

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant offered multiple explanations for his failure to disclose his delinquent debts. The Judge's findings of deliberate falsification is sustainable. There is a rebuttable presumption that the Judge is impartial and unbiased. Applicant has not demonstrated that any basis for a reasonable person to question the Judge's fairness. Adverse decision affirmed.

CASENO: 07-00260.a1

DATE: 01/24/2008

DATE: January 24, 2008

In Re: ----- Applicant for Security Clearance))))))))))))))	ISCR Case No. 07-00260
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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 March 20, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations)

and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 27, 2007, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: whether the Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; whether the Judge was unfair, or arbitrary and capricious. Finding no error, we affirm.

(1) Applicant argues that he did not deliberately falsify his response to two questions on his security clearance application by failing to disclose three debts totaling approximately \$36,000 that had been delinquent for more than 90 or 180 days. Applicant's argument in this regard does not demonstrate that the Judge erred.

In this case, Applicant had initially offered multiple explanations for his failure to disclose the delinquent debts, including not having enough time to review his answers, having problems with the on-line account used to submit his security clearance application, and working in a high pressure position. At the end of cross-examination, he had admitted that he had not disclosed the information in question because he was embarrassed about his financial problems.² The Judge reasonably considered Applicant's explanations in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1.

(2) Applicant also contends that the Judge was unfair, essentially based upon the fact that the Judge did not find Applicant's favorable evidence sufficient to mitigate the government's security concerns. In support of this contention, he argues that he has been granted a clearance on two prior occasions without incident, and that he has received numerous awards for excellent service from both the Navy and the Coast Guard. The Board does not find this argument persuasive.

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. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was unfair, but whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question his fairness. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Lack of partiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or prejudice. *See, e.g.*, ISCR Case No. 04-03834 at 2 (App. Bd. Jul. 2, 2007). Applicant has not met this heavy burden of persuasion, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case

¹The Judge found in favor of Applicant under Guideline F. That favorable finding is not at issue on appeal.

²Decision at 3.

No. 03-00740 at 2 (App. Bd. Jun. 6, 2006).

The Board has previously noted that there is no right to a security clearance, nor is there a presumption in favor of granting or continuing a security clearance. *See, e.g.*, ISCR Case No. 02-00318 at 8 (App. Bd. Feb. 25, 2004); ISCR Case No. 03-08073 at 3 (App. Bd. Oct. 25, 2005). Prior security clearance adjudications and the granting of clearances for the Applicant have no bearing on the legal sufficiency of the Judge's adverse clearance decision here. *See, e.g.* ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 01-24506 at 3 (App. Bd. Feb. 11, 2003). In that regard, the government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct or circumstances having negative security significance. *See, e.g.*, DISCR Case No. 91-0775 at 3 (App. Bd. Aug. 25, 1992); ISCR Case No. 02-17609 at 3-4 (App. Bd. May 19, 2004).

Likewise, the absence of prior security violations does not bar or preclude an adverse security clearance decision. The federal government need not wait until an applicant actually mishandles classified information before it can deny or revoke access to such information. *See* ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007) citing *Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole-person analysis to determine an applicant's security eligibility. A whole-person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (App. Bd. Jun. 4, 2004).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by Applicant's falsifications had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. He found in favor of the Applicant with respect to the Guideline F allegations. However, he reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security

concerns under Guideline E. 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. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline E is sustainable.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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