KEYWORD: Guideline E; Guideline H

DIGEST: After considering the totality of the evidence and paying particular attention to the transcript of the hearing, we conclude that the Judge did not evidence bias. He permitted Applicant to raise objections, present evidence, and call and examine witnesses, as the Directive provides. The Judge sustained Applicant's objections to two Government exhibits due to lack of authentication. In fact, the Judge's admonition to counsel to sit down occurred during Department Counsel's later efforts to lay a foundation for these documents, which were not successful. The Judge explicitly stated that he would not consider the contents of these two exhibits, and there is nothing in the Decision to suggest otherwise. Adverse decision affirmed.

CASENO: 17-02391.a1

DATE: 08/07/2018

DATE: August 7, 2018

In Re:	)	
	)	
----------	)	ISCR Case No. 17-02391
	)	
	)	
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 August 21, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline H are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant has worked for a Defense contractor since mid-2016. He served in the military from 2009 until 2013, which included a deployment to the Middle East. Applicant has held a clearance since 2010.

Applicant used marijuana in 2008, before he joined the military. After his discharge, he smoked marijuana offered to him by a friend. He presented evidence of drug tests in 2017 and 2018, which were negative. He signed a statement of intent not to use drugs in the future. In 2009, while still in the military, Applicant completed two security clearance applications (SCA). In neither of these did he disclose his marijuana use. He did disclose the use in his 2015 SCA. In his Answer to the SOR, Applicant admitted that he "consciously and willingly, attempt[ed] to hide the fact that I had consumed marijuana[.]" Decision at 3. This answer is consistent with his testimony at the hearing.

Applicant realizes now that it was wrong to lie on his two SCAs. He states that he is now a different man, older and more mature. Co-workers, who were aware of Applicant's security-significant conduct, testified that he should have a clearance. He also provided letters of support from colleagues and certifications that he has earned.

The Judge's Analysis

Though finding the Drug Involvement allegations mitigated, the Judge concluded that Applicant had not mitigated his deliberate falsifications of his two SCAs. The Judge noted that, having lied on his SCAs, Applicant served an entire military enlistment without notifying anyone of his misconduct. Moreover, Applicant's acknowledgment of his drug use occurred six years after his omissions, and there is no evidence that Applicant has sought counseling for his conduct. Though citing evidence of Applicant's military service, work performance, and changed circumstances such as marriage, the Judge concluded that Applicant's omissions were solely for

personal gain–that is, qualifying for an enlistment. Applicant had numerous opportunities to correct his omissions but failed to do so.

Discussion

Applicant contends that the Judge was biased against him. 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). "[E]xpressions of impatience, dissatisfaction, annoyance, even anger" do not establish bias. "A judge's ordinary efforts at courtroom administration–even a stern and short-tempered judge's ordinary efforts at courtroom administration–remain immune." *Liteky v. United States*, 510 U.S. 540 at 555-556 (1994).

During cross examination, Applicant's counsel objected to questions posed by Department Counsel in an effort to authenticate an interview summary.

> [Department Counsel]: [W]ould you concur that those are places that you might have lived in the 2007 to 2009 time frame?
>
> [Applicant Counsel]: Objection, assumes facts not in evidence.
>
> [Judge]: Overruled.
>
> [Applicant Counsel]: Well, I just, your honor, I have to -
>
> [Judge]: This is cross-examination, counsel. Overruled.
>
> [Applicant Counsel]: May I address the court?
>
> [Judge]: Overruled.
>
> [Applicant Counsel]: May I address the -
>
> [Judge]: I've made, I've made a ruling. You can sit down. Go ahead, counsel. Tr. at 56-57.

During closing argument, the following colloquy took place:

> [Applicant Counsel]: "[T]here was a demeaning and disparaging cross-examination, and pressuring my client. . . The court prevented me from making objections, I want to put that on the record and I think that's contrary to the [D]irective. I am absolutely allowed to make objections.
>
> [Judge]: You made your objections, you want to explain after I made a ruling.

[Applicant Counsel]: Right, and you said no more objections. So, you told me to sit down.

A bit later during argument, Applicant's counsel accused the Judge of bias.

[Applicant Counsel]: I've never seen a judge come off and tell an attorney he's quote unquote sit down. That's demeaning and totally inappropriate and so I want to make-

[Judge]: Do you have any evidence of bias, [counsel] you want to put on the record?

[Applicant Counsel]: Yes, your -- I just did.

[Judge]: That wasn't evidence, you're arguing now. You know the difference between argument and evidence?

[Applicant Counsel]: You're asking a lawyer with 40 years' experience if I know the difference between evidence and argument, is that what you're asking me?

[Judge]: This is the argument phase of this case, that's all I'm going to say. Tr. at 91-92.

After considering the totality of the evidence and paying particular attention to the transcript of the hearing, we conclude that the Judge did not evidence bias. He permitted Applicant to raise objections, present evidence, and call and examine witnesses, as the Directive provides. The Judge sustained Applicant's objections to two Government exhibits due to lack of authentication. Tr. at 15. In fact, the Judge's admonition to counsel to sit down occurred during Department Counsel's later efforts to lay a foundation for these documents, which were not successful. The Judge explicitly stated that he would not consider the contents of these two exhibits, and there is nothing in the Decision to suggest otherwise. Tr. at 83. Although the Judge may have responded testily to Applicant's counsel, we find nothing in his comments or in the Decision to suggest that he had an inflexible predisposition to render a holding that was adverse to Applicant. To the contrary, the Judge's comments appear to have been part of his effort to administer the hearing in an orderly and efficient manner. The Judge found for Applicant on the allegations under Guideline H. Applicant has not met his heavy burden of persuasion that the Judge was biased against him. We resolve this issue adversely to Applicant.

The balance of Applicant's brief is a contention that the Judge did not consider all of the evidence or that he mis-weighed the evidence. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018). We give due consideration to the Hearing Office case that

Applicant has addressed in his brief. However, Hearing Office Decisions are not binding on other Hearing Office Judges or on the Appeal Board. *Id.*

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**.

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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board