



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
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Date: January 21, 2025

In the matter of:)	
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)	
-----)	ISCR Case No. 23-00583
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nicole Smith, Esq., Department Counsel
 Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 28, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline J (Criminal Conduct) 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 October 30, 2024, Defense Office of Hearings and Appeals Administrative Judge Ross D. Hyams granted Applicant security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, the Government asserts that the Judge’s conclusion to grant Applicant eligibility for access to classified information is arbitrary, capricious, contrary to law, and unsupported by the record evidence. For the reasons discussed below, we reverse.

Background

In his late forties, Applicant retired from the U.S. military after a 23-year career and is currently employed as a safety supervisor for a defense contractor. The allegations in the SOR – that he was charged with two counts of Felony Aggravated Assault with a Deadly Weapon – stem from what police, the Government, and Applicant described as a road rage incident that escalated to the point that Applicant confronted the driver and occupant of another car and drew a weapon.

According to Applicant, the incident began when he was driving his pickup truck in the left lane in heavy traffic behind an SUV that was being driven below the speed limit. Applicant maintained that he was not tailgating the SUV but that the driver of that vehicle, nonetheless, was “brake-checking” him.¹ Believing that he could not merge into the adjacent right-hand lane and pass the SUV, Applicant elected to get around the vehicle by driving down the unpaved median strip and pulling directly in front of it. His rationale for doing so was that he believed “there’s something going on.” Transcript (Tr.) at 27. Applicant maintained that his effort to pass the SUV by driving down the median was initially thwarted by the driver of that vehicle who attempted to prevent him from merging back into the actual driving lane. However, Applicant sped up enough to make the merge.

Having successfully passed the SUV, Applicant nonetheless stopped his truck and exited it to confront the driver rather than continue driving with the flow of slow-moving traffic or changing lanes. Applicant’s explanation for doing this was that he believed he would be shot through the window of his truck had he stayed in it. Tr. at 24, 52. Applicant further explained that he stopped his truck and got out because the occupants might “think I’m somebody I’m not because I didn’t do anything to them” and “we’ve got to figure this out.” Tr. at 28, 48.

After Applicant exited his truck, the female driver of the SUV and her male passenger exited their vehicle. Applicant approached them yelling, “What in the living F. What are you doing?” or something along those lines. Tr. at 55; Government Exhibit (GE) 2 at 3. Applicant then became involved in an altercation with the male passenger and was punched in the face. He claims this was unprovoked although the passenger, driver, and an eye-witness claim that Applicant threw the first punch but missed. Applicant returned to his truck, retrieved a handgun that was on the console and brandished it in the direction of the occupants of the SUV with his finger on the trigger. At that point, the SUV left the scene and the police were notified.

After police responded, Applicant, the occupants of the SUV, and other individuals who had witnessed the events were stopped and interviewed. Although Applicant claimed to have been only briefly interviewed, he was questioned at the scene repeatedly before asserting his 5th Amendment rights. When first interviewed by a police lieutenant and a deputy sheriff, Applicant claimed to have been struck by an unknown vehicle. The officers, however, concluded he had been involved in a road-rage incident. In a subsequent interview with the lieutenant, Applicant stated that he and the driver of the SUV were driving aggressively and that he eventually ended up in front of the SUV. He further stated that he got out of his truck, confronted the occupants of the SUV, and was “clocked” from behind. In a final interview conducted by the lieutenant and two

¹ Applicant refers to brake-checking as the act of a vehicle applying brakes when not necessary.

deputy sheriffs, Applicant was confronted by what the witnesses told the officers and he admitted to retrieving his weapon from his truck but denied that he pointed it at the occupants of the SUV. He gave the officers permission to retrieve the gun from his truck and, after a loaded 9mm handgun was removed from Applicant's vehicle, he was placed under arrest. GE 3 at 4-7. During questioning, Applicant did not raise self-defense as an explanation for his role in this incident.

The occupants of the SUV and four other eyewitnesses also provided statements to the police. Although at hearing Applicant disputed some of the details of their statements, their renditions of events are essentially consistent with Applicant's version: that Applicant passed the SUV by driving down the median, that both cars engaged in aggressive driving, that Applicant stopped his truck once he was in front of the SUV, that he exited his vehicle and confronted the occupants of the SUV, that there was a physical altercation during which Applicant was punched, that Applicant returned to his truck and retrieved a handgun, and that Applicant held the weapon in the direction of the occupants of the SUV. While there are differences in some details (*e.g.*, who started the physical altercation, whether Applicant was initially tailgating the SUV or was brake-checked, and whether Applicant pointed the weapon at the occupants of the SUV or had it in the "tactical carry" position²), the pertinent facts are consistent.

Applicant was charged with two counts of Felony Aggravated Assault with a Deadly Weapon. He was allowed to enter a pre-trial diversion program and, after meeting the requirements of the program, the case was dismissed. Neither the driver nor passenger of the SUV was charged with any offense.

The Judge concluded that, although Criminal Conduct disqualifying condition AG ¶ 31(b) applied, the concern was mitigated under AG ¶ 32(a) because Applicant's conduct "was sensible and consistent with logical self-defense principles" and "it was reasonable for Applicant to believe the driver wanted to cause him harm." Decision at 6. He also found that AG ¶ 32(d) applied and concluded that "[t]here is ample evidence to find there has been successful rehabilitation." *Id.* The Judge did not make a specific finding that any disqualifying condition applied under Guideline E but noted that "Department Counsel argued that ¶ 16(c) applies." *Id.* Despite that ambiguity, he found that AG ¶ 17(c) applied for the same reasons he found in Applicant's favor under Guideline J. *Id.* at 6.

Discussion

On appeal, the Government challenges several of the Judge's factual findings and argues that his applications of the mitigating conditions and the whole-person concept were arbitrary, capricious, and contrary to the weight of the record evidence. Underlying the Government's allegations of error is an assertion that the Judge erred in concluding that Applicant's conduct was justified because he was in fear of his life. This argument has merit.

² Applicant described the "tactical carry" position as one in "which the gun is out in front of you, but it's pointing down." Tr. at 30, 41-42.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that “a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Dept. 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).

When a judge’s factual findings are challenged, the Board must determine whether those findings “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.” Directive ¶ E3.1.32.1. A judge’s decision can be found to be arbitrary or capricious if “it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts 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. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As detailed below, the Judge’s findings do not reflect a reasonable interpretation of the record evidence.

Reduced to its simplest component, the essence of the security concern in this case is the manner in which Applicant conducted himself under the circumstances. The Judge’s mitigation analyses under Guidelines E and J and his whole-person analysis are based upon his acceptance of Applicant’s claim that the actions he took were justified because he was in fear for his life. The Judge found as fact that:

[Applicant] got out of his vehicle for two reasons, first, he thought if the driver mistook him for someone else, seeing that he was not that person would deescalate the situation. Second, Applicant feared for his personal safety. He was worried because the other driver was acting so aggressively, they could get out of their car with a gun and shoot him from behind. [Decision at 2.]

In his mitigation analysis, the Judge concluded:

Applicant’s decision to get out of his vehicle, so that he would not get shot from behind, was sensible and consistent with logical self-defense principles. Given his interaction on the road with the other driver, it was reasonable for Applicant to believe the driver wanted to cause him harm. Applicant was legally carrying his firearm. Despite being physically attacked, Applicant used the proper amount of force, brandishing his pistol to prevent further assault. [Decision at 6.]

These findings and conclusions fail for several reasons.

As noted above, Applicant never claimed self-defense in his multiple interviews with law enforcement at the scene. Moreover, there is no factual basis in the record to support his contention that he was in any serious danger or that “whatever was inside this vehicle, human-wise, they were extremely violent.” Tr. at 24-25. No witness accounts corroborate Applicant’s claim that the situation began when the driver of the SUV brake-checked him without provocation or otherwise threatened him. But, even accepting at face value that the brake-checking occurred, the evidence does not support a conclusion that it was an act of aggression such that it would reasonably put Applicant in fear for his life. Furthermore, if Applicant perceived a sense of danger that could somehow justify driving on the median rather than calling 911 or simply increasing the distance between the vehicles or merging into the other lane,³ his actions after that were reckless and inconsistent with his claims of fear of bodily harm. He was the aggressor, not a victim, when he exited his truck, confronted the occupants of the SUV, and brandished a weapon. Applicant’s attempt at an *ex post facto* justification of his actions by asserting that he was in danger because an occupant of the SUV had a criminal history is irrelevant because that fact was unknown to him at the time of incident and could not possibly have influenced his state of mind or his conduct. As such, the Judge’s conclusion that “the evidence that the other driver was a habitual felony offender gives further credibility to Applicant’s version of events and actions that day”⁴ has no basis in the record evidence.

The Judge’s finding that Applicant feared for his life yet chose to confront the occupants of the SUV to “deescalate the situation” is illogical and wholly inconsistent with the record evidence, let alone common sense. Decision at 2. Nothing in the evidence supports Applicant’s professed belief that the occupants of the SUV were armed and might shoot him as he claimed as justification for his actions. There also is no evidence explaining why, if Applicant was in fear of his life, he would exit his truck and confront a presumptively-armed individual whom he believed was intent on shooting him. Contrary to the Judge’s finding, the record evidence reflects that Applicant’s conduct escalated, not de-escalated, the situation. Even if Applicant felt threatened after having been punched – which he provoked by confronting the SUV’s passenger – it does not follow that re-engaging the passenger with a handgun was a warranted or necessary defensive response.

While the Board gives deference to a judge’s credibility determinations (Directive ¶ E3.1.32.1), our deference is not unfettered. As we have previously held, when the record “contains a basis to question an applicant’s credibility,” the judge “should address that aspect of the record explicitly.” ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). 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 or common sense. Failure to do so suggests that a judge “has merely substituted a favorable impression of an applicant’s demeanor for record evidence.” *Id.*

³ Applicant’s claim that it was not possible to merge into the right-hand lane is implausible. He testified that the right lane was bumper to bumper, so a car could not merge into that lane “unless they forced themselves over and, like, made a car stop to let them over.” Tr. at 44-45, 47. However, rather than attempt this standard merge tactic, he elected to drive down the off-road median.

⁴ Decision at 6.

In this instance, the Judge does not explain why he discounts evidence which, on its face, would suggest that Applicant's presentation at the hearing was self-serving. In cases that do not proceed to trial—such as this one—the police report typically provides critical information about the circumstances surrounding the arrest, both from the standpoint of complainants and from the neutral observations of law enforcement officers or witnesses. Here, the Judge failed to address significant contradictory evidence and internal inconsistencies between Applicant's state of mind as claimed at his security clearance hearing and the facts as he and others presented them as recorded in police reports. Our review of the record convinces us that Applicant's story is contradicted by other evidence and is so internally inconsistent or implausible that a reasonable fact finder would not accept it, undermining the Judge's favorable credibility determination.

In his mitigation analysis, the Judge considered, among other things, Applicant's lack of a prior criminal record, his successful completion of probation, his honorable military service, and the amount of time that had elapsed since the events in question. This led him to conclude that Applicant had been successfully rehabilitated. However, while those facts provide a degree of mitigation, the 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). This is especially true in an instance such as this in which Applicant claims no wrongdoing in the face of significant evidence to the contrary.

In a security clearance adjudication, an applicant's acceptance of responsibility is an indication of whether he has reformed and rehabilitated himself, which is then used in concluding if that individual has demonstrated the high degree of reliability, trustworthiness, and good judgment required of persons granted access to classified information. When an applicant is unwilling to accept responsibility for his own actions, "such a failure is evidence that detracts from a finding of reform and rehabilitation." ISCR Case No. 96-0360 at 4-5 (App. Bd. Sep. 25, 1997). Applicant's adherence to an implausible explanation for his conduct seriously undercuts the Judge's finding that he has mitigated his misconduct. *E.g.*, ISCR Case No. 03-01009 at n.7 (App. Bd. Mar. 29, 2005).

In summary, Applicant's self-serving version of events is implausible and controverted by neutral witnesses and logic. The Judge failed to adequately address contradictory evidence. In concluding that Applicant acted in self-defense and that his conduct was justified, the Judge substituted a favorable credibility determination that is inconsistent with the record evidence. This flawed credibility determination distorted his findings of fact and his analysis regarding Applicant's state of mind, and rendered his decision arbitrary and capricious.

Conclusion

The Government has met its burden on appeal of demonstrating reversible error. When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The former is appropriate when the legal errors can be corrected through remand *and* there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence. If the identified errors cannot be

remedied on remand, the decision must be reversed. *See* ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024) (citation omitted).

Considering the record as a whole, the Judge's findings are arbitrary and capricious as they fail to consider important aspects of the case, reflect a clear error of judgment, and run contrary to the weight of the record evidence. Accordingly, the Judge's favorable decision is not sustainable under *Egan*. After addressing the identified errors, the Board concludes that a denial of security clearance eligibility is the clear outcome based on the record and the Judge's favorable decision is reversed.

ORDER

The decision in ISCR Case No. 23-00583 is REVERSED.

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