



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: June 18, 2024

In the matter of:

Applicant for Security Clearance

ISCR Case No. 20-02097

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Adrienne Driskill, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 22, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline I (Psychological Conditions) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On November 16, 2023, after a hearing, Defense Office of Hearings and Appeals Administrative Judge Richard A. Cefola denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On February 13, 2024, the Appeal Board issued a decision remanding the case to the Judge to correct identified errors and for further processing consistent with the Directive. On March 22, 2024, the Judge issued a Decision on Remand denying Applicant's request for security clearance eligibility. Applicant appealed that decision.

Under Guideline E, the SOR alleged that Applicant was terminated by a prior employer and that he falsified certain information in his security clearance investigation and during a mental

health evaluation. Under Guideline I, the SOR alleged that a licensed psychologist determined that Applicant met criteria for Other Specified Personality Disorder, Mixed Personality Features. The Judge found that Applicant had mitigated the concerns under Guideline E but failed to mitigate the concern under Guideline I.

On appeal, Applicant presents arguments similar to those raised in his first appeal.¹ He again argues that the Judge erred in finding that Guideline I, Disqualifying Condition ¶ 28(b) was supported by the mental health examination conducted by the Government's witness, Dr. S. He also argues that the Judge did not adequately weigh mitigating facts in his favor. Finally, he asserts that because the Judge determined that the concerns under Guideline E were mitigated, he was precluded from finding against Applicant under Guideline I. For the reasons discussed below, none of these allegations have merit.

In deciding whether a judge's rulings or conclusions are erroneous, we review the judge's 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. *E.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In our previous decision, the Board concluded that "although the Judge did not specifically discuss the facts relative to the Guidelines, when read in the context of the specific diagnosis and testimony of Dr. S., the conclusion that there was substantial evidence under AG ¶ 28(b) is uncontroverted and supported by the facts." ISCR Case No. 20-02097 at 4 (App. Bd. Feb. 13, 2024). Nothing in Applicant's current submission or the record supports any change to that conclusion. Applicant simply argues for an alternative weighing of the evidence on this issue. A disagreement 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. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Although there was no error in the weighing of Dr. S's testimony, we previously concluded that "the Judge's failure to discuss or even mention Applicant's mitigating evidence leaves his case analysis incomplete and constitutes error." That error was the basis for the remand. In his Remand Decision, the Judge included an expanded analysis of the evidence. He stated that he considered Applicant's exhibits, including Applicant's 2023 award and mid-year performance review; his "commendable" mid-year and full-year review; his letters of recommendation; his awards and ceremonies; his honorable discharge from the U.S. Navy; and his performance evaluations and training certificates. Remand Decision at 6. Similarly, under the whole person analysis, the Judge

¹ On June 16, 2024 Applicant submitted a second brief in this proceeding, asserting that the Government's reply brief contained new evidence. The Directive only authorizes one brief from each party. Directive ¶ E3.1.30; ISCR Case No. 17-03228 at 2 (App. Bd. Mar. 1, 2019.) Even if we could consider his untimely submission, we note that it is largely repetitive of the issues raised in his appeal brief. Furthermore, it is well-established that if either party submits new evidence on appeal it may not be considered by the Board. Directive ¶ E3.1.29.

addressed potentially mitigating evidence with specificity. *Id.* at 8. Thus, the Judge corrected the error identified in the first appeal.

Administrative judges have broad latitude and discretion in how to write their decisions, provided they issue decisions that (a) comply with pertinent provisions of the Directive, and (b) set forth their findings and conclusions with sufficient specificity and clarity that allow the parties and the Board to discern what the Judge is finding and concluding. ISCR Case No. 00-0621 at 3 (App. Bd. Jan. 30, 2002). In this case, a reading of the decision below persuades the Board that the Judge: (i) fulfilled his duty to consider the evidence as a whole, and (ii) issued a decision that is consistent with the requirements of pertinent provisions of the Directive and allows the parties and the Board to discern what the Judge found and concluded. Applicant's dissatisfaction with the Judge's choice to not write more extensively about evidence that he feels is favorable to him is insufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *Id.*

Applicant's assertion that because the Judge found in his favor under Guideline E regarding allegations pertaining to his mental health evaluation he must find in his favor under Guideline I is a *non-sequitur*. The fact that the Judge concluded that Applicant had not willfully falsified material facts during the evaluation is not inconsistent with Dr. S's conclusion that Applicant lacked candor at times during his interviews. The Judge's conclusion under Guideline E regarding falsification has no bearing or relationship to his Guideline I analysis.

Applicant has not established that the Judge committed harmful error and his arguments fail to rebut the presumption that the Judge considered all of the record evidence. We have considered the entirety of the arguments contained in Applicant's appeal brief. The record supports a conclusion that the Judge examined the relevant evidence 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)). His conclusions and adverse decision are 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). The mere presence of some favorable or mitigating evidence does not require the Judge to make an overall favorable determination in the face of disqualifying concerns such as in this instance. See ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006).

Order

The decision in ISCR Case No. 20-02097 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