

KEYWORD: Guideline E

DIGEST: 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. We conclude that the Judge's questioning of Applicant, though somewhat sharp at times, did not evidence an inflexible predisposition against him. Adverse decision affirmed.

CASENO: 15-06751.a1

DATE: 05/14/2018

DATE: May 14, 2018

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**

Troy L. Nussbaum, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 17, 2016, 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 February 8, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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 lacked the requisite impartiality; whether the Judge erred in amending the SOR; whether the Judge’s credibility determination was erroneous; 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**

From the late 1990s until the early 2000s, Applicant worked for a previous employer. He told one of the company’s owners that, in the past, he had installed a program that permitted the downloading and sharing of illegal or pirated software. His employer told him not to do that at the company. Later, the company decided to make an online game available to its employees. The company sent a server to Applicant’s home to be used for the game. At some point, the illegal program referenced above was installed on the server. Applicant used the program to download educational material, music, games, pornographic videos, and movies. Applicant had several dozen CDs and DVDs of pirated software at his home.

At the same time, the FBI was conducting an investigation into software piracy. Agents visited Applicant’s home. His wife notified him that agents were there, and he told her to hide the pirated software that he had downloaded. During an interview, he initially stated to the agents that the purpose of the server was to provide access to the online game. Applicant later admitted that the server also contained the illicit software program. Applicant turned over the pirated software that he had told his wife to hide and consented to a search of his home. The agents seized pirated software as well as legitimate CDs and DVDs, including Christmas presents. Applicant agreed to act as a confidential informant for the FBI, and he was not charged with any offense.

During his background interview, Applicant discussed the FBI investigation. He did not disclose that he had known the illegal program had been installed on the server. In his answers to DOHA interrogatories, he again discussed the FBI investigation. He stated that the FBI returned all of his property that they had seized and he was never charged with any crime. Again, he did not disclose that he had known about the illegal program or that he had used it to download software. Applicant’s statements were correct, insofar as he advised that he did not know *how* the illegal

program had been installed on the server. They were not correct in that they failed to mention his own involvement in downloading pirated software. Applicant admitted that he should have disclosed that he himself had downloaded pirated software.

Applicant enjoys an excellent reputation for his job performance. He is considered trustworthy, reliable, mature, honest and responsible. His witnesses and character references recommend that he receive a clearance.

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

The Judge found that Applicant's interview and his interrogatory answers were untrue because they omitted material information about his own knowledge of the illegal program and his having used it to download pirated software. He found that Applicant's omissions were for the purpose of misleading the Government about his involvement in the incident. The Judge resolved allegations about the presence of the illegal program on the company server and Applicant's effort to hide the contraband in Applicant's favor due to the passage of time without re-offense. However, he concluded that Applicant had not mitigated concerns arising from his omissions during his interview and in interrogatory answers. He stated that Applicant's claim that the omissions were innocent was untrue and that, as a consequence, he could not find that Applicant had met his burden of persuasion as to mitigation.

### **Discussion**

Applicant contends that the Judge was biased against him. He cites to portions of the transcript in which the Judge questioned him concerning a possible false statement Applicant had made during his interrogatory answers and concerning his failure to admit his knowledge of the illegal technology. The Judge also questioned a witness to discover the extent to which he was aware of the facts underlying the SOR allegations. 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. 12-09421 at 2 (App. Bd. Nov. 15, 2017).

We have considered this assignment of error in light of the Decision, the transcript, and the record as a whole. The Judge admitted all of Applicant's evidence,<sup>1</sup> permitted him to testify at length, and to call witnesses, who testified unimpeded, save for questions designed to explore a witnesses's knowledge. We conclude that the Judge's questioning of Applicant, though somewhat sharp at times, did not evidence an inflexible predisposition against him.

In presenting his argument about bias, Applicant cites to the Judge's having granted a Department Counsel motion to amend the SOR. The allegation in question originally stated, in pertinent part, that Applicant had failed to disclose that he had known that the computers were not

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<sup>1</sup>The Judge concluded that one of Applicant's documents was a brief rather than an evidentiary exhibit. He made the brief part of the record, though he stated that he would consider it as argument rather than evidence. Tr. at 18-19.

actually being used to run the online game. As amended, the allegation stated that Applicant had failed to disclose that he had known that the computers were being used for software piracy as well as to run the online game. We review a Judge's decision to amend an SOR for an abuse of discretion. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014).

In this case, the transcript shows that the Judge granted the proposed amendment in order to conform the SOR with the evidence, which is consistent with Directive ¶ E3.1.17. The Judge offered both parties additional time to present evidence in regard to the amended allegation. Applicant stated that he did not desire additional time. Tr. at 175. The Judge did not abuse his discretion in amending the SOR. In light of the above, we conclude that Applicant has not met his heavy burden of persuasion to rebut the presumption that the Judge was unbiased.

The balance of Applicant's appeal brief is a challenge to the Judge's weighing of the evidence. In so doing, he argues that the Judge erred in finding Applicant's presentation to be lacking credibility. We are required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant's argument does not persuade us to withhold that deference. Moreover, an ability to argue for a different interpretation of the evidence 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.15-07062 at 2 (App. Bd. Nov. 21, 2017).

The concern under Guideline E addresses, among other things, an applicant's failure to provide candid answers during national security investigative or adjudicative processes. The Directive provides that "refusal to provide full, frank, and truthful answers to lawful questions of investigators [or] security officials" will "normally result in an unfavorable . . . security clearance action[.]" Directive, Encl. 2, App. A, ¶ 15. Given evidence that Applicant deliberately failed to disclose his involvement in the illegal information technology, we find no reason to disturb the Judge's overall adverse decision.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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