KEYWORD: Guideline G; Guideline H; Guideline J

DIGEST: Applicant point to statements and questions by the Judge which were inconsistent with the decorum normally anticipated in the courtroom. Nonetheless, they ar insufficient to rebut the presumption that the Judge's ultimate decision was based on the record evidence. Adverse decision affirmed.

CASENO: 09-07395.a1

DATE: 09/14/2010

DATE: September 14, 2010

In Re:	)	
	)	
-------	)	ISCR Case No. 09-07395
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Daniel Klein, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 8, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 22, 2010, after the hearing, Administrative Judge Carol G. Ricciardello 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 was biased against Applicant, and whether the Judge did not consider Applicant's work performance and did not give adequate weight to the mitigating evidence he presented. For the reasons discussed below, the Board affirms the Judge's decision.

The Judge made the following relevant findings of fact: Applicant is 48 years old. Applicant worked at a casino from 1996 until 2007, when he was laid off. Although using drugs while working at a casino was not permitted, Applicant used marijuana approximately once a month from about 1980 until sometime in 2007. Applicant passed a drug test in order to obtain his job at the casino, but did not have to take another drug test during his employment there. Applicant did not use any other illegal drugs. Applicant was arrested and charged with possession of marijuana in February 2004. Applicant pled guilty to the offense. Applicant stated that the drugs were in his car. Applicant's driver's license was suspended, and he was fined. Applicant was charged with possession of drug paraphernalia in September 2000, but Applicant stated that he did not remember that incident. Applicant was charged with possession of marijuana in March 1982. Applicant admitted using marijuana that day. Applicant stated that the charge was later dropped.

In March 1999, Applicant was charged with two felonies, unlawful possession of a weapon and receiving stolen property. Applicant stated that a passenger in his car put a stolen gun under the car seat when the police stopped the car. Applicant stated that he pled no contest and was awarded one year of probation. The record shows that Applicant was found guilty of possession of a hand gun and was sentenced to four years in jail, all of which was suspended.

Applicant was arrested for Driving Under the Influence of Alcohol (DUI) in December 2006. Applicant voluntarily attended group alcohol counseling before his court date for the arrest. The court date did not occur until June 2008, when Applicant was found guilty of Operating Under the Influence of Liquor or Drugs. Applicant's license was suspended for two years. Applicant continued to drink after his prior DUI arrest and was again arrested for DUI in October 2008. Applicant paid a fine, and his license was suspended for three years. Applicant attended a residential alcohol rehabilitation program; he was diagnosed as an alcoholic and advised not to drink again. Applicant continues to consume alcohol, his last drink being four or five days before the hearing. Although Applicant drinks alcohol about twice a week, he attends Alcoholics Anonymous or Narcotics Anonymous meetings.

Applicant alleges that he did not receive a fair hearing because the Judge was biased against him. Applicant points out examples in the transcript of what he considers to be the Judge's bias against him. He also states that there was bias evident in the Judge's tone of voice which does not appear in the written record. 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. The issue is not whether Applicant personally believes that the Judge was biased against him; rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question her fairness and impartiality. Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions in a case, or because Applicant strongly disagrees with the Judge's findings or conclusions. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). In pointing out his examples of alleged bias, Applicant adds a significant amount of commentary and characterization which are not reflected in the record. Our review of the transcript leads us to conclude that, at most, this case is comparable to ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006), where we concluded that "Applicant points to several examples of statements and questions by the Judge which were inconsistent with the decorum normally anticipated in the courtroom. While these comments were gratuitous and at times harsh, they do not rebut the presumption that the Judge ultimately decided the case on anything other than the record evidence." The examples cited by Applicant do not rise to the level that might lead a reasonable person to question the Judge's impartiality. *Compare* ISCR Case No. 07-18525 at 2 (App. Bd. Feb. 18, 2009), where the Board remanded to another Judge in light of the "vigor and length" with which the Judge questioned Applicant " as well as her citation in the course of that questioning to matters outside the record." Applicant has failed to meet the heavy burden associated with a demonstration of bias on appeal.

Applicant maintains that the Judge did not consider his work performance. There is a rebuttable presumption that the Judge considered all the record evidence, and there is no requirement that the Judge mention or discuss every piece of evidence when reaching a decision. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). It does not appear that Applicant submitted formal work evaluations from his employer, but the record contains letters of reference from persons who know him. While the Judge did not specifically mention Applicant's work performance, she stated that she considered the character reference letters which Applicant had submitted. She found that Applicant is "honorable, honest, and dependable" and that he is "a conscientious and responsible employee, who is motivated and a natural leader." Decision at 4. Applicant has not demonstrated error in this regard.

Applicant also argues that the Judge did not give adequate weight to his evidence of mitigation. Applicant admitted six of the SOR allegations against him. Decision at 2. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised under Guideline G and Guideline J.[1] The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security determination. 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*. A party's disagreement with the Judge's weighing of the

[1]The Judge found in Applicant's favor with regard to Guideline H. The Judge's findings under Guideline H are not in issue.

evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate that 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. 06-23384 at 3 (App. Bd. Nov. 23, 2007). Applicant has not demonstrated error.

The Judge examined the relevant data and articulated a satisfactory explanation for her decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines 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.'" *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge's adverse decision is sustainable.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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