

KEYWORD: Guideline E

DIGEST: Applicant failed to demonstrate that the Judge mis-weighed evidence concerning her ex-husband’s responsibility for initiating conduct alleged in the SOR. The Judge’s whole-person analysis is sustainable even though he did not explicitly mention every factor listed in the Directive. Adverse decision affirmed.

CASE NO: 08-04806.a1

DATE: 05/17/2011

DATE: May 17, 2011

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In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 20, 2009 DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 28, 2011, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 48 years old. She has a bachelors degree which was awarded to her in 1984. She married the same year. She was a full-time housewife and mother from 1986 to 1997 and had three daughters during that time. Applicant's employment history includes working as a contractor at the Pentagon on September 11, 2001. Her office was located on an interior ring near the location where the commercial jet crashed into the outer ring of the building. The explosion impacted her office and she and her colleagues successfully evacuated the building. Applicant has a good employment record and the central theme of the available information is that she is a reliable, dedicated, and competent employee and a trustworthy person. She is also active in her church and its community outreach ministry.

Applicant's marriage was troubled for a period of years. It ended in the alienation of her three daughters from her as well as divorce in 1998. During her marriage and after her divorce, Applicant was involved in numerous incidents indicative of questionable judgment. In January 1994 Applicant was involved in a domestic dispute with her husband which resulted in the police issuing her a citation or summons for disorderly conduct. She had drunk alcohol prior to this incident. In May 1994, Applicant was involved in another domestic dispute with her husband. The argument escalated to the point where Applicant, probably having a severe anxiety attack, struck herself in the leg with a shovel. She may have threatened to hit her husband with the shovel. She had feelings of wanting to hurt herself further. She was admitted to the hospital "by the detention process" with an admission diagnosis of major depression, borderline personality disorder. She described suicidal ideation and homicidal ideation. Although her husband initially pressed criminal charges, they were dropped. Applicant was discharged from the hospital after a few days. In September 1996, Applicant attempted suicide by hanging herself with an electrical cord in her garage. The incident stemmed from an argument between Applicant and her husband. Applicant was initially hospitalized and then transferred to the psychiatric unit of the hospital of her treating psychiatrist, who was treating her on an outpatient basis. In May 1997, Applicant cut herself on the wrist or forearm in an attempt to get her husband's attention. She explained she did so as a coping mechanism to deal with the emotional pain she was experiencing at the time.

In June 1998, Applicant was involved in a domestic dispute with her husband. She had consumed several beers during a party. As her husband was attempting to leave the location in a vehicle, Applicant struck the vehicle's side mirror with a rock and then threw the rock through a closed window. Applicant was arrested and charged by the police based on her husband's report that she scratched him. She spent a night in jail. The charge against her was *nolle prossed*, but her husband obtained a child protective order based on Applicant's emotional state and past history. She was removed from the household for 30 days. Applicant and her husband divorced some months later. About a month after the 9/11 terrorist attack, Applicant was arrested for driving while intoxicated. She was also charged with the felony offense of assault and battery upon a police officer based on her conduct at the police station. The incident stemmed from Applicant's drinking too many beers at a party hosted by her softball team. Applicant pleaded guilty to the DWI charge, and the assault charge was *nolle prossed*. In January 2003, Applicant was arrested and charged with the offense of public swearing/intoxication. It was an alcohol related incident. Applicant and her

ex-husband's new wife were having words at Applicant's former residence, which was rented out to a third party. Applicant spent the night in jail and was released the next day. The misdemeanor offense was eventually resolved when Applicant paid a small fine and court costs. In January 2008 Applicant received a summons to appear in juvenile and domestic relations court for the misdemeanor offense of making annoying phone calls to her ex-husband. This incident stemmed from Applicant's repeated phone calls to the residence of her ex-husband in an effort to speak to her daughters. Applicant appeared in court, paid a small fine, and was ordered to have no further contact. In addition, the record contains documentary evidence showing Applicant was listed as the complainant or victim on six occasions during 1993-2005. It is probable that her husband was less than an ideal spouse, and it is probable that he emotionally and physically abused Applicant.

Applicant has been under the care of a psychiatrist since 1994. She has been hospitalized for brief periods for mental health reasons four times since 1994. The general Axis I diagnosis for these treatments was adjustment reaction with depressed mood and major depression, recurrent. Applicant's psychiatrist's current diagnostic impression of Applicant, consistent since 2008, is dysthymic mood disorder (chronic depression) and his prognosis is good with continuous treatment because it is a lifetime illness. He believes Applicant has been in remission for some time, that her judgment is good, she is not in crisis, and she requires minimal medication. Applicant has been in a close and intimate relationship with a gentleman for the last several years. He thinks she has come to closure with her lack of relationship with her daughters, her consumption of alcohol is moderate, and she is no longer self-absorbed but is stable and comfortable with her situation. Applicant's current consumption of alcohol is moderate. The last time she drank to the point of intoxication was in 2003.

The Judge reached the following conclusions: Taken together, the numerous incidents indicative of questionable judgment demonstrate a long-term pattern of behavior. This was for the most part related to Applicant's failed marriage, which led to her acting out in anger or frustration or both to the point that she required hospitalization more than once. The pattern often included law-enforcement intervention. The pattern also included the periodic abuse of alcohol, although that is not a current concern. The overall pattern of behavior raises a security concern and may be disqualifying. Applicant presented substantial evidence in mitigation, including a difficult and abusive marriage that contributed to many of the incidents, an outstanding employment record, a long-term personal relationship that is providing stability, a positive outlook, an ability to cope, and an improved mental health situation. Nevertheless, Applicant's evidence in mitigation is outweighed by a well established pattern of behavior that is indicative of questionable judgment. Given that the last incident took place less than three years ago in 2008, it is too soon to tell if this part of Applicant's life is safely in the past or will recur yet again. What is missing here is a long-term track record of Applicant conducting herself as a stable, responsible and law abiding citizen. Considering the numerous incidents, along with the multiple hospitalizations, a period longer than three years without further problematic incidents is necessary to fully mitigate the security concern.

Applicant argues that: (1) the Judge improperly underplayed the actions of Applicant's ex-husband in evaluating the incidents giving rise to the SOR allegations and erroneously held Applicant accountable for the false and vicious attacks perpetrated upon her by her ex-husband and his new wife; (2) the Judge ignored Applicant's strengths and accomplishments in lifting herself out of the morass that was her relationship with her husband; (3) the Judge gave undue weight to the

2008 annoying phone call incident, which is the only incident on the record since 2003; (4) the Judge erred in not applying Guideline E mitigating factors in Applicant's favor; (5) the Judge engaged in a piecemeal analysis of the case; and (6) the Judge did not engage in a proper whole-person analysis. The Board construes these various arguments as an overall assertion that the Judge's decision was arbitrary, capricious, or contrary to law. The Board concludes that the Judge's ultimate decision is sustainable.

The crux of Applicant's arguments is a disagreement with the Judge over emphasis. The Judge's decision clearly indicates, and Applicant acknowledges, that the Judge recognized the connections between the domestic strife between Applicant and her husband and the various incidents and involvements with the criminal justice system. The Judge explicitly concluded that Applicant's circumstances were, to an extent, mitigating. Applicant argues however that the Judge fails to grasp the magnitude of the suffering Applicant endured at the hands of her abusive and manipulative husband and later his second wife. Applicant asserts that the Judge was, in essence, "blaming the victim." After a review of the entire record, the Board concludes that the Judge's interpretation of the record evidence was reasonable. The Judge discussed Applicant's circumstances over a period of many years in considerable detail, indicating that he carefully considered evidence favorable to Applicant. The test on appeal is whether the Judge's 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 contradictory evidence in the same record. Directive, ¶ E3.1.32.1. The Judge's findings and conclusions satisfy this test. The Board notes that the evidence does not establish that, in terms of physical altercation, Applicant's husband was the aggressor in all the incidents, nor was a dispute with her ex-husband connected to her arrest in 2001 for DWI and assault upon a police officer.

As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. The Judge properly considered the whole pattern of Applicant's involvements with law enforcement, her sometimes excessive use of alcohol, and her attempts to bring physical harm to herself, as well as the more favorable evidence of her conduct since 2008, and concluded that Applicant had not fully mitigated the government's concerns. On these facts, under the *Egan* standard, the Board is not prepared to conclude that the Judge was required to find that Applicant had overcome those concerns.

Applicant states that the Judge did not engage in a proper whole-person analysis. A review of the Judge's overall discussion and analysis of the facts and circumstances of the case convinces the Board that the Judge adequately considered the whole-person factors, even if he did not specifically discuss them under the whole-person rubric. Applicant also asserts that the Judge engaged in a piecemeal analysis of the evidence in the case by not considering the circumstances behind Applicant's charged conduct. This is a variation of Applicant's primary argument that the

Judge did not adequately consider Applicant's status as a victim of her husband's malfeasance. For reasons previously articulated, the Board concludes that the Judge did not err on this point. Moreover, the Judge's decision indicates an emphasis on consideration of Applicant's overall pattern of conduct, including the circumstances surrounding that conduct over a period of many years. This is the opposite of a piecemeal approach.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

### **Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

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

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board