

KEYWORD: Guideline E; Guideline J

DIGEST: The Board's review of a Judge's finding determine if the finding is supported by such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary record evidence. There is a rebuttable presumption that a Judge is impartial and unbiased and a party seeking to rebut that presumption has a heavy burden of persuasion. Adverse decision affirmed.

CASENO: 04-03834.a1

DATE: 07/02/2007

DATE: July 2, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-03834
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Stephen P. Dalrymple, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 2, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and

Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive).¹ Applicant requested the case be decided on the written record. However, the government requested a hearing, and on October 31, 2006, after the hearing, Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred with respect to a finding; whether the Judge was biased; and whether the Judge erred by concluding that the security concerns raised under Guidelines E and J had not been mitigated.

(1) Applicant argues that: "The Administrative Judge err[ed] by describing the DUI in 1996 as 'driving drunk.' While this term may be acceptable in the vernacular, it is not a correct legal description of the offense charged and exhibits bias on the part of the judge in this context."² The Board does not find this argument persuasive.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966). The Board does not review a case *de novo*. Considering the record evidence as a whole, the Board concludes that the Judge's finding is supported by substantial evidence and is sustainable. Applicant has not met his burden of demonstrating that the Judge's material findings of security concern do not reflect a reasonable or plausible interpretation of the record evidence.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias or prejudice is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or prejudiced. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999). Applicant has not met his heavy burden of persuasion on this issue, merely because the Judge referred to Applicant's 1996 DUI as "driving drunk." Moreover, Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. June 6, 2006).

¹The SOR was amended prior to the hearing on the motion of the government to add paragraph 2.b.

²Applicant's Brief at 5.

(2) Applicant argues that the Judge should have concluded, as a matter of law, that Applicant's disqualifying conduct under Guideline J was extenuated or mitigated because the conduct was an isolated incident; it was not recent; it was not likely to recur; it would not subject Applicant to coercion; and Applicant has subsequently demonstrated rehabilitation. Applicant argues that the Judge should have concluded, as a matter of law, that Applicant's disqualifying conduct under Guideline E was extenuated or mitigated because "it is an impermissible stretch to consider [Applicant's] one-time failure to disclose his criminal record as a violation of Guideline E."³ The Board does not find Applicant's arguments persuasive.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant'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.

In this case, the Judge weighed the mitigating evidence against the nature and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole person factors. The Judge reasonably explained why the evidence presented in mitigation was insufficient to overcome the government's security concerns. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines E and J is sustainable.⁴

³*Id* at 4.

⁴Because the Board finds no error with respect to the Judge's adverse conclusions under Guidelines J and E, it need not address Applicant's additional request that the Board recommend to the Director, DOHA that he waive application of 10 U.S.C. § 986, which admittedly applies in this case. In any event, there is no provision for waiver recommendations by Judges or others. *See* DOHA Operating Instruction 64, as revised, Sept. 12, 2006 ("... the Administrative Judge shall not opine whether a waiver of 10 U.S.C. 986 is merited, nor recommend whether to consider the case for a waiver of 10 U.S.C. 986"). Only the Director, DOHA or his designee has the authority to grant waivers in meritorious case. *See* "Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Dec. 29, 2005)."

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board