

KEYWORD: Guideline D; Guideline J; Guideline E

DIGEST: Applicant challenges the Judge's findings regarding the number of times he frequented prostitutes, the circumstances of his visit to the massage parlor whether he deliberately concealed facts during the security clearance process. There is substantial evidence to support the Judge's material findings. Adverse decision affirmed.

CASENO: 12-04540.a1

DATE: 03/19/2014

DATE: March 19, 2014

In Re:)
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-----) ISCR Case No. 12-04540
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)
Applicant for Security Clearance)
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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 June 19, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision–security concerns raised under Guideline D (Sexual Behavior), 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 January 3, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., 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 Applicant was denied due process; whether the Judge was biased against Applicant; whether the Judge erred in his rulings on motions prior to the taking of evidence; whether the Judge’s findings of fact contained errors; whether the Judge failed to consider all of the evidence in the record; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline D and his favorable finding regarding one of the two allegations under Guideline J are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant solicited prostitutes on several occasions while on business travel. Additionally, while undergoing couples counseling in 2009, he went to a massage parlor and paid for sexual activity. In 2009, he failed to discuss his misconduct during an interview with a Government investigator. A year later, his sexual activity became the subject of a denial of sensitive compartmented information (SCI) by another Government agency (AGA). Applicant refused to discuss that determination during a subsequent interview with a Government investigator.

Applicant produced no work or character references by persons who were aware of the SOR allegations. The Judge found Applicant’s hearing testimony to be evasive.

The Judge’s Analysis

The Judge found that Applicant had mitigated security concerns alleged under Guideline D. He also found that Applicant had mitigated an allegation under Guideline J regarding solicitation of prostitutes. However, the Judge found that Applicant had not mitigated two allegations under Guideline E. One of the allegations addressed his failure to disclose his sexual misconduct during the 2009 interview.¹ The other concerned Applicant’s refusal to discuss the details of his SCI denial. The Judge stated that the concealed and/or misrepresented information was relevant and material to a clearance determination. The Government relies on applicants to provide truthful information about adverse circumstances. An applicant’s failure to do so raises a reasonable concern that he would be unwilling to report inadvertent security violations in the future. Applicant’s conduct suggests that he is willing to put his personal interests ahead of the Government’s legitimate interests in protecting national security. While an applicant may decline to answer questions for any

¹Applicant’s failure to disclose this misconduct was also alleged under Guideline J and resulted in an adverse finding.

reason, including a legal right, an assertion of that right will not immunize him from an adverse clearance determination.

Discussion

Applicant makes several claims of denial of due process. He did not raise these claims at the hearing. He contends that he was not able to secure a lawyer or other representation due to the timing of various DOHA actions. We note, however, that Applicant was advised of his right to counsel, both in pre-hearing guidance and at the beginning of the hearing itself. Tr. at 8. At no point did Applicant state a desire to be represented by counsel or request additional time in which to obtain representation.

Applicant contends that Department Counsel engaged in unprofessional behavior by withholding exculpatory evidence and by making improper comments during his closing argument. Applicant's argument is based on the erroneous assumption that DOHA proceedings are akin to criminal ones, with corresponding rights for the applicant and obligations for Department Counsel. However, DOHA proceedings are civil in nature and DOHA applicants are not afforded the procedural protections received by criminal defendants. *See, e.g.*, ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2013). An applicant's procedural rights are those set forth in the Directive. Concerning discovery, the Directive provides the following:

Discovery by the applicant is limited to non-privileged documents and materials subject to control by the DOHA. Directive ¶ E3.1.11.

As far in advance as practical, Department Counsel and the applicant shall serve one another with a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge. Directive ¶ E3.1.13.

At the hearing, Applicant acknowledged that he had received the Government's exhibits and had had an opportunity to review them. Tr. at 64-65. The record provides no reason to conclude that Department Counsel failed to comply with the Directive's discovery requirements.

In closing argument, Department Counsel stated the following: "I have to tell you, with all candor . . . in 34 years as a trial lawyer, I have not come across a more evasive witness than [Applicant]." Tr. at 147. Applicant argues that Department Counsel improperly (1) voiced an opinion as to Applicant's credibility and (2) inserted his personal belief into the hearing.² We have considered Applicant's argument in light of the record as a whole. A reasonable person could find Applicant's hearing testimony to have been evasive and, in significant ways, lacking in credibility.

²Applicant also contends that certain arguments by Department Counsel misstated the evidence. However, we find no error in these arguments, which reflect a reasonable, if partisan, interpretation of the record. Even had Department Counsel's arguments contained some misstatements, they would not likely have affected the outcome of the case.

Under the facts of this case, Department Counsel's argument did not exceed the bounds of zealous advocacy expected of his position. *See, e.g.*, ISCR Case No. 97-0299 at 3 (App. Bd. Dec. 11, 1997). Fact finders in DOHA proceedings are Judges who, by education and experience, are able properly to evaluate arguments that might be problematic if made before a lay jury. We have considered the entirety of Applicant's appeal arguments in light of the record as a whole and conclude that he was not denied the due process afforded by the Directive.

Applicant contends that the Judge was biased against him. A Judge is presumed to be unbiased, and an applicant who argues otherwise has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 09-07395 at 2 (App. Bd. Sep. 14, 2010). We find nothing in the Judge's conduct of the hearing or in his written decision that would likely persuade a reasonable person that he lacked the requisite impartiality. Applicant has not rebutted the presumption that the Judge was impartial.³

Applicant argues that the Judge erred in ruling on pre-hearing motions. We examine a Judge's rulings on motions for an abuse of discretion. *See, e.g.*, ISCR Case No. 04-08547 at 3 (App. Bd. Aug. 30, 2007). The Judge denied a motion to the effect that the processing of Applicant's case took too long, in violation of his right to a speedy trial. We have no jurisdiction to rule on this matter. *See, e.g.*, ISCR Case No. 11-12730 at 2 (App. Bd. Sep. 4, 2013).⁴ The Judge did not abuse his discretion in denying this motion. As noted earlier, DOHA hearings are not analogous to criminal trials.

Applicant argued to the Judge that he should receive a clearance by operation of law under a theory of *res judicata*, a motion that the Judge denied. In written matters submitted in support of his motion and in his Appeal Brief, Applicant notes that his security-significant conduct came to light during the processing of his application for SCI by AGA. Although that agency initially found Applicant not eligible for SCI,⁵ the pertinent Appeals Panel reached a conditional conclusion that

³Applicant contends that the Judge asked Department Counsel off-the-record "if he knew of a security clearance petition that was denied based on Condition E." Appeal Brief, Part 2, at 3. He cites this in support of the proposition that the Judge had made up his mind about the disposition of the case before the close of the record. We have previously observed that failure to preserve the record is an error that can impair our ability to perform appellate review. *See, e.g.*, ISCR Case No. 03-08257 at 5 (App. Bd. Feb. 8, 2007). There is not a sufficient basis to conclude that such an error occurred in this case. In any event, this purported statement by the Judge does not show an inflexible predisposition to decide the case adversely to Applicant. Assuming arguendo that it is a reference to Personal Conduct Disqualifying Condition (DC) 16(e), the Judge did not find this DC to have been raised by the evidence, nor did he even reference it in his decision. On its face, Applicant's argument is not sufficient to raise an issue of bias.

⁴The record does not support a conclusion that the manner in which Applicant's case was processed prejudiced his ability to present evidence in mitigation. *See, e.g.*, ISCR Case No. 11-08063 at 3 (App. Bd. Jul. 19, 2013).

⁵This determination was conveyed to Applicant through a Clearance Decision Statement, dated May 13, 2010, Government Exhibit (GE) 3. Applicant objected to this document at the hearing, but the Judge admitted it. This was not an abuse of the Judge's discretion. *See, e.g.*, ISCR Case 07-18324 at 5 (App. Bd. Mar. 11, 2011). It was an appeal of the decision reflected in this document that resulted in the AGA Appeals Panel determination to permit continued processing of Applicant's request for SCI. We note that, based on the Clearance Decision Statement, the Defense Industrial Security Clearance Office (DISCO) suspended Applicant's collateral clearance. Letter from DISCO to

processing of his application could proceed.⁶ Before a final adjudication could be made, however, Applicant lost his employment, which resulted in a termination of his case.⁷ The Appeals Panel did not make a determination regarding Applicant's eligibility for a clearance. Applicant argues that the decision by the AGA Appeals Panel to permit the continued adjudication of his case supports the grant of a clearance by DOHA through *res judicata*. Although *res judicata* can be applicable in DOHA cases, it can be invoked only regarding decisions that have attained finality. *See, e.g.*, ISCR Case No. 00-0519 at 3 (App. Bd. Dec. 7, 2001); *see also Purter v. Heckler*, 771 F.2d 682 at 689-90 (3d Cir. 1985). Because Applicant's request for SCI was terminated prior to a decision, there was no administrative finality and, therefore, no basis for the application of *res judicata*.

Applicant has cited to the reciprocity provision of DoD 5220.22M, National Industrial Security Program Operating Manual (NISPOM) ¶ 2-204.⁸ Under this paragraph, reciprocity is predicated on (a) a person having an existing security clearance, (b) based on a current investigation, (c) of a scope that meets or exceeds that necessary for the security clearance at issue, and (d) the absence of significant derogatory information that was not previously adjudicated. ISCR Case No. 03-04172 at 3-4 (App. Bd. Jun. 7, 2005).⁹ Applicant's circumstances fail to satisfy the requirements of the NISPOM for a number of reasons. Among other things, the AGA adjudication did not result in the grant of an existing clearance. In addition, Applicant's refusal to discuss his SCI denial during his August 30, 2010, interview obviously occurred after AGA issued its Clearance Decision Statement and, therefore, constitutes conduct not previously adjudicated. In light of this, reciprocity is not appropriate.¹⁰ The Judge did not abuse his discretion in denying this motion. We have considered the balance of Applicant's arguments in light of the record as a whole. The Judge's

Applicant, dated August 2, 2010.

⁶*See* AGA Appeals Panel Letter, dated February 14, 2011: "This letter is to notify you of the . . . Panel's decision concerning your . . . appeal of the [AGA] decision to deny you access to Sensitive Compartmented Information (SCI). After a thorough review and discussion of all the information contained in the investigative file, as well as your oral reply, the Panel has decided to recommend your continued processing for access to SCI, *provided you are re-sponsored for [AGA] SCI access.*" (emphasis added)

⁷*See* GE 1, Security Clearance Application, dated December 1, 2011, at 35: In discussing his investigations and clearance record, Applicant stated that his prior employment "required a full-scope polygraph. The results of the polygraph were inconclusive. The appeals process was to continue the processing of the clearance but [employer] laid me off before final processing could continue. The result was loss of jurisdiction and not final eligibility and my previous TS SCI remained in admin hold. The position I am currently promised is at the collateral secret level . . ."

⁸"Any previously granted [Personnel Security Clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency."

⁹ISCR Case No. 03-04172 was decided under a previous edition of the NISPOM. However, the reciprocity language of that edition is identical to that of the current one.

¹⁰Although the record contains evidence that Applicant had been investigated by a DoD agency for a clearance in 2009, the NISPOM does not preclude a Federal agency from reevaluating a person's security worthiness. ISCR Case No. 03-04172, *supra*, at 4.

challenged rulings are either sustainable or, to the extent that they may contain errors, the errors did not likely affect the overall outcome of the case.

Applicant contends that the Judge's Findings of Fact contained errors. Among other things, he contends that there is no evidence that he deliberately tried to conceal facts from those adjudicating his clearance application. He also contends that the findings about the number of times he used prostitutes, as well as the circumstances underlying his visit to the massage parlor, were erroneous. We examine a Judge's findings to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. In evaluating an applicant's *mens rea*, the Judge should consider the applicant's conduct in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014).

The record supports the Judge's finding that, during his 2009 interview, Applicant did not disclose his interactions with prostitutes. It also supports the finding that Applicant refused to discuss the details of his SCI denial during the August 2010 interview. Applicant stated to the interviewer that he would not discuss this matter because it was still undergoing the appeal process. Applicant Interview, dated August 30, 2010, including in GE 2, Answers to Interrogatories. Accordingly, the Judge could conclude that Applicant's refusal was intentional and deliberate. A reasonable person could conclude that, during both interviews, Applicant had a motive to withhold information that was embarrassing and potentially detrimental to his effort to retain his clearance. Moreover, there is no evidence that his failure to address these matters was caused or contributed to by improper or inadequate advice from a lawyer or some other authorized person.¹¹ The evidence as a whole, viewed in light of the Judge's sustainable finding that Applicant lacked credibility, supports these findings, as well as those about Applicant's interaction with prostitutes. The Judge's material findings of security concern are supported by substantial record evidence or constitute reasonable inferences that could be drawn from the evidence.

Applicant cites to various pieces of evidence that he believes the Judge did not consider. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-10695 at 2 (App. Bd. Jan. 24, 2014). Applicant's arguments on appeal are not sufficient to rebut this presumption.

Applicant contends that the Judge failed properly to apply the mitigating conditions. In particular, in apparent reference to Directive, Enclosure 2 ¶ 15(a),¹² he claims that he had reasonable cause to refrain from discussing his security-significant conduct. However, "[o]f special interest is *any* failure to provide truthful and candid answers during the security clearance process or *any other* failure to cooperate with the security clearance process." Directive, Enclosure 2 ¶ 15 (emphasis

¹¹Directive, Enclosure 2 ¶ 17(b).

¹²This provision states, among other things, that "[t]he following will normally result in an unfavorable clearance action . . . (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing[.]"

added). Although the Government cannot compel an applicant to answer questions during the processing of his application for a clearance, it is not precluded from deciding that an applicant's failure to cooperate has security significance. *See, e.g.,* ISCR Case No. 98-0331 at 8 (App. Bd. May 26, 1999). In this case, the pendency of an administrative appeal of SCI denial was not a reasonable cause to refuse to discuss the underlying conduct with a clearance investigator or otherwise cooperate with the investigation. We have considered the totality of Applicant's explanations and find no reason to disturb the Judge's treatment of the mitigating conditions.

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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