

KEYWORD: Guideline J; Guideline D

DIGEST: There is a rebuttable presumption that a judge is impartial and unbiased. A party seeking to overcome that presumption has a heavy burden on appeal. We find no basis to conclude that the Judge was biased. Adverse decision affirmed.

CASENO: 09-00963.a1

DATE: 04/23/2010

DATE: April 23, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-00963
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 9, 2009, 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 D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 26, 2010, after the hearing, Administrative Judge Joan Caton Anthony 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; whether the Judge failed properly to apply the whole-person factors; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge's findings include the following: Applicant is a field engineer for a federal contractor. He has held a security clearance since 1994. He served in the U.S. military for 13 years and is currently in the reserves.

Applicant divorced his wife in 2004. After the divorce, he bought a house, acquiring a housemate, whose rental payments would offset some of the cost of his mortgage payment. Applicant also permitted other persons to stay at his house. He had a personal computer, to which the other persons staying there had access. In October 2005, law enforcement agents searched Applicant's house and seized his computer. The following July Applicant was arrested and charged with 20 counts of possession of child pornography¹ and with possession both of marijuana and marijuana paraphernalia.

The 20 counts of child pornography possession were subsequently merged into 11, and the marijuana charges were dropped. Applicant pled not guilty, and, "represented by an attorney with a national reputation for defending against child pornography charges," he fully litigated the prosecution's case against him. Decision at 4. He was found guilty on all 11 counts, sentenced to a year of prison for each count, all suspended; fined \$100 for each count; placed on supervised probation for 3 years; and ordered to receive psychiatric treatment.

Applicant contends that the Judge was biased against him. In his brief, he states that the Judge "allowed the prejudicial nature of the underlying crime to cloud her eyes regarding the considerable favorable evidence expressed. Thus, undue weight was given to the isolated incident of criminal/sexual misconduct." Applicant's Brief at 11. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008); ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The Board has examined Applicant's contention in light of the record as a whole. Beyond the conclusory statement quoted above, Applicant points to nothing in the Judge's handling of his case that would cause a reasonable person to question her impartiality. We find no basis to conclude that the Judge was predisposed against Applicant or that

¹Government Exhibit 2 is a document submitted by law enforcement authorities to the state district court, seeking charges and an authorization for the arrest of Applicant. It describes the general nature of the pornographic material found on Applicant's computer. These include numerous digital videos and photographs displaying prepubescent girls engaging in sexual acts.

she exhibited other indicia of a lack of impartiality. ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). We conclude that Applicant has failed to rebut the presumption that the Judge was impartial. Neither has Applicant demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009).

In support of his appeal, Applicant cites to cases decided by the DOHA Hearing Office which, he contends, support his argument for mitigation. We give due consideration to these cases. However, each case “must be decided upon its own merits.” Directive ¶ E2.2.3. The cases cited by Applicant are factually distinct from his in significant ways. Moreover, one of the cases he cites was actually reversed on appeal. In any event, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008).

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made,’” both as to the mitigating conditions and the whole-person factors. *See Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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