

KEYWORD: Guideline J; Guideline E

DIGEST: Given the record evidence, it was reasonable for the Judge to conclude that Applicant committed the assaults and that charges were dropped for reasons that were not inconsistent with Applicant's guilt. Adverse decision affirmed.

CASENO: 14-01763.a1

DATE: 11/03/2015

DATE: November 3, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-01763
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 18, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On August 31, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge made a finding that was not supported by the record evidence; whether the Judge considered all of the evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant served in the U.S. military from 1983 until his retirement in 2005. He holds a master’s degree. Applicant has been married three times, the first two marriages ending in divorces. Applicant has two children, ages 17 and 29. He has held a security clearance since 1987. Applicant is currently employed by a Defense contractor.

Applicant’s SOR alleges seven incidents in which he was charged with assault-related offenses, one of them a felony. Six of the charges were dismissed, and the disposition of the remaining one was not alleged. In addition, the record contains evidence of other non-alleged misconduct of a similar nature, including a commander’s report of adverse action substantiating that Applicant had struck his then-wife several times on the chest, neck, and head with his fist; an affidavit completed in 1992 in which Applicant admitted to having hit a former wife;¹ a 2003 incident in which military Family Advocacy Program (FAP) officials substantiated an assault by Applicant on his second wife;² a 2013 sheriff’s report describing Applicant’s having committed a battery by strangulation; and two incidents from 2014, evidenced by sheriff’s reports, in which Applicant was described as having shoved his wife and, in the latter incident, placed his hands around her throat. The Judge stated that he was considering the non-alleged assaults in evaluating Applicant’s credibility, his case for mitigation, the whole-person analysis, etc.³ Applicant either

¹“There have been times when I have hit my wife and I believe being abused myself makes it easier for me to strike another.” Decision at 3, quoting from Government Exhibit 11, Affidavit, dated December 5, 1992.

²Applicant claimed that he acted in self-defense. FAP officials substantiated mutual assaults by both Applicant and his spouse. Decision at 3.

³A Judge is precluded from raising security concerns outside the scope of the SOR without amending the SOR and giving the parties a reasonable time in which to prepare to address the amendment. However, conduct not alleged may be relevant for other purposes, for example in evaluating an applicant’s evidence for extenuation or mitigation and for assessing his credibility. *See, e.g.*, ISCR Case No. 14-00151 at 3, Note 1 (App. Bd. Sep. 12, 2014). The Judge evaluated Applicant’s non-alleged misconduct in its proper context.

denied that he committed the misconduct described above or claimed that he was acting in self-defense.

Applicant has attended an anger management class as a result of one of the charges. He has also consulted with a psychiatrist during the course of his current marriage. Applicant stated that his current wife is an alcoholic and that when she drinks he leaves the residence. Applicant enjoys a good reputation for trustworthiness, integrity, and devotion to protecting U.S. interests.

The Judge's Analysis

The Judge cleared Applicant of one Guideline E allegation concerning an omission from his security clearance application. He arrived at a different conclusion for the allegations under Guideline J as well and one under Guideline E that cross-alleged the same misconduct. The Judge noted that Applicant had never been convicted of any of the assault charges evidenced in the record. However, he found that the Government had presented sufficient evidence to establish that the misconduct underlying the charges took place. The Judge stated that some of the incidents were corroborated by witnesses or by evidence of the complainant's injuries. He also noted that the record contains evidence of multiple victims. He stated that, in domestic abuse cases, it is not surprising that a victim might be unwilling to pursue charges against her primary income earner. The Judge found that Applicant's denials of culpability were not credible and that the evidence raised security concerns.

In evaluating Applicant's case for mitigation, the Judge acknowledged that some of the victims may not have been blameless themselves insofar as they may have participated in the violent conduct. However, the Judge concluded that, despite provocation, Applicant was a willing participant. He noted that the incidents contained in the record involved five different victims and occurred over a lengthy period of time, from 1987 to 2014. The Judge cited to evidence that Applicant has sought marital counseling. However, he concluded that there was insufficient reason to believe that the misconduct will not recur, insofar as the stressors that gave rise to the assaults are still present in Applicant's life. The Judge cited to evidence of Applicant's military service and good employment record but stated that Applicant had presented insufficient evidence of reform and rehabilitation.

Discussion

Applicant challenges the statement in the Analysis portion of the Decision that it is not surprising that an assault victim might decline to pursue charges against the household's income earner. He contends that this was not supported by any evidence in the record. We examine a Judge's findings of fact to see if they 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.

We have considered this assignment of error in light of the record as a whole. Applicant is correct that there is no evidence that explicitly addresses this matter. However, the record contains

substantial evidence of (1) numerous assault charges against Applicant extending over a lengthy period of time; (2) multiple victims of the assaults; (3) the contents of military records and police/sheriff's reports that establish assaults by Applicant against domestic partners; and (4) Applicant's 1992 admission that he had hit a former wife. We also note evidence in which authorities cited to a lack of cooperation by victims as a reason for declining to prosecute, without stating or suggesting that the charges were unfounded.⁴

Under these facts, it was reasonable for the Judge to conclude that Applicant committed the assaults at issue here and that the charges against him were dropped for reasons not inconsistent with his guilt. *See* ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011) for the proposition that dismissal of charges does not preclude a Judge from finding that the underlying conduct occurred.⁵ Insofar as the victims were spouses or persons residing with Applicant, the Judge inferred that they may well have been concerned about a loss of income should Applicant have been convicted. This inference was reasonable. Even if the Judge had not drawn this inference, however, there is no reason to believe that he would have arrived at a different overall decision. Therefore, even if the Judge's comment constituted an error, it was harmless. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007), for a definition of harmless error. Applicant has not identified any harmful error in the Judge's findings of fact. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant cites to evidence favorable to him, such as his character references, his having never been convicted of any charges, and his clean security record. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-08412 at 2 (App. Bd. Sep. 11, 2015). Neither has he demonstrated that the Judge mis-weighed the evidence.

In support of his appeal, Applicant cites to a Hearing Office case that he believes supports his effort to retain his clearance. We have given this case due consideration as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-02632 at 3 (App. Bd. Aug. 28, 2015). The case that Applicant has cited is different from his own in many ways, including that it arose from a single incident rather than numerous ones. This case does not provide a reason to conclude that the Judge erred in his analysis of Applicant's security-significant conduct.

⁴*See, e.g.*, Government Exhibit 3, Employer's Adverse Information Report, that contains a bill of No Information by the State Attorney for the 2013 incident. It states in pertinent part, "The Victim does not wish to proceed or cooperate with the State, and based thereon, the State will not be able to meet its burden of proof beyond a reasonable doubt."

⁵Indeed, it can be error for a Judge to conclude, as Applicant proposes, that the dismissal of multiple charges means that the defendant was innocent. *See, e.g.*, ISCR Case No. 14-02567 at 5-6 (App. Bd. Oct. 5, 2015): "[C]harges can be dismissed for any number of reasons that are consistent with guilt. 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." (footnote omitted)

Applicant argues that Applicant’s denials of wrongdoing were worthy of belief, citing to evidence that the charges were dismissed. He also states that not all of the charges were dropped because the victims refused to cooperate. We give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. It is true that the record does not describe specific reasons for many of the charges having been dropped. However, considering the evidence as a whole, that does not provide a reason to conclude that Applicant’s claims of factual innocence were worthy of belief. Applicant’s appeal brief does not point to evidence that undermines the Judge’s credibility determination.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors.. The multiple nature of the assaults, the multiple victims, the length of time over which the misconduct took place, the relative recency of Applicant’s last recorded incident of domestic battery, and the Judge’s adverse credibility determination support his overall conclusions. The 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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board