KEYWORD: Guideline K; Guideline E

DIGEST: We cannot consider new evidence on appeal. Applicant did not rebut the presumption that the Judge was impartial. The Judge's finding that Applicant deliberately withheld information from his application and during his interview is sustainable. The Government does not have to prove a clear and present danger to national security before it can deny a clearance. The Government is not estopped from denying a clearance even when there have bene prior favorable adjudications. Security violations strike at the heart of the industrial security program. A Judge must give any claims of reform or rehabilitation strict scrutiny. Adverse decision affirmed.

CASE NO: 15-03293

DATE: 08/18/2016

DATE: August 18, 2016

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 June 12, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline K (Handling Protected Information) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 8, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip S. Howe 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 finding that he had deliberately provided false information in his security clearance application (SCA) and during his interview; 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 has been employed by the same Defense contractor for 26 years. He was first granted a security clearance in 1963. He held one during his military service from 1969 to 1989 and has held one during his post-military employment. His clearance was suspended in 2015 pending disposition of this case.

Applicant had six security incidents over a four year period from 2010 to 2014. Two of the incidents occurred within a month of each other, in March and April 2013. The incidents alleged in the SOR included failure to set an alarm in his employer's office and the improper transmission of classified information. He received a verbal reprimand for an incident in 2012 in which he sent an email that contained improper markings, resulting in a "data spill." Decision at 3. He received a "corrective action memorandum" for the violations that occurred in 2013. All of the incidents addressed in the SOR constituted violations of the requirements of the National Industrial Security Program Operating Manual. Applicant drew a distinction between "infractions" and "violations" and contended that no classified information was released to the public. *Id*. at 4.

When he completed his November 2012 SCA, he failed to disclose the verbal reprimand that he received earlier that year. He claimed that he thought the question was asking only about security violations rather than other types of misconduct, such as infractions. In a clearance interview in August 2013, Applicant disclosed a March 2013 incident but denied any other infractions. He later stated that he thought that the interviewer was asking only about any security incidents subsequent to his 2012 SCA.

The Judge's Analysis

Regarding Guideline K, the Judge stated that Applicant's conduct, whether classified as infractions or as violations, demonstrated a pattern of non-compliance by a person with many years experience as a Defense contractor. He concluded that these incidents occurred under normal, as

opposed to unusual, circumstances and that Applicant apparently did not react favorably to counseling and remedial training. He noted Applicant's reliance on technical distinctions in terminology. However, he cited to evidence that Applicant had held clearances since the 1960s and to evidence about his career as a military officer, from which he concluded that Applicant should have known how to avoid incidents such as those at issue in this case.

The Judge found that Applicant had deliberately concealed his various security incidents in his SCA response and in his answers to questions during his interview. He stated that the instructions accompanying the SCA put Applicant on notice of the requirements for full disclosure but that Applicant relied on his own definitions of what was reportable. The Judge characterized Applicant as having engaged in "concealment and sophistry." *Id*. at 10. He found that Applicant's arguments were not credible, in light of what he termed a pattern of incidents that increased in frequency over the years. In the whole-person analysis, the Judge noted Applicant's many years experience in holding clearances. He stated that the various technical distinctions that Applicant drew would have been more credible if he had simply disclosed the conduct as required and then explained it.

Discussion

Applicant challenges the Judge's impartiality. He argues, among other things, that the Judge told him in the hearing that he should not parse language but that the Judge permitted Department Counsel to argue that Applicant believed that he was above the rules. He states that there is no evidence that would support such an argument. He contends that the Judge did not give his testimony equal weight with Department Counsel's presentation. In making his argument he asserts matters that are not in the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

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. 12-10122 at 3 (App. Bd. Apr. 22, 2016). We have examined the record as a whole, paying particular attention to the transcript. We find nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. The Judge's colloquy with Applicant, in which he found the distinction between infractions and violations to be "nitpicking," was not unreasonable under the circumstances. Tr. at 66. Applicant's belief that the Judge did not extend sufficient weight to his testimony is not sufficient to establish that the Judge was biased. *See Bixler v. Foster*, 596 F.3d 751 at 762 (10th Cir. 2010) for the proposition that adverse rulings alone do not establish judicial bias.[1] Moreover, we conclude that Department Counsel's argument did not exceed the bounds of zealous advocacy expected of her position. *See, e.g.*, ISCR Case No. 12-04540 at 3 (App. Bd. Mar. 19, 2014). Applicant has not rebutted the presumption that the Judge was unbiased.

[1]A party'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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06686 at 2 (App. Bd. Apr. 27, 2016).

Applicant challenges the Judge's finding that he had deliberately withheld information from his SCA and during his interview. We examine a Judge's findings to see if they 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. When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

Applicant's brief reiterates his distinction between infractions and violations, arguing that he reasonably believed that the SCA question was limited to the latter sort of misconduct. He also argues that, during the interview, the investigator only asked about incidents subsequent to the SCA. He claims that he disclosed two violations that had occurred since then. Regarding the SCA,[2] we conclude that it is unreasonable to read the question as Applicant claims to do. To the contrary, a reasonable person would understand that the question addressed any workplace misconduct that resulted in official corrective action. By failing to disclose the 2012 incident that led to the verbal warning, Applicant omitted material information from his SCA. In addition, it is clear that, during his interview, he disclosed only his March 2013 violation, omitting the similar incident that occurred a month later.[3] Therefore, the Judge's finding that Applicant had omitted material information is supported by substantial evidence. Moreover, given the multiple nature of the omissions, Applicant's security experience and training, and the Judge's adverse credibility determination,[4] we conclude that the finding that these omissions were deliberate is sustainable.

Applicant argues that the Judge's decision is contradictory, in that he found on one hand that Applicant had held a clearance for many years but on the other that it is not consistent with the national security for him to have access to classified information. He contends that unless the Judge found him to be a danger to national security he should have been awarded a clearance.

As a general matter the Government does not have to prove a "clear and present danger" to national security before it can deny an applicant a clearance. *See, e.g.*, ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016). Rather, a DOHA adjudication focuses on whether an applicant has met his or her burden of persuasion in mitigating any concerns raised in the SOR and established by the applicant's admissions or by the evidence. Directive ¶ E3.1.15. It is clear that even those with good prior records can engage in conduct that draws their judgment and reliability into question. *See, e.g.*,

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[2]The question actually asks the following: "For this employment, **in the last seven (7) years** have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?" (emphasis in original) The words "such as" underscore that the scope of the inquiry is not limited as Applicant contends.

[3]In his Appeal Brief, Applicant states that he "disclosed the incidents in April/May 2012, i.e., after the [SCA] but before the interview, which was characterized as a violation." Appeal Brief at 2. We construe this to mean that he disclosed at least two violations that occurred after his SCA, although they actually occurred in 2013 rather than 2012. *Compare* with his Response to the SOR, in which he stated that, at the time of his interview, he had been aware of only one security violation that occurred after his SCA. SOR Response at 5.

[4]We are required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1.

ISCR Case No. 14-02995 at 2 (App. Bd. Apr. 7, 2016); *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied* 397 U.S. 1039 (1970). Moreover, the Government is not estopped from denying an applicant a clearance even when there have been favorable prior adjudications. *See, e.g.*, ISCR Case No. 14-02995, *supra*, at 2-3. In the case before us, it was not inconsistent for the Judge to have acknowledged Applicant's lengthy history of access to classified information while concluding that the misconduct addressed in the SOR rendered him ineligible for continued access. We find no inconsistency in the Judge's analysis.

Applicant cites to evidence that no classified information was actually released to the public due to his various infractions. He also cites to his evidence regarding the distinction between infractions and violations. The Judge made findings about Applicant's circumstances, including that there was no release to the public of sensitive or classified information. However, his conclusion that Applicant's terminological distinctions were not entitled to much weight is sustainable, given the record as a whole. The Directive provides that "[d]eliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information . . . is a serious security concern" without reference to whether the incidents are called infractions or violations. Directive, Enclosure 2 ¶ 33. Conduct such as Applicant's "strike[s] at the heart of the industrial security program." Accordingly, a Judge must give any claims of reform or rehabilitation "strict scrutiny." ISCR Case No. 14-04441 at 4 (App. Bd. Apr. 8, 2016). We find no reason to disturb the Judge's treatment of Applicant's multiple failures or of his mitigating evidence.

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
Administrative Judge

Member, Appeal Board

Signed: Catherine M. Engstrom
Catherine M. Engstrom
Administrative Judge
Member, Appeal Board