

KEYWORD: Guideline G; Guideline E; Guideline F

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Applicant failed to rebut the presumption that the Judge was unbiased. A Judge is required to address all of the allegations in the SOR. Adverse decision affirmed.

CASE NO: 10-09281.a1

DATE: 03/05/2012

DATE: March 5, 2012

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| In Re:                           | ) |                        |
|                                  | ) |                        |
| -----                            | ) | ISCR Case No. 10-09281 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 15, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2011, after the hearing, Administrative Judge Henry Lazzaro denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge failed to consider, or mis-

weighed, evidence favorable to Applicant; whether the Judge was biased against Applicant; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross appeal: whether the Judge failed properly to evaluate some of the Guideline E security concerns. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant has a history of employment as an aircraft painter. He enjoys a good reputation for the quality of his job performance. He served in the U.S. Navy for ten years, achieving the rank of petty officer third class.

Applicant has had problems with alcohol in past, having been convicted of driving under the influence of alcohol in 1994, 1995, and in 2004. The first two convictions occurred while he was serving on active duty with the Navy. His driving privileges were suspended for five years following the latest conviction, and he was required to install an alcohol detection device on his vehicle as well. In addition to the alcohol convictions, Applicant was charged with driving on a suspended license, once in 2000 and again in 2006. The second charge resulted in a conviction.

When questioned about his alcohol misconduct, Applicant initially denied any offenses other than the one in 2004. During one interview, Applicant stated that he only drank two or three bottles of beer a week. However, he also stated that it took about six bottles to make him drunk and that he became drunk about once a month. During another interview, he stated that he became drunk only once a year. He also stated that he had attempted either to stop drinking altogether or to reduce his consumption of alcohol three or four times since his last conviction. The Judge found his testimony that he had not drunk alcohol since March 2011 to be unconvincing.

Applicant has numerous delinquent debts, for medical expenses, judgments against him, and various collection accounts. He attributes the delinquent accounts to a period of unemployment in the late 2000s. However, the Judge noted that many of Applicant's debts were incurred after he had become employed. When asked why he had not satisfied even the small debts alleged in the SOR, Applicant replied, "There's no reason." Decision at 4.

In completing his security clearance application (SCA), Applicant failed to list the following: (1) the judgments against him; (2) collection accounts; (3) debts over 180 days delinquent; and (4) debts currently over 90 days delinquent. Applicant claimed that he did not know that judgments were considered financial in nature. He testified that he did not know why he did not list other debts, although he also stated that he didn't understand some of the questions and may have overlooked others.

In the Analysis, the Judge noted that, although Applicant's last drug conviction was in 2004, Applicant regularly consumed alcohol until June 2010 and that he had only recently had the alcohol detection device removed from his car. The Judge stated that he did not find Applicant's testimony that he had quit drinking altogether to be convincing. He concluded that omissions from the SCA were deliberate, noting that Applicant's SCA contained many other omissions and false statements, undermining the credibility of Applicant's presentation. The Judge characterized the two suspended license charges as directly related to the DUI convictions and declined to adjudicate them under

Guideline E. The Judge acknowledged that Applicant's financial problems had been affected by unemployment, which was beyond Applicant's control. The Judge also noted that Applicant had demonstrated no effort to pay any of his debts, despite having been employed full-time since September 2009. Accordingly, he concluded that Applicant had not met his burden of persuasion as to mitigation.

### Applicant's Appeal

Applicant contends that the Judge did not consider all of the record evidence. He cites to his good military record; to evidence that he has held a clearance in the past with no security violations; and to his evidence of good character. He argues that the Judge either ignored this evidence or that he did not properly weigh it. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-07080 at 2 (App. Bd. Oct. 12, 2011). In this case, the Judge made explicit findings concerning Applicant's military record and job history. However, he provided a rational justification for his adverse decision, given the extent of Applicant's security significant conduct. Applicant has not rebutted the presumption that the Judge considered all of the record evidence. Neither has he demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

In his appeal brief, Applicant stated that the Judge and Department Counsel were cordial to him at first, but once the hearing began, the atmosphere became prosecutorial. He asserted that his character letters "were thrown to the wayside," and that "it was stated that these individuals standing up for me didn't know who I was and that they wrote those letters blindly." He further stated that he was an honorable person who can admit his mistakes. Though acknowledging that he had not used the best judgment in the past, he stated that he had taken steps to address his problems. He then declared, "I still feel that my case was handled unfairly." Appeal Brief at 1.

To the extent that Applicant is contending that the Judge was biased against him, the record does not support such a conclusion. The challenged comments concerning his character letters were made by Department Counsel. Though not objecting to their admission, she pointed out to the Judge that these letters did not indicate that the writers "have read the Statement of Reasons and understand what the underlying concerns are with respect to [Applicant's] clearance." Tr. at 23. This is a fair characterization of the letters. There is nothing in the record to suggest that the Judge assumed a prosecutorial role or that he otherwise lacked the requisite impartiality. Applicant has not met his heavy burden of persuasion that the Judge was biased. *See, e.g.*, ISCR Case No. 09-02566 at 2 (App. Bd. Nov. 12, 2010). Neither has he demonstrated that Department Counsel acted improperly,<sup>1</sup> or engaged in a course of conduct that had the effect of denying Applicant due process.<sup>2</sup>

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<sup>1</sup>Applicant was advised in the Prehearing Guidance that the "hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases. The Government is normally represented by an attorney known as a Department Counsel."

<sup>2</sup>To the extent that Applicant is challenging the Judge's adverse credibility determination, we conclude that the credibility determination is consistent with the record. We note the Judge's citation to inconsistent statements by Applicant, as well as to evidence that suggests a reluctance by Applicant to be forthcoming in his answers to on the SCA. The Judge made specific reference to Applicant's having stated in the SCA that his 2004 arrest for DUI had resulted in his having been cleared of the offense, a statement at odds with substantial record evidence of his conviction. The Judge

*See, e.g.*, ISCR Case No. 08-03233 at 2 (App. Bd. Aug. 7, 2009). Given Applicant’s history of legal infractions, alcohol-related incidents, delinquent indebtedness, and failure to disclose pertinent information on his SCA, the Judge’s ultimate decision is not arbitrary, capricious, or contrary to law.

### Department Counsel’s Cross Appeal

Department Counsel argues that the Judge’s analysis failed to address some of the alleged Guideline E security concerns. This argument is persuasive.

Under Guideline G, the SOR alleged, among other things, that Applicant had been convicted three times of DUI. Under Guideline E, the SOR alleged two instances of false statements on the SCA plus the same three DUI convictions. The SOR contained two additional Guideline E allegations of Applicant’s having driven under a suspended license. These two offenses were not alleged under Guideline G. However, in the analysis, the Judge stated that the suspended license charges were directly related to the DUI convictions, and that all these offenses had been adequately addressed under Guideline G, requiring no separate Personal Conduct consideration. Decision at 6. We conclude that the Judge made an error. While it may be true that the suspension of Applicant’s license was a consequence of his convictions for DUI, the offenses of driving on a suspended license are factually and legally different from DUI, and they are properly the subject of separate SOR allegations. Disposition of the DUI allegations under Guideline G is not sufficient to address independent security concerns regarding separate instances of misconduct alleged elsewhere. As it stands, the Judge failed to discuss the license allegations in light of the pertinent security concerns and mitigating conditions of the only guideline under which they were raised, thereby failing to provide a rational basis for his conclusions regarding them.<sup>3</sup> However, even if the Judge had not made this error, his overall adverse decision would have been the same. Therefore, the error is harmless.<sup>4</sup> *See, e.g.*, ISCR Case No. 10-01021 at 3 (App. Bd. Nov. 18, 2011).

The record supports a conclusion 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.’” *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

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reasonably characterized this statement as knowingly false. We find no basis to disturb the Judge’s credibility determination. *See, e.g.*, ISCR Case No. 09-08023 at 3 (App. Bd. Sep. 6, 2011).

<sup>3</sup>*See* Directive ¶ E3.1.25: “The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR[.]” This provision does not authorize a Judge to discuss only some of the allegations. Rather, “by its plain language it requires the Judge to address all of them.” ISCR Case No. 08-07803 at 2 (App. Bd. Sep. 21, 2011). *See also Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d. 841, 851 (D.C. Cir. 1979), *cert. denied*, 403 U.S. 932 (1971), which requires an agency to give “reasoned consideration to all the material facts and issues” in cases before it.

<sup>4</sup>Department Counsel also argues that the Judge applied an unreasonably narrow interpretation of Guideline E, one which we have previously held to be erroneous. *See, e.g.*, ISCR Case No. 06-20964 at 6 (App. Bd. Apr. 10, 2008). However, nothing in the Judge’s language suggests that he made this error.

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 adverse security clearance decision 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