

KEYWORD: Guideline J; Guideline G

DIGEST: Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party or not whether a party can demonstrate the Judge committed a factual or legal error, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. Adverse decision affirmed.

CASENO: 15-01717.a1

DATE: 07/03/2017

DATE: July 3, 2017

In Re:))	
-----))	ISCR Case No. 15-01717
))	
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 20, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested a hearing. On April 17, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 bias against Applicant 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 is a 47-year-old employee of a Federal contractor. In his security clearance application, Applicant disclosed that he was arrested for driving while intoxicated (DUI) in 2012 and 2013.

In 2012, Applicant was arrested for DUI and does not dispute that his blood alcohol content (BAC) measured .20%. This arrest occurred after Applicant and his wife consumed alcohol from approximately 10:00 p.m. to 7:00 a.m. After a couple hours of sleep, Applicant decided to go to work. "He testified that he felt groggy and hungover, but 'not overly intoxicated.'" Decision at 2. Responding to a passerby's notification, the police approached Applicant's vehicle after he had pulled into a parking lot to rest. The police suspected he was intoxicated and had him perform a sobriety test. He later pled guilty to an alcohol-related driving offense and was sentenced to 60 months of unsupervised probation, 45 days in jail with 31 days suspended, substance abuse screening and treatment, and 18 months of interlock device restriction. Applicant did not disclose his probation status on his security clearance application.

In 2013, Applicant was arrested for DUI and other traffic offenses. After leaving a bar, Applicant drove home on his motorcycle. Police measured his speed at over 90 mile per hour. When the police finally approached him in his driveway, Applicant asked for his lawyer. He was transported to jail and consented to breathalyzer and blood tests. His three breathalyzer test results ranged between .26% and .29%. His blood test measured a BAC of .28%. Applicant was not prosecuted for any charges arising from this incident because of a finding that the police violated his right to counsel.

Applicant's testimony offered a sanitized version of the events surrounding his arrests. He claimed interlock devices were not available for motorcycles, and he believed the interlock device restriction did not apply to motorcycles. Records, however, showed Applicant fully understood the extent of the restriction. In his signed 2012 plea agreement, he agreed to install the interlock device "on any motor vehicle he operated" Decision at 3. During his 2013 arrest, he informed the officer of the interlock device restriction and, when asked if he should be riding a motorcycle, he stated, "I shouldn't be, but I was hoping you would let me slide." *Id.*

During his direct testimony about the 2013 arrest, Applicant failed to mention that after leaving the bar he went to a grocery store to purchase alcohol to consume at home. On cross-examination, he said he walked to the store, which contradicted a statement he made in an interview that he rode his motorcycle to the store. In the driveway of his home, Applicant told police that he was coming from the grocery store where he intended to buy milk, but did not buy anything and

repeatedly denied consuming alcohol. He eventually admitted that he consumed two small beers. While talking to the police, a bottle of vodka fell to the ground, which he denied belonged to him.

Character witnesses provided favorable assessments of Applicant's security worthiness. Applicant does not believe he has an alcohol problem and claims he has abstained from alcohol since his arrest in 2013. He submitted a signed statement of intent not to abuse alcohol in the future with automatic revocation of his security clearance for any future violations.

The Judge's Analysis

Applicant's conduct shows serious flaws in his judgment. In 2012, he chose to operate a vehicle and attempted to report to work with a BAC of more than twice the legal limit. In 2013, he was riding his motorcycle without an interlock device installed in violation of a plea agreement and was speeding with a BAC of more than three times the legal limit. His conduct shows a reckless disregard for the law. He is on probation until July 2017. The Judge was unable to accept his claims of abstinence as true given his lack of credibility. The Judge also stated:

Applicant's testimony at the hearing revealed an inability to provide full, frank, and candid statements to the government about his actions. Self-reporting is the hallmark of the security clearance process and is key to the fiduciary relationship between the government and clearance holder. The government must be able, with a high degree of confidence, [to] believe that a clearance holder will self-report a potential security violation even in the face of adverse consequences. Based on his behavior at the hearing, I conclude Applicant is unlikely to do so.¹

Discussion

In the appeal brief, Applicant's Counsel stated, "A minor, yet necessary note is that the Judge's decision reflects the [Applicant] appeared "Pro Se" which is an error as he was represented by Counsel, which could possibly indicate a boilerplate decision by the Administrative Judge." Appeal Brief at 2. A review of the Judge's decision shows that it was not a "boilerplate decision." The record reveals that the Judge's decision set forth detailed findings of fact, analyzed the applicable disqualifying and mitigating conditions, applied the whole-person concept to the specific facts of this case, and reached conclusions regarding each SOR allegation. The Judge's decision complied with the requirements of Directive ¶ E3.1.25, was judged on its own merits, and addressed the specific security concerns raised in this case.

In the appeal brief, Applicant's Counsel also stated, "Contrary to the Judge's findings, the [Applicant] provided a general denial of the allegations in the SOR, but admitted some aspects, which a thorough reading of the [Applicant's] response would have indicated." Appeal Brief at 3. Applicant's Counsel has misstated the Judge's finding. In her findings of fact, the Judge correctly noted that Applicant denied the SOR allegations. Decision at 2.

¹ Decision at 6.

Applicant's Counsel contends the Judge erred in concluding that "Applicant intended to report to work intoxicated." Appeal Brief at 6. We do not find this contention persuasive. After consuming alcohol for about nine hours, Applicant went to sleep for a couple of hours before deciding to drive to work while still feeling groggy. On his way to work, he pulled into a parking lot and was later determined to have a BAC of about .20%. The Judge's challenged conclusion was based on substantial evidence, or constituted reasonable characterizations or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant's Counsel argues that the Judge seemed to be bias against his client "for his alleged failure to disclose 'material information'" (Appeal Brief at 9-10) and for not providing full, frank, and candid statements to the Government about his actions. There is a rebuttable presumption that an administrative judge is fair and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. *Id.* The standard is not whether a party personally believes a Judge was biased or prejudiced against that party or not whether a party can demonstrate the Judge committed a factual or legal error, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *Id.*

Applicant's Counsel failed to establish that the Judge was biased against his client. It first merits noting that the Appeal Board gives deference to a Judge's credibility determinations. *See*, Directive ¶ E3.1.32. Next, the Judge provided examples in her decision of why she believed Applicant was less than forthcoming in his testimony. Additionally, the Judge correctly noted that Applicant failed to disclose in response to a question on his security clearance application that he was on probation. Each of those noted shortcomings was a matter the Judge could properly consider in determining whether Applicant had mitigated the alleged security concerns. *See, e.g.*, ISCR Case No. 96-0360 at 5 (App. Bd. Sep. 25, 1997) (an applicant's unwillingness to accept responsibility for his or her actions detracts from a finding of reform or rehabilitation). The Judge's conclusion that Applicant is unlikely to self-report a security violation in the face of adverse consequences is supported by the evidence.

Applicant's Counsel further argues that the Judge did not weigh and consider all relevant evidence. He cites, for example, to Applicant's period of abstinence, his signed statement of intent, and his favorable character evidence. This argument, however, is neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-07277 at 3 (App. Bd. Apr. 26, 2017). We give due consideration to the Hearing Office case that Applicant has cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* Applicant's Counsel has not identified any harmful error likely to change the outcome of the case.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. "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.” The decision is sustainable on this record.

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board