

KEYWORD: Guideline D; Guideline J; Guideline E

DIGEST: There is a rebuttable presumption that a Judge is impartial and unbiased and a party seeking to rebut that presumption has a heavy burden on appeal. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. Adverse decision affirmed.

CASENO: 04-07861.a1

DATE: 10/11/2007

DATE: October 11, 2007

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In Re:)	
-----)	ISCR Case No. 04-07861
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 29, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Conduct), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6

(Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On March 26, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr., denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge demonstrated bias against Applicant; and whether the Judge's decision was arbitrary, capricious, or contrary to law.

The Judge made the following relevant factual findings: Between 1993 and 2002, Applicant downloaded pornographic images onto his computer from the internet, amassing a collection of around 63,000. A small number of these images, perhaps a hundred or less, depicted nude images under the age of 18 and included "video clips of adults engaging in sexual acts with minors." On other occasions, Applicant used a radio scanner to listen to other persons' cordless telephone conversations, sometimes taping them for future listening. He also took photographs of female revelers baring their upper bodies during Mardi Gras in New Orleans, posting them on his website and offering them for sale. These activities were discovered when Applicant underwent a "lifestyle polygraph" pursuant to his employment with a government agency. Applicant consulted a psychologist and, in preparation for the hearing, a forensic psychiatrist as well. These persons concluded that Applicant suffered from "a sexual disorder not otherwise specified" and that he was not a security risk.¹ Applicant continues to view pornography on line about 1-2 hours a week. The Judge's findings include the following in a footnote: "Although not alleged in the SOR, Applicant admitted to "peeping tom" activity with binoculars, both in his neighborhood and while traveling on business."²

Applicant's first assignment of error refers to a remark the Judge made during Applicant's closing argument. Applicant argues that comment indicates that the Judge did not believe the argument Applicant was making and that therefore the Judge's decision was not fair or impartial. 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 Board has noted that the issue is not whether Applicant believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 99-0710 at 5 (App. Bd. Mar. 19, 2001). Assessing credibility is within the authority of a Judge, and adverse findings by a Judge do not, by themselves, indicate bias. *See, e.g.*, ISCR Case No. 06-09401 at 2 (App. Bd. Apr. 16, 2007). Applicant has not met his burden of demonstrating that the cited comment constitutes bias on the part of the Judge.

In contending that the Judge's decision is arbitrary, capricious, and contrary to law, Applicant raises two arguments. The first is that the Judge committed error by failing to find that Applicant's behavior was mitigated. Applicant's argument in this regard lacks merit. In his conclusions, the Judge discussed the record evidence and explained why Applicant's evidence did not overcome the government's security concerns. Moreover, the application of disqualifying and mitigating

¹The forensic psychiatrist concluded that Applicant's "condition is no longer active." AE A at 4.

²Decision at 2, n. 2.

conditions 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 facts, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 05-05439 at 2 (App. Bd. May 29, 2007).

Applicant also argues that the government failed to produce evidence that his use of the scanner and possession of photographs of minors was illegal. On this latter point, he contends that the government presented no evidence that these images were those of actual minors.³ Therefore, Applicant contends that the Judge should not have found against him on these matters insofar as they were alleged under Guideline J. The Board finds that the Judge's finding concerning child pornography is based upon substantial evidence, sufficient to shift the burden of persuasion to Applicant.⁴ Any error as to the legality of the scanner is harmless. Furthermore, the Judge's decision, read in light of the record as a whole, articulates a rational connection between his findings and his adverse security clearance decision. *See Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The record supports the conclusion that Applicant failed to meet his burden of persuasion that it is "clearly in the interests of national security" for him to have a clearance. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Judge's decision is not arbitrary, capricious, or contrary to law.

³*See, e.g.*, 18 U.S.C. § 2252A; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

⁴"My most serious crime is possession of child pornography. I began collecting images from the internet in 1993 . . . In early April 2002 my digital image and video collection consisted of over 63,000 files, of which about 100 were nude photos of minors, mostly by famous photographers . . . and in my estimation, less than a dozen that would have met the legal definition of child pornography." GE 2 (Applicant statement to Defense Security Service) at 2. "[Applicant] stated that he frequents various Internet newsgroups and automatically downloads a significant number of pornographic pictures . . . although he did not originally intend to download child pornography . . . [o]n occasion he has put those files into a folder on his hard drive and saved them . . . [He] has viewed Internet pictures of naked children ranging in age from 5 to 18." GE 4 (Memo by Government Agency) at 1.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

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

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

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board