

KEYWORD: Guideline J; Guideline E; Guideline D

DIGEST: We give deference to a Judge’s credibility determinations. Our deference has limits, as in cases in which the record contains evidence that contradicts the Judge’s credibility determination. In this case, we find nothing in the record that would contradict the Judge’s assessment of Applicant’s demeanor. Some of his testimony might have sounded evasive, suggesting that he did not view his circumstances with the appropriate seriousness. We find no reason to disturb the Judge’s credibility determination. Moreover, we conclude that Applicant has not rebutted the presumption that the Judge was impartial. Adverse decision affirmed.

CASENO: 14-03838.a1

DATE: 05/06/2016

DATE: May 6, 2016

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In Re:)	
)	
-----)	ISCR Case No. 14-03838
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Matthew E. Hughes, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Activity), Guideline E (Personal Conduct), and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 25, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard 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 him; whether the Judge erred in his credibility determination; and whether the Judge failed properly to weigh the evidence. Consistent with the following, we affirm.

The Judge’s Findings of Fact

In mid-2013, Applicant, who was in his thirties and held a security clearance at the time, became involved with a 15 year-old girl. The girl’s mother introduced her to him and provided Applicant with the girl’s phone number. Applicant and the girl exchanged text messages. At some point, Applicant received a text message from someone, perhaps the girl’s aunt, advising him of the child’s age. He subsequently received another, apparently from the mother, telling him that he could continue communicating with the girl. The two eventually met at a restaurant. Applicant and the girl went to Applicant’s car, where they kissed, and Applicant fondled her above the waist. The girl’s father notified law enforcement, and Applicant was eventually convicted of contributing to the delinquency of a minor. He received a suspended six-month sentence to confinement. He served his sentence without incident. Applicant cooperated with law enforcement in the investigation of the case. He disclosed it on his security clearance application (SCA) and provided court documents during the course of the clearance investigation.

The Judge’s Analysis

The Judge noted Applicant’s cooperation with authorities investigating the case and his voluntary reporting of it on his SCA. He stated, however, that he had “serious doubts” about Applicant’s judgment and self-control. Decision at 6. He stated that Applicant pursued a relationship with a girl despite knowing that she was half his age. He also stated that he had observed Applicant’s demeanor during the hearing and that he appeared “too nonchalant about his overall situation, and he was not particularly contrite.” *Id.*

Discussion

Applicant contends that the Judge’s assessment of his demeanor was not based on anything in the record but, to the contrary, was the result of bias. He argues that the Judge’s opinion of him (or of the offense of which he was convicted) may have predisposed him to render an adverse

decision. We give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. This is because the Appeal Board does not view a witness’s demeanor or observe the witness as he or she provides testimony. Our deference has limits, of course, as in cases in which the record contains evidence that contradicts the Judge’s credibility determination. *See, e.g.*, ISCR Case No. 14-01894 at 6 (App. Bd. Aug. 18, 2015). In this case, however, we find nothing in the record that would contradict the Judge’s assessment of Applicant’s demeanor. Some of his testimony might have sounded evasive, suggesting that he did not view his circumstances with the appropriate seriousness.¹ We find no reason to disturb the Judge’s credibility determination. Moreover, we conclude that Applicant has not rebutted the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 14-03108 at 3 (App. Bd. May 20, 2015). His argument that the Judge’s adverse decision is explicable only as a result of an inflexible predisposition against granting Applicant a clearance is not supported by anything in the record. Adverse rulings alone do not demonstrate judicial bias. *See, e.g., Bixler v. Foster*, 596 F.3d 751 at 762 (10th Cir. 2010).

Applicant cites to record evidence that he believes is favorable to him, such as his cooperation with the investigation of the case, his having ceased his contact with the girl, his character references, etc. However, the Judge made findings about much of the evidence that Applicant has cited. Applicant’s arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record or to show that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). The Judge examined the relevant data 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, 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 Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody

¹ “[Department Counsel]: Your texts were sexual in nature? [Applicant]: I would assume so, but I don’t really, 100 percent recall. I’m going to—yes. We’ll go with yes.” Tr. at 36.

Administrative Judge
Member, Appeal Board

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