

KEYWORD: Guideline J; Guideline E

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the evidence. Applicant failed to rebut the presumption that the Judge was unbiased. Adverse decision affirmed.

CASE NO: 11-05027.a1

DATE: 11/26/2012

DATE: November 26, 2012

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 9, 2012, DOHA 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 September 13, 2012, after the hearing, Administrative Judge Arthur E. Marshall, Jr., 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 failed to consider all of the record evidence and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: During his teenage years, and into his adult life, Applicant committed a series of criminal offenses, many involving alcohol. In addition to charges of operating a vehicle while under the influence of alcohol (OUI), Applicant was also charged, at various times, with assault, on one occasion a felony assault. As a result of his most recent OUI, Applicant was required by the court to attend an inpatient alcohol treatment program. Applicant has stopped drinking and his wife helps him maintain his sobriety. His family has provided him with stability.

In completing his security clearance application (SCA), Applicant made some false statements. For example, he denied having been arrested; having been charged with a felony; or having been ordered to seek alcohol counseling or treatment. He also stated that he had been laid off from a job, denying that he had ever been fired or had ever left a job under unfavorable circumstances. Applicant contended that he had mis-read the questions about his police record or had forgotten about some of the incidents. However, he admitted to having knowingly provided a false answer to the question about his job termination, stating that he was embarrassed to have been fired.<sup>1</sup>

In the Analysis, the Judge found in Applicant's favor under Guideline J for the alcohol and assault offenses, concluding that Applicant had made significant changes to his conduct, thereby demonstrating rehabilitation. However, he found against Applicant regarding a Guideline J allegation that he had falsified his SCA. Under Guideline E, the Judge concluded that Applicant had not intentionally falsified the SCA questions about his criminal history, accepting as credible Applicant's explanations of having misread the questions, etc. However, the Judge stated that he could not enter a favorable finding regarding Applicant's false statement about his job termination. Noting Applicant's testimony that he had intentionally failed to provide correct information on this matter, the Judge concluded that Applicant had failed to demonstrate mitigation, given the relative recency of the misconduct.<sup>2</sup>

Applicant cites to record evidence of his military service and other things that he believes support his case for a clearance. A Judge is presumed to have considered all of the evidence in the record, and Applicant's brief is not sufficient to have rebutted that presumption. *See, e.g., ISCR*

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<sup>1</sup>Applicant testified that his employer had not permitted him to miss work in order to attend the court-ordered alcohol treatment and, when he had attended the program anyway, terminated his employment. "Q: So, he told you that you were fired? A: He says I have to let you go. Q: So when you wrote . . . that the reason for leaving is you were laid off from [employer], that was a false statement, is that right? A: Yes, yes it was. Q: Okay. And you wrote that you weren't fired, that was also a false statement, is that right? A: Yes, I will agree on that. Q: Now, why did you lie on it? A: Because it is embarrassing to be fired." Tr. at 58-59.

<sup>2</sup>Although the Judge stated that Applicant did not intend to falsify the SCA concerning his police record, at the end of the Decision he entered formal findings against Applicant for all Guideline E allegations, including these. Reading the Decision as a whole, we believe that the Judge intended to clear Applicant on the Guideline E allegations regarding his police record. *See, e.g., ISCR Case No. 08-01075 at 5 (App. Bd. Jul. 26, 2011)*(To be a security concern, an error or omission on a SCA must be deliberately false). We conclude that his formal findings to the contrary are an inadvertent error. Given the Judge's sustainable adverse finding concerning the job termination, the error in question is harmless.

Case No. ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). Applicant requests that his case be remanded to a different Judge for a new decision. To the extent that he is arguing that the Judge in his case lacked impartiality, there is a presumption that a Judge is impartial. An applicant who contends that a Judge is biased against him has a heavy burden on appeal. *See, e.g.,* ISCR Case No. 08-03798 at 2 (App. Bd. Jan. 21, 2010). Applicant has cited to nothing in the record to impugn the Judge's impartiality. Applicant's brief is not sufficient to rebut the presumption that the Judge was impartial.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. 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, 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 Judge's decision is **AFFIRMED**.

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

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

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