KEYWORD: Guideline E; Guideline G

DIGEST: Applicant contends the Judge "became angered with me and extremely intimidating for not recalling (incorrect count of two DUI's) and he did not allow me to explain why I felt the information was incorrect." He further asserts that he felt the Judge "bullied" him into agreeing with a response when he was not comfortable with it. From our review of the record, we conclude there is no basis for Applicant's assertions. While the Judge interrupted Applicant's testimony to ask pointed questions, his questioning of Applicant was not inappropriate, and he provided Applicant ample opportunity to explain himself. Furthermore, Applicant was represented at the hearing. At no time during the segment of the hearing in question did Applicant's counsel object to the Judge's questions or conduct. Applicant's assertions are not sufficient to rebut the presumption the Judge was impartial. Adverse decision affirmed.

CASENO: 14-05801.a1

DATE: 04/18/2019

DATE: April 18, 2019

In Re:	)	
----------	)	ISCR Case No. 14-05801
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 April 20, 2018, DoD 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 August 22, 2018, Department Counsel amended the SOR to add allegations under Guideline G (Alcohol Consumption) as well as an additional allegation under Guideline E. On February 7, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge was biased; whether Applicant was denied due process; 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 and Analysis

Applicant, who is 58 years old, has a history of alcohol-related incidents and problems in the workplace. In about 1978 to 1979, he was arrested twice for driving under the influence (DUI). During an interview in 1987, he stated he was fined more that $100 for one DUI and could not recall the amount of the fine for the other. At the hearing, he could not remember being arrested for DUI during that period but eventually conceded he was arrested as alleged. Later, he again stated he could not recall those incidents. "Applicant's testimony and statements about this and other incidents were evasive, inconsistent, and not credible." Decision at 2.

In 1988, Applicant was arrested and charged with drunk driving and speeding. A military police report of the incident reflects his blood alcohol content measured "12% and 13%."[1] He pled guilty to reckless driving, paid a $200 fine, and had his driver's license suspended. In 2007, he was charged with public swearing/intoxication. He paid a fine and the charge was dismissed. In 2013, he was arrested and charged with driving while intoxicated (DWI). He pled guilty to reckless driving and was sentenced to 60 days in jail (suspended), probation for 12 months, a fine, and a restricted driver's license. In a later background interview, he stated the 2013 arrest was an isolated incident and denied ever being charged with any other alcohol-related offenses. In his SOR response, he also stated, "this was my first and only offense in my entire driving history . . . . I emphasize that this was my first offense, at that time, in my entire driving history." Decision at 3, quoting from SOR Response.[2] At the hearing, he testified that he did not intend to be dishonest with those comments and thought the investigation was limited to the past seven years. In 2014, he was charged with reckless driving: improper brakes, and was found guilty of improper control/driving. He attributed the last offense to stopping abruptly when a car cut in front of him while he was reaching for sunglasses.

In 2007, Applicant was terminated from a job when multiple pornographic images were discovered on his network drive. He claims he brought in a CD from home and accidently loaded those images while he was copying other files. "He stated that he was terminated the next day, 'on the same day that [he] had planned to resign.'" Decision at 4. He provided a similar but slightly different account during a 2009 background investigation.

[1] Decision at 2. The military police report reflects Applicant's blood alcohol content was ".12% and .13%."

[2] Of note, Applicant submitted his initial SOR response on May 24, 2018, about four months before the SOR was amended to add other alcohol-related driving incidents.

In 2013, Applicant received a written reprimand for violating company policy when he downloaded a file from his personal email account that contained multiple usernames and passwords for DoD accounts and other personal information. At that time, he was warned of potential consequences for future security incidents. Later that year, he plugged a personal phone into his work computer and immediately removed it when he was told he was violating security rules. About a month later, he commented to the person next to him during a work meeting that, if he brought a firearm, he could take out the entire leadership or a bomb could do the same. He denied making a threat and meant the comment as an observation about a lack of security.

The Judge determined that two of the Guideline E allegations were duplicative, found in favor of Applicant on one of them, and also concluded the allegation concerning the threatening comment was not proven by substantial evidence. The Judge further concluded that Applicant's inconsistent and contradictory testimony about his arrests are not worthy of belief and determined the remaining security concerns regarding Applicant's trustworthiness and judgment were unmitigated.

Discussion

Bias Issue

In his appeal brief, Applicant contends the Judge "became angered with me and extremely intimidating for not recalling (incorrect count of two DUI's) and he did not allow me to explain why I felt the information was incorrect." He further asserts that he felt the Judge "bullied" him into agreeing with a response when he was not comfortable with it. Appeal Brief at 1. These contentions apparently pertain to Applicant's testimony regarding allegation SOR ¶ 2.a that asserted he was arrested and charged twice with DUI between 1978 and 1979.[3] To the extent that Applicant is contending the Judge was biased against him, we note there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 17-02391 at 2 (App. Bd. Aug. 7, 2018)(*citing*, *Liteky v. United States*, 510 U.S. 540, 555-556 (1994) for the proposition that "expressions of impatience, dissatisfaction, annoyance, even anger" do not establish bias. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune."). From our review of the record, we conclude there is no basis for Applicant's assertions. *See, e.g.*, Tr. at 103-110. While the Judge interrupted Applicant's testimony to ask pointed questions, his questioning of Applicant was not inappropriate, and he provided Applicant ample opportunity to explain himself. Furthermore, Applicant was represented at the hearing. At no time during the segment of the hearing in question did Applicant's counsel object to the Judge's questions or conduct. Applicant's assertions are not sufficient to rebut the presumption the Judge was impartial.

Due Process Issue

[3] SOR ¶ 2.a states, "Between approximately 1978 and 1979, you were arrested on two occasions and charged with Driving Under the Influence."

Applicant's appeal brief also contends that he was denied the opportunity to present some evidence. His appeal brief and Department Counsel's reply brief contain documents that are not in the record. Generally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. The Appeal Board, however, can consider new evidence to address the threshold issues of jurisdiction and due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015).

During the hearing held on January 23, 2019, the Judge indicated that he would leave the record open until February 1, 2019, to provide Applicant an opportunity to submit additional matters. Tr. at 134-135. On January 24, 2019, Applicant's Counsel sent an email with an attachment to Department Counsel for submission to the Judge. On that same day, the Judge responded to both parties by saying, "I have received the e-mail and attached document. I will treat the record as closed unless there is a specific request otherwise." Reply Brief at Attachment 1. No responses or further emails from the parties about leaving the record open are in the record.

In his appeal brief, Applicant notes the Judge closed the record on January 25, 2019, *i.e.*, six days prior to the "agreed upon date." Appeal Brief at 1. He also states his lawyer sent one document to DOHA without waiting for additional evidence he was seeking to send. His appeal brief contains two documents. For purposes of resolving the appeal, we construe his brief as asserting that he intended to send the two documents to the Judge within the original time frame.

One of the documents attached to Applicant's appeal brief is a copy of the Amendment to the SOR with his circled and initialed "admit" or "deny" responses to each of the five allegations listed in that document. Interestingly, this copy of his response to the SOR Amendment does not match the one in the record. In the record copy of his SOR Amendment response, Applicant circled and initialed "admit" for each of the five listed allegations. Applicant's Counsel also provided two letters containing explanations for each of those five admissions. In the copy of the SOR Amendment response attached to his appeal brief, he circled and initialed "admit" for three of the allegations and "deny" for the other two. In the submitting that document, he stated, "I also included the 4 page amendment to the SOR which shows I Deny 2a. and 1g. which refers [cross-alleges] 2a.-2d. and explained why I feel Guideline G does not apply." Appeal Brief Cover Letter. However, he does not explain why the copy he submitted with his appeal brief does not match the one in the record. The copy of the SOR Amendment response attached to his appeal brief does not establish any due process violation. Moreover, because it contradicts record evidence without any explanation for that incongruity, it is considered new evidence and will not be considered in analyzing the merits of his appeal.

The other document attached to Applicant's appeal brief is a copy of a state court record. It is apparently being offered regarding the allegation in SOR ¶ 2.a.[4] The court record reflects that he was charged with operation while under the influence or while having an elevated blood alcohol

[4] In his appeal brief, Applicant asserts that he had "one suspected DUI" in 1980 instead of two as alleged in SOR ¶ 2.a. Applicant also challenges the Judge's adverse findings that Applicant was charged with public swearing/intoxication in 2007, but this was also an allegation that he admitted in responding to the SOR Amendment.

content and improper turn/stop.[5] While the date of arrest is unreadable, it reflects that he pled guilty to reckless driving and was fined in May 1980. In his brief, Applicant does not state that this document was forwarded either to his Counsel, Department Counsel, or the Judge before the original deadline for closing the record (February 1, 2019). Consequently, he has failed to establish a *prima facie* case of a due process violation. *See, e.g.*, ISCR Case No. 15-02933 at 2 (App. Bd. Sep. 23, 2016). Moreover, in the unlikely event the state court record was forwarded to DOHA before the original deadline and did not make it into the record, such an error was harmless because it likely did not affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15188 at 3 (App. Bd. Jul. 25, 2013). Given that Applicant admitted the allegation in SOR ¶ 2.a, the state court record is not sufficient to show that the Judge erred in his findings and conclusions regarding that allegation. Furthermore, even if the Judge would have found for Applicant on SOR ¶ 2.a in light of that document, such a change in the findings would not likely have altered the ultimate adverse decision considering the other unfavorable SOR findings.

Other Appeal Issues

Applicant states that he has no violations or incidents over the past five years while working with classified information and highlights his excellent job performance. He also argues that he had three reckless driving convictions over a period of 39 years with a 25-year span between the second and third offenses and such conduct does not show a pattern of excessive alcohol use. His arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 15-04856 at 2-3 (App. Bd. Mar. 9, 2017). Additionally, 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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *Id.*

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. 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, 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."

[5] The court document references a statute section for the original offense, which correlates to the charge noted above.

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