2005). Even if the Judge had correctly concluded that other Mitigating Conditions potentially applied, the analysis lacks any specificity explaining the factual basis for why he found them applicable. It does not follow that domestic violence is not likely to recur because "Applicant is no longer married," inasmuch as domestic violence is not limited to married couples. The simplistic analysis of Mitigating Condition ¶ 32 (a) in this manner ignores the conjunctive clause, "and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." As such it does not consider the overall significance of the conduct. The purpose of this adjudication is to assess Applicant's character as well as speculate as to whether he might commit further offenses.

Conclusion

We conclude that the best resolution is to remand the case to the Judge to correct the above-identified harmful errors and for further processing consistent with the Directive. Upon remand, a Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130.

ORDER

The Judge's favorable security clearance decision is **REMANDED**.

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