

KEYWORD: Guideline H

DIGEST: Applicant argues that the Judge was biased. 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. A party seeking to overcome that presumption has a heavy burden of persuasion. We have examined the record, paying particular attention to the hearing transcript. We find nothing to suggest that the Judge lacked impartiality or that he entered the hearing with an inflexible predisposition against Applicant. He did not impede Applicant's presentation of her evidence, and his questioning appears to have been directed toward clarifying the record. Applicant has not rebutted the presumption that the Judge was unbiased. Adverse decision affirmed.

CASENO: 16-03451.a1

DATE: 12/26/2017

The Judge's Findings of Fact

Applicant is a “substance abuser” who has primarily used marijuana. The SOR alleged recent marijuana use while Applicant held a clearance, although during an earlier part of her life she engaged in more extensive marijuana use as well as limited instances of ingesting mushrooms and LSD. The Judge stated that he was considering the non-alleged drug abuse in evaluating Applicant’s case for mitigation and rehabilitation, her credibility, and the whole-person concept. During Applicant’s earlier period of drug use, she lost an internship after a drug test yielded a positive result for marijuana.

Applicant’s more recent misconduct began after she was granted a security clearance. Her employer had provided annual training, in which Applicant was made aware that marijuana use was prohibited. In her security clearance application (SCA), Applicant stated that it is possible that she could use marijuana in the future if it became available while she was on vacation, etc. In her clearance interview she stated that she had no specific intent for future use but that it would be possible for it to happen again. In her SOR answer, Applicant reversed her position on future use, stating that she will not use marijuana again.

Applicant enjoys excellent performance ratings at her job. She received an award for her effort in advancing inclusive values and diversity. She has also received an award for her contribution to her employer’s mission. She enjoys an excellent reputation for honesty, integrity, and her work ethic. She is active in fund-raising activities, such as the crusade against cancer.

The Judge's Analysis

The Judge noted evidence that Applicant’s more recent drug abuse has been relatively infrequent. However, he stated that Applicant has presented no unusual circumstances underlying her misconduct and cited to her having used marijuana after having been placed on notice that it was inconsistent with holding a clearance. He stated that she has not dissociated from all of her drug-using friends. He also found her two years of abstinence to be relatively short when compared with her period of drug abuse while holding a clearance.

In the whole-person analysis, the Judge noted Applicant’s candor in admitting her drug abuse and her evidence of good work performance and community service. However, he cited to her entire history of drug abuse, noting her lost internship due to a failed drug test. He also found her “vacillating future intention regarding marijuana abuse” to be “disturbing.” Decision at 8. He stated that she unequivocally foreswore marijuana use only upon realization that she could lose her clearance. He found that Applicant’s security-significant conduct casts doubt upon her reliability, trustworthiness, and good judgment.

Discussion

Applicant argues that the Judge was biased against her. She states that “he was very short with me, his tone was annoyed, and he repeatedly cut me off.” Appeal Brief at 7. She cites in

particular to a colloquy toward the end of the hearing regarding whether Applicant had waived her opening statement. She argues that the Judge's words and tone of voice were designed to "throw me off." *Id.* 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. *See, e.g.*, ISCR Case No. 12-09545 at 3 (App. Bd. Dec. 21, 2015). 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 entire record and Decision, paying particular attention to the transcript of the hearing. We find nothing therein to suggest that the Judge lacked impartiality or that he entered the hearing with an inflexible predisposition against Applicant. He did not impede Applicant's presentation of her evidence, and his questioning appears to have been directed toward clarifying the record. In the particular instance that Applicant has cited, the Judge may have conveyed a certain testiness, but this appears to have been the result of confusion over whether Applicant had waived her opening statement. After this exchange, the Judge permitted Applicant to testify at length about her various professional accomplishments, her community service activities, and her personal circumstances, and he made detailed findings about this evidence, which he addressed in his analysis. Tr. at 39-48. Applicant has not rebutted the presumption that the Judge was unbiased.

Applicant challenges the Judge's findings of fact, citing to numerous comments in the Decision that she believes are in error. One of them is his finding that she had not submitted a written promise to refrain from drug use in the future. She contends that she made such a promise in her written answer to the SOR and that she repeated it in her clearance interview and during the hearing.

We conclude that the challenged reference is to Directive, Encl. 2, App. A ¶ 26(b)(3) ("a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility"). The record contains no signed statement that satisfies all of the requirements of this mitigating condition. The Judge did note Applicant's SOR answer wherein she stated that she would not use drugs in the future, as well as her similar promises during the hearing. It was within his discretion to assign those recent statements less weight than contravening evidence, such as her SCA comment that she might indeed use marijuana in the future. After considering the entirety of Applicant's arguments on appeal, we conclude that the Judge's material findings are based upon "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 cited to no harmful error in the Judge's findings.

Applicant argues that she has mitigated the concerns arising from her drug use. She cites to record evidence that she contends is favorable to her, such as her statements of intent not to use drugs in the future, her good character references, etc, which she argues that the Judge did not consider. However, the Judge's detailed findings included the evidence she has addressed on appeal.

Applicant's brief is not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 15-08711 at 3 (App. Bd. Aug. 24, 2017).

On the question of mitigation, the Judge's findings and record evidence that Applicant has used marijuana extensively in the past; that she lost an internship due to a failed urinalysis; that she was advised by her employer that drug use was prohibited; that her recent drug use occurred after she had been granted a clearance; and that she stated in her SCA that she might use marijuana again support his adverse decision. The purpose of a clearance adjudication is to evaluate an applicant's judgment and reliability. An applicant who has demonstrated an unwillingness to abide by rules and regulations regarding illegal drugs may be similarly unwilling to follow rules governing the protection of classified information.¹ Given Applicant's continued marijuana use after having been placed on notice that it was prohibited, the Judge could reasonably conclude that Applicant had not demonstrated sufficient reliability and good judgment to justify a favorable decision. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015) (The applicant's use of drugs after being placed on notice that such conduct was inconsistent with holding a clearance is a substantial reason to doubt the applicant's reliability). Though the Judge cited to Applicant's recent abstinence and to other favorable matters, there is no reason to believe that his overall weighing of the evidence was erroneous.

The Judge examined the relevant evidence 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, 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."

¹*See, e.g.*, Directive, Encl. 2, App. A ¶ 24: "The illegal use of controlled substances . . . raises questions about a person's ability or willingness to comply with laws, rules, and regulations."

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan

Michael Y. 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