

KEYWORD: Guideline E; Guideline J

DIGEST: When an Applicant alleges bias the issue is not whether Applicant personally believes the Judge was biased or unfair. Rather the issue is whether the record contains any indication that would lead a reasonable person to question the fairness and impartiality of the Judge. There is a rebuttable presumption that the Judge considered all the record evidence. The Judge is not required to discuss every piece of evidence. Adverse decision affirmed

CASENO: 06-17409.a1

DATE: 10/12/2007

DATE: October 12, 2007

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 06-17409
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 16, 2006, 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). Applicant requested that the case be decided on the written record. On May 3, 2007, after considering the record, Administrative Judge Joseph Testan 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 was biased; whether the Judge's unfavorable clearance decision under Guidelines E and J is arbitrary, capricious, or contrary to law.

(1) Applicant argues that the Judge was biased, essentially based upon the fact that the Judge did not find Applicant's favorable evidence sufficient to mitigate the government's security concerns. The Board does not find this argument persuasive.

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 unfair. 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. 06-09462 at 2 (App. Bd. Jul. 19, 2007). Lack of partiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *Id.* 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 prejudice. *See, e.g.*, ISCR Case No. 04-03834 at 2 (App. Bd. Jul. 2, 2007).

Applicant has not met the heavy burden of persuasion noted above, in that he 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. Jun. 6, 2006).

(2) Applicant also argues that the Judge should have concluded, as a matter of law, that the security concerns raised by his multiple falsifications were mitigated by Applicant's favorable evidence, particularly the fact that: (a) Applicant had admitted to his multiple falsifications and had subsequently provided the correct information, and (b) Applicant had held a security clearance for nearly 30 years without a security violation, infraction, or incident. As part of his argument, Applicant notes that the text of the Judge's decision did not mention his years of dedicated service and his outstanding job performance.<sup>1</sup> Applicant's argument does not demonstrate that the Judge erred.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 04-08806 at 2 (App. Bd. May 8, 2007). Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 05-03143 at 2 (App. Bd. Dec. 20, 2006).

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<sup>1</sup>Applicant includes two character reference letters as attachments to his brief. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's attachments, and they do not demonstrate error on the part of the Judge.

The absence of security violations does not bar or preclude an adverse security clearance decision. The federal government need not wait until an applicant actually mishandles or fails to properly handle classified information before it can deny or revoke access to such information. *See* ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007) citing *Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole-person analysis to determine an applicant's security eligibility. A whole-person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (App. Bd. Jun. 4, 2004).

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> 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. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by Applicant’s two falsifications had not been mitigated. Although Applicant strongly disagrees with the Judge’s conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

The security concerns raised by Applicant’s two falsifications were not necessarily overcome by Applicant’s subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors.<sup>2</sup> He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government’s security concerns. The Board does not review a case *de novo*. The favorable 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. Jun. 29, 2005).

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<sup>2</sup>The record in this case was limited. Applicant elected to have the case decided on the written record, and then filed a two page statement in response to the government’s file of relevant material (FORM). The government’s FORM consisted of only four documents—Applicant’s two security clearance applications, the SOR, and Applicant’s answer to the SOR. There were no statements from independent witnesses, and the Judge did not have an opportunity to assess the credibility of Applicant’s statements in the context of a hearing. The Judge based his decision in part on “. . . the fact that applicant offered no positive evidence concerning his character, honesty, and integrity from people who know him well (e.g., family, friends, coworkers, supervisors) . . .” Decision at 3.

Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines E and J is sustainable.

**Order**

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairman, 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