

KEYWORD: Guideline E

DIGEST: After considering the entirety of Applicant’s arguments in light of the record as a whole, paying particular attention to the transcript of the hearing, we conclude that the Judge did nothing that would persuade a reasonable person that he lacked the requisite impartiality. The tenor of Applicant’s appeal argument is essentially a challenge to the sufficiency of the Judge’s findings and his weighing of the evidence. Such disagreement with the Judge’s findings, analysis, and adverse conclusions is not sufficient to establish bias. Applicant has not met her burden of persuasion on this issue. Adverse decision affirmed.

CASENO: 16-03183.a1

DATE: 11/20/2018

DATE: November 20, 2018

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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 May 9, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 26, 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 was biased against her, whether the Judge’s findings of fact contained errors, and whether the Judge properly evaluated Applicant’s case in light of the whole-person concept. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact**

Applicant is an employee of a Defense contractor. She has served in this job since 2014. Applicant has held a security clearance since 2009. She attended several colleges between 2000 and 2012 and accumulated a number of credit hours but did not receive a bachelor’s degree until 2012. In 2017, she earned a master’s degree.

In 2011, Applicant submitted an application to a previous employer. On this application, Applicant gave an affirmative reply to a question about whether she had a bachelor’s degree or equivalent. In fact, she had more than 120 credit hours but had not been awarded a degree. She explained that she thought that holding as many credit hours as she did was the equivalent of a degree. The Judge found that Applicant did not intend to mislead the company, but she also submitted a resume that could be interpreted (and apparently was interpreted by her employer) as stating that she had a bachelor’s degree. Applicant was terminated from her employment.

From 2012 to 2014, Applicant worked for another contractor. In late 2013, Applicant saw papers on the desk of one of the company’s partners. These were private papers regarding a marital separation of another company employee. Believing that they would corroborate her claim that the partner had sexually assaulted her, Applicant copied these papers and presented them to HR personnel. She was subsequently told either to resign or be fired for removing personal information from a partner’s office. Applicant resigned.

Applicant reported the alleged offense to the police in 2014. The police report stated that Applicant had been informed that the evidence did not establish all of the elements of the crime. It stated that the officer answered Applicant’s questions and ensured that she had his contact number as well as information about victim services. In completing her security clearance application in 2014, Applicant stated that the case was still under investigation. She testified at the hearing that she thought the police were still involved with the case.

Applicant expressed remorse for removing the documents from the partner's office. She acknowledged that doing so displayed poor judgment and was not the best way to handle the situation. She has received counseling to deal with the stress resulting from the alleged assault.

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

The Judge found that Applicant's claim to have had the equivalent of a bachelor's degree was honestly held. Accordingly, he entered favorable findings on this allegation. However, he found against Applicant on an allegation that she had removed personal papers from the partner's office. He noted Applicant's expressions of remorse and her acknowledgment that the incident reflected poorly on her judgment. He went on to say that the incident suggested some "troubling aspects of Applicant's thought processes." Decision at 6. Although Applicant was not deliberately dishonest in stating she held a bachelor's degree on her application, most people would have interpreted her answer and resume as indicating she had the degree which leaves lingering questions about her judgment. The Judge concluded that Applicant's belief that it was "a good idea" to copy personal records of another person and present them as corroborating evidence was even more troubling. Though the Judge noted character evidence to the effect that Applicant is an honest person, she stated that he had to resolve all doubt about her judgment and reliability in favor of the national security.

### **Discussion**

Applicant's brief contains assertions from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant contends that the Judge was biased against her. She argues that the Judge presented only selected facts in his findings and analysis, that he did not evaluate the evidence in its proper context, that he used "biased language" in the Decision, and that he failed to evaluate the evidence as a cumulative whole. 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. 17-02391 at 2 (App. Bd. Aug. 7, 2018). Adverse rulings alone do not demonstrate judicial bias. *See, e.g.,* ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017); *See also Bixler v. Foster*, 596 F.3d 751 at 762 (10<sup>th</sup> Cir. 2010).

After considering the entirety of Applicant's arguments in light of the record as a whole, paying particular attention to the transcript of the hearing, we conclude that the Judge did nothing that would persuade a reasonable person that he lacked the requisite impartiality. The tenor of Applicant's appeal argument is essentially a challenge to the sufficiency of the Judge's findings and his weighing of the evidence. Such disagreement with the Judge's findings, analysis, and adverse conclusions is not sufficient to establish bias. Applicant has not met her burden of persuasion on this issue.

Applicant cites to various pieces of evidence that the Judge did not explicitly discuss. However, a Judge cannot be expected to discuss every piece of evidence, which is a practical

impossibility. We conclude that the Judge’s material findings of security concern reflect a reasonable interpretation of the record that was before him. *See, e.g.*, ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018). Applicant’s alternative interpretation of the record does not establish error. (*See, e.g.*, ISCR Case No. 17-03049 at 2 (App. Bd. May 15, 2018) (“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.”) Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has she shown that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018). Moreover, we conclude that the Judge’s whole-person analysis complies with Directive ¶ 6.3, in that he considered the totality of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 15-03592 at 2 (App. Bd. Jun. 14, 2017).

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.

### **Order**

The Decision is **AFFIRMED**.

See Dissenting Opinion \_\_\_\_\_

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

**Dissenting Opinion Of Administrative Judge Michael Y. Ra'anan**

The record evidence includes several instances of Applicant's conduct which could be deemed as a pattern of exhibiting poor judgment: she was fired five times. The problem for me is that most of these instances could no longer serve as the basis for an adverse decision by the time of the Judge's decision. Three of the allegations regarding Applicant having been fired were withdrawn by Department Counsel. On one allegation of her having been fired, the Judge found in her favor.<sup>1</sup>

The sole surviving allegation involves conduct that took place in the aftermath of a sexual assault against her by a senior official of her employer. The corporate investigation was being conducted by an office, the head of which was intimately involved with the accused sexual offender. In short, Applicant's conduct in that case is actually the least problematic of the instances which could have served as an allegation of the governmental security concerns.

To the extent that her conduct in the one remaining allegation is then analyzed as a case in mitigation, it is technically permissible to bring in non-alleged conduct. It is, however, not entirely consonant with the spirit of due process to rely on a relative mass of non-alleged conduct to diminish the mitigation of conduct which was arguably reasonable given the context.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

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<sup>1</sup>Also, there was an incident raised in the investigation that might have served as an independent basis for denial. Applicant discussed that incident at length in response to interrogatories sent to her by Department Counsel in 2016. The incident was not alleged in the SOR.