

KEYWORD: Guideline E

DIGEST: Nothing in the record would likely persuade a reasonable person that the Judge lacked the requisite impartiality. Applicant has not met his heavy burden of persuasion to establish bias. The Judge’s findings are sustainable. Adverse decision affirmed.

CASENO: 14-02083.a1

DATE: 04/02/2015

DATE: April 2, 2015

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 Department of Defense (DoD) declined to grant Applicant a security clearance. On July 30, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 17, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Carol G. Ricciardello 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 denied him an opportunity to present evidence; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant served in the military, retiring in 1997 as an E-8. After that, he worked as a Federal contractor, a Federal employee, and then again as a contractor.

From 1978 to 2008, Applicant was charged with various traffic offenses, such as expired registrations, failure to wear a seat belt, and speeding. In addition, between 1978 and 2008, he had six "serious alcohol-related incidents," involving driving while intoxicated, reckless driving, refusal to take a breathalyzer, etc. After the 2008 incident, he attended a court-ordered outpatient alcohol education program. He did not disclose to the counselors the full extent of his history with alcohol. He states that much of his misconduct occurred while he was in the military at a time when alcohol offenses were not frowned upon to the extent that they currently are. He also states that his marriage has provided him with stability.

In 2010, Applicant was working as a DoD civilian. He disclosed a military capabilities document to employees of a private company. This document was not releasable to the public. When interviewed by a military investigator, he lied by denying that he had provided the document. After the interview, he drove to another state where he met with a representative of the company. He solicited this person to provide a false cover story to the investigator to the effect that the company had not obtained the document from Applicant. When subsequently queried about this by the investigator, Applicant lied by denying that he had contacted the company's representative. Ultimately, Applicant admitted that he had released the document to the company. He denied that he had proposed the false story to the company representative, asserting that it was the representative himself who originated the plan. Nevertheless, Applicant conceded that he had agreed to the deception.

Applicant resigned from his job before being fired. He received numerous awards and positive character references. Some of the writers of the character letters did not know of his misconduct or of the full extent of it.

### **The Judge's Analysis**

In concluding that Applicant had not mitigated the concerns arising from his misconduct, the Judge cited to evidence of his repeated lies to the military investigator, his knowing disclosure of proprietary information, and his history of alcohol offenses. She noted his admission that he continues to consume alcohol. She stated that, though some of the allegations were minor, the remainder were serious offenses. She stated that Applicant has provided insufficient information

to permit a conclusion that such misconduct is unlikely to recur. She stated that the record left her with doubts about Applicant's fitness for access to national security information.

## Discussion

Applicant contends that the Judge was biased against him. He argues that she and the Department Counsel appeared to have been in collusion and that she repeatedly cut him off, precluding him from offering mitigating evidence. A party who argues that a Judge is biased has a "heavy burden of persuasion" on appeal. *See, e.g.*, ISCR Case No. 11-01618 at 3 (App. Bd. Jan. 24, 2013). Applicant cites to various places in the transcript which, he believes, demonstrate this bias. We have examined the entire transcript, along with the rest of the record evidence and the Decision. While the Judge questioned him throughout the hearing, sometimes a bit sharply, it appears to have been for the purpose of clarifying the record and preventing Applicant, who acted *pro se*, from straying from the essential issues.<sup>1</sup> He notes that, during a discussion about misconduct that had occurred during his military service, the Judge stated that it was surprising that he had not been administratively discharged. Tr. at 37. This comment was not unreasonable, given the evidence that was before her. Moreover Applicant's argument about purported collusion between the Judge and Department Counsel is merely speculative.<sup>2</sup> We find nothing that would likely persuade a reasonable person that the Judge lacked the requisite impartiality and conclude that Applicant has not met his heavy burden of persuasion.

In making his arguments on appeal, Applicant includes numerous assertions that are outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. Our examination of the record does not support Applicant's contention that the Judge prevented him from presenting evidence. In fact, he offered numerous documents, all of which were admitted. Tr. at 22-24, 36. In addition, the Judge questioned him not only regarding the allegations in the SOR but also about his family circumstances, education, military service, etc., all of which were germane to a whole-person evaluation. Tr. at 118-123. At the close of the hearing she gave Applicant an opportunity to provide any other information that he thought relevant. He replied that he had no more evidence. Tr. at 124. We find no reason to conclude that Applicant was denied an opportunity to present evidence.

Applicant challenges some of the Judge's findings of fact. For example, he denies that he was actually impaired by alcohol on some of the occasions upon which he was charged. He also challenges some of the Judge's findings about the circumstances surrounding his release of the protected document. We have examined the Judge's findings of fact in light of the entirety of the

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<sup>1</sup>Applicant's testimony could, in several places, be found confusing and even evasive. For example, the Judge asked Applicant several times why he had traveled from his place of duty to the company representative in the different state before Applicant provided a satisfactory answer. "[Judge]: So, why did you go to [city]? They did the right thing. [Applicant]: Day after. [Judge]: Why did you go to [city]? [Applicant]: After they talked to their legal people, yes, ma'am. [Judge]: Why did you go to [city]? [Applicant]: I was NSPS at the time. I was not – [Judge]: Why did you go to [city]? [Applicant]: Ma'am, I wanted to talk to those people to find out why this happened." Tr. at 62.

<sup>2</sup>Applicant asserts that he does not know if the Judge and Department Counsel discussed his case, but that it was possible that "they could have stayed at the same hotel and shared a rental car . . . they could have had a nice conversation about my case." Appeal Brief at 4.

record evidence. Her material findings are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. Applicant has not cited to any harmful error in the Judge’s findings of fact. The findings are sustainable.

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: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board