

KEYWORD: Guideline E; Guideline J

DIGEST: Applicant cites to his character references, which he believes that the Judge either did not consider or to which the Judge failed to extend the proper weight. Applicant’s arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record, nor are they sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 17-01472.a1

DATE: 08/06/2018

DATE: August 6, 2018

In Re:)	
)	
-----)	ISCR Case No. 17-01472
)	
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 28, 2017, 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). Applicant requested a hearing. On April 12, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy 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’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant has worked in the Defense industry for many years and for his current employer since 2015. He was most recently granted a security clearance in 2010. In 2006, Applicant was arrested and charged with assault and battery upon a family member. He and his wife engaged in an argument, resulting in a mutual affray. Both were charged, but the case was dismissed because neither party agreed to testify.

In 2016, Applicant was charged with assault and battery. His wife stated that he had struck her with an electrical cord. Applicant pled no contest to this charge, and the court deferred adjudication until June 2018. There is no documentary evidence in the file regarding the disposition of this case, except for a JPAS entry based upon a letter from Applicant’s attorney.

Applicant’s wife obtained a protective order against him. When Applicant learned that his wife had taken out a line of credit from the equity on their home, he suggested that his son talk to his wife and persuade her to put the money back. He realized that this might be a violation of the protective order and deleted the text to his son. Applicant was indeed charged with violating the protective order by attempting to contact his wife through a third party, though it was not prosecuted. Applicant’s wife lodged other charges against him, for example rape and assault and battery, that were not prosecuted as well.

Applicant submitted several letters of recommendation that described him as hard working and professionally competent. He is described as calm, trustworthy, and honest.

The Judge’s Analysis

The Judge noted that the only evidence in the record to substantiate the charges against Applicant came from his wife. On the other hand, the Judge stated that Applicant had presented no evidence to undercut the veracity of her statements. The Judge relied in large measure upon the arrests in 2006 and 2016, citing to evidence that the latter resulted in a no contest plea and is in deferred adjudication status. Though Applicant has lived apart from his wife and has completed a

domestic violence program, the Judge concluded that insufficient time had passed to mitigate the concerns arising from Applicant's criminal charges.

Discussion

Applicant's brief appears to assert that his due process rights were impugned. In making his arguments, he presented new evidence, which we generally cannot consider. However, we will consider new evidence insofar as it bears upon threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No.16-01129 at 2 (App. Bd. Aug 7, 2017).

Applicant asserts that he was not able to hire an attorney to represent him. He states that the Department Counsel "played down the seriousness of the hearing. In our first conversation, he started off by saying, '[Applicant], I want to allay your fears about the upcoming event.' He went on [to] explain the process and told me he did not intend to call any witnesses or object to anything I submitted." Appeal Brief at 1. We find nothing objectionable or misleading in the statements attributed to Department Counsel. To the extent that Applicant is contending that Department Counsel in some way caused him to approach the hearing with insufficient seriousness, thereby resulting in a less vigorous mitigation case than he could otherwise have presented, we find nothing in his brief to support such a claim. Moreover, Applicant received pre-hearing guidance from DOHA, as well as a copy of the Directive, which notified him of his rights and responsibilities in presenting his case. Applicant confirmed receipt of both items at the hearing. Transcript pp. 7-8. There is no reason to believe that Applicant was denied adequate notice of his rights or that he was denied the due process afforded by the Directive.

Applicant cites to his character references, which he believes that the Judge either did not consider or to which the Judge failed to extend the proper weight. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record, nor are they sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018). Applicant contends that the Judge erred in finding that there was no documentary evidence of the deferred adjudication status of his 2016 assault charge. The challenged finding is consistent with the record that was before the Judge. In any event, the Judge found that this charge was indeed in deferred adjudication; therefore, even if there were an error it was harmless.

The record supports a conclusion that the Judge examined the relevant data 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)). The Judge's adverse 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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board