

DKEYWORD: Guideline K; Guideline E

DIGEST: The Judge stated that any evidence must be in the form of documents, including photographs. However, she stated that she could not accept videos or other media devices because she was not permitted to use external media on a DoD computer. She advised that he could testify as to what was on the videos, but he did not offer any testimony in that regard. The Judge would not be able to preserve a record that included evidence presented in a format that could not be accessed through DoD computer systems. Other than this, the Judge admitted the evidence that Applicant offered, including a document sent to her after the hearing. Her evidentiary rulings were not arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 15-03162.a1

DATE: 07/25/2017

DATE: July 25, 2017

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In Re:	)	
	)	
-----	)	ISCR Case No. 15-03162
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 23, 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 April 6, 2017, 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 erred in her evidentiary rulings; 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 a bachelor's degree and has completed course work toward a master's. Applicant was commissioned as a military officer in 1979, transferring to the Reserves in 1980. In 2003, a female enlisted member alleged that Applicant brushed her neck and kissed it without her consent. An investigation into the allegation concluded that the misconduct occurred. Applicant received a reprimand from a general officer. Applicant testified that the official who conducted the investigation was biased against him.

In 2004, an administrative board recommended that Applicant be discharged from the Reserves under other than honorable conditions. Ultimately, the service secretary awarded Applicant a general discharge under honorable conditions, although in his answer to the SOR he stated that he had received an honorable discharge. He also provided inconsistent statements about his military rank. The Judge stated that she would consider these statements in analyzing Applicant's credibility, his case for mitigation, and in performing a whole-person analysis.

The Judge made extensive findings of fact concerning SOR allegations that Applicant violated security rules on numerous occasions, the latest being in late November 2012. He brought a camera into a restricted area where cameras were not allowed; he discussed sensitive information with a foreign national in an unsecured area; he left a foreign national unattended at a computer which could be switched to a classified system; he failed to store hard drives properly; and he was evicted from a compound in an overseas area due to his behavior and lax security practices. Applicant contended that many of the statements against him were lies spread by persons who did not like him and were "out to get [him]." Decision at 10.

Applicant presented a substantial amount of documentary evidence commending his professional expertise. He also presented character letters regarding his competence and courtesy as well as numerous photographic examples of his work product.

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

The Judge stated that she did not find Applicant's testimony to be credible. In evaluating his case for mitigation, the Judge stated that Applicant had committed various infractions despite having received prior security training. She also cited to Applicant's contentions that "everyone involved in the allegations does not like him, were out to get him, and were conspiring to have him removed because he could expose their complicity in nefarious conduct." Decision at 13. Although

the most recent incident was several years old, the Judge stated that it still casts doubt upon his current reliability.

In the whole-person analysis, the Judge acknowledged evidence of Applicant's professional attainments, his letters of reference, etc. However, she also noted that Applicant was discharged from the Reserves with a general discharge, committed various security infractions, and provided testimony that was not credible. She stated that the record left her with serious questions about Applicant's fitness for a security clearance.

## **Discussion**

Applicant contends that the Judge was biased against him. He argues that she displayed hostility to him during the hearing and that she was condescending and adversarial in her demeanor. 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. 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, and find nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. While she questioned Applicant sharply at times, it appears to have been in an effort to clarify his testimony. Applicant has not met his heavy burden of persuasion.

Applicant contends that the Judge erred in some of her evidentiary rulings. Among other things, he argues that the Judge improperly denied him the opportunity to present a videotape that he believes is essential to his case. We examine a Judge's rulings on admissibility of evidence to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 12-02296 at 3 (App. Bd. Mar. 12, 2014). Prior to the hearing, Applicant sought guidance on the kind of evidence that he could submit. The Judge stated that any evidence must be in the form of documents, including photographs. However, she stated that she could not accept videos or other media devices because she was not permitted to use external media on a DoD computer. She advised that he could testify as to what was on the videos, but he did not offer any testimony in that regard.<sup>1</sup> Hearing Exhibit II.

Under the circumstances, we find no error in the Judge's ruling on this matter. A Judge is obligated to preserve the record for purposes of appeal and other things. *See, e.g.*, ISCR Case No. 12-04540 at 4, n.3 (App. Bd. Mar. 19, 2014). The Judge would not be able to preserve a record that included evidence presented in a format that could not be accessed through DoD computer systems. Other than this, the Judge admitted the evidence that Applicant offered, including a document sent to her after the hearing. Tr. at 28, 147; HE V. Her evidentiary rulings were not arbitrary, capricious, or contrary to law.

Applicant's appeal includes matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. His arguments consist in large measure of disagreements with the Judge's

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<sup>1</sup>Of note, before the hearing ended, the Judge asked Applicant whether he had any further evidence to present. He continued to testify and presented an exhibit before indicating that he had nothing further. The Judge admitted the proffered exhibit. Tr. at 140-149.

weighing of the evidence, which is not 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. 15-08842 at 3 (App. Bd. Feb. 14, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. An applicant who has committed security violations has “a very heavy burden” of persuasion as to mitigation. Accordingly, a Judge must give any claims of reform or rehabilitation “strict scrutiny.” ISCR Case No. 15-04340 at 3 (App. Bd. Jan. 30, 2017). 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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility 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: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board