



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: September 16, 2024

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 In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 23-01559

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Samir Nakhleh, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 19, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guidelines J (Criminal Conduct) and E (Personal 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 hearing, which was held on March 13, 2024. On July 25, 2024, Defense Office of Hearings and Appeals Administrative Judge Richard A. Cefola concluded that it is not clearly consistent with the national interest to grant Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant had been arrested on five occasions and that he failed to identify those arrests when filling out his security clearance application. In his response to the SOR, Applicant admitted the allegations. At hearing, the Judge granted the Government’s request to amend the SOR to cross-allege the Guideline J arrests under Guideline G (Alcohol Consumption). The Administrative Judge found against Applicant on the Guideline J and E allegations and for Applicant under Guideline G. Our review of the Judge’s decision confirms that he considered all relevant issues and properly applied the mitigating conditions in concluding that

Applicant's personal and criminal conduct concerns were unmitigated. Consistent with the following, we affirm.

Discussion

On appeal, Applicant does not directly challenge the Judge's factual findings, but rather argues that "the Administrative Judge did not consider all the evidence, both favorable and unfavorable, in a *comprehensive, common-sense* manner, and the Administrative Judge rendered a decision that was arbitrary, capricious, and contrary to law." Appeal Brief at 2 (emphasis in original). He elaborates on this by stating that the "Administrative Judge failed to adequately consider the mitigating factors." *Id.* at 8. However, Applicant's challenge conflates evidentiary "facts" with the Judge's "conclusions" and fails to recognize the difference between a judge's substantive failure to consider evidence and a party's qualitative opinion that a judge did not "adequately" consider the evidence as part of his or her analysis. An analysis that merely is considered inadequate in the eyes of a party does not equate to an analysis that is arbitrary and capricious. "Unless a Judge's weighing of the record evidence is patently absurd, clearly illogical, or obviously unreasonable, the appealing party must present a cogent reason or argument as to how or why the Judge's weighing of the record evidence is arbitrary, capricious, or contrary to law." ISCR Case No. 03-05072 at 4 (App. Bd. Jul. 14, 2005). Applicant has not asserted a factual basis that would support a conclusion that the Judge's analysis of the facts and his conclusions were arbitrary, capricious, or contrary to law.

When an administrative judge's factual findings are challenged, the Board must determine whether the findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record and whether the judge's findings reflect a reasonable interpretation of the record evidence as a whole. Directive ¶ E3.1.32.1; ISCR Case No. 02-12199 at 2-3 (App Bd. Aug. 8, 2005). 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).

The Government's burden is to prove its case by substantial evidence, which was clearly met in this instance through Applicant's SOR admissions, his testimony, and the documentary evidence. Once the Government established a *prima facie* case against him, Applicant had the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance. Thus, the burden was on Applicant to present witnesses and other evidence to rebut, explain, extenuate, or mitigate the security concerns raised by his arrests and the circumstances surrounding them. Directive ¶ E3.1.15.

Regardless of whether the allegations of error raised in Applicant's brief are considered to be facts or conclusions, the assertions are without merit because the Judge's findings and conclusions are amply supported by the record. The mere presence of some mitigating evidence

does not require the Judge to make an overall favorable determination in the face of disqualifying conduct such as Applicant's. See ISCR Case No. 04-08975 at 1 (App. Bd. Aug. 4, 2006). Applicant's brief simply 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, Applicant's arguments fail to rebut the presumption that the Judge considered all of the record evidence.

Applicant has failed to establish any harmful error below. We have considered the entirety of the arguments contained in his 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).

ORDER

The decision in ISCR Case No. 23-01559 is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board