

KEYWORD: Guideline H; Guideline E

DIGEST: A Judge is presumed to be unbiased and a party arguing the contrary has a heavy burden on appeal. Adverse decision affirmed.

CASENO: 12-10889.a1

DATE: 05/08/2014

DATE: May 8, 2014

In Re:)	
)	
-----)	ISCR Case No. 12-10889
)	
Applicant for Security Clearance)	
)	

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 September 10, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E

(Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 11, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 Applicant; whether the Judge's findings of fact contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant works for a Defense contractor. He served in the U.S. military from early 1984 until mid-1985, at which point he received a General Discharge under Honorable Conditions. He has worked for his current employer since 2012 and believes that he held a clearance while in the military.

Applicant used marijuana occasionally between 1979 and 2010. During the last incident, he was at a holiday party and "had a couple of puffs." Decision at 2. He stated at the hearing that, prior to 2010, his last use had been in 2005. In his clearance interview, however, he had stated that over the past five years he had used marijuana about two times a month. He stated that his failure to correct this interview statement was an oversight.

Applicant admitted that he led a "party-boy life style," but that he wanted to change in order to better his employment prospects. The death of his mother and the closing of his business in 2009 also influenced his decision to stop using marijuana.

The Judge made the following pertinent findings regarding the Guideline E allegations: In 1985 Applicant received non-judicial punishment for drunk on duty and failure to obey an order or regulation. He went to an enlisted club on post, that was restricted to him. He was present on post due to field exercises. Applicant's commander imposed 30 days correctional custody and forfeiture of pay on him as punishment for these offenses.

Applicant sought a discharge from the military due to his father's illness. Because of his Article 15 his service was characterized as General. In October 1985 he was charged with unlawful possession of a controlled substance. The police had searched Applicant's vehicle and found a container with marijuana residue therein. He was found not guilty because the Judge believed the search was not legal.

In 1989 he was charged with concealing a deadly weapon. He was delivering pizza on a military base and was subjected to a random search at the gate. The gate guards found a wooden nightstick by the front seat of the car. Applicant stated that he carried the nightstick for protection in case someone tried to rob him.

Applicant was stopped the same evening with DUI. He left a bar with a friend and did not come to a full stop at an intersection. He successfully completed probation and attended alcohol abuse classes. He no longer consumes alcohol.

In 1990 Applicant was charged with battery. Although he stated that he had never been convicted of the offense, he testified that he had engaged in an altercation with a woman concerning Applicant's mother. The woman's boyfriend bumped Applicant's chest, and Applicant pushed back. He stated that the charge was dismissed because the complainant did not appear at court.

Applicant admitted that, in 2011, he left a job under conditions that were not favorable to him. He stated that he was threatened by another employee and was given a reprimand. Applicant refused to sign the reprimand and never returned to work. He described this job as not being "career-oriented" (Decision at 3) but, rather, one to make money for paying bills.

Later that year he was terminated from another job. He did not report to work, having explained to his supervisor that he needed to meet a friend who was going to give him money to pay his water bill. The friend did not show. Applicant received a call from his supervisor telling him to get to work by a specified time or be fired, and Applicant replied that he could not be there by that time. He characterized this job, too, as one merely for earning money.

Applicant provided a letter from a colleague, describing him as a model employee. This person knows about Applicant's SOR allegations but believes that he should get a clearance.

The Judge's Analysis

Regarding Guideline H, the Judge noted evidence that Applicant has not used marijuana since 2010. However, she stated that his overall pattern of drug use was such that it impugned his good judgment, reliability, and trustworthiness to a degree that his recent years of abstinence were insufficient to mitigate. Under Guideline E, she cited to evidence of a pattern of what she characterized as "unreliable" behavior extending back to 1985. She stated that Applicant had not provided enough evidence to mitigate the concerns arising from this evidence. In the whole-person analysis, the Judge stated that Applicant's history of misconduct left her with doubts about his ability to protect classified information.

Discussion

Applicant argues that the Judge did not decide the case based upon evidence but upon "defamatory comments and accusations." Appeal Brief at 8. The gravamen of Applicant's argument is that she lacked the appropriate degree of objectivity. A Judge is presumed to be unbiased, and an applicant who argues the contrary has a heavy burden of persuasion on appeal. *See, e.g.,* ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013). In this case, Applicant's complaints are expressed in often caustic language that attributes to the Judge a lack of good faith. We have examined the Judge's conduct of the case and her Decision, finding nothing therein that would lead a reasonable person to believe that she lacked the requisite impartiality. This could

persuade a reasonable person that Applicant's argument results merely from his dissatisfaction with the result. *See* ISCR Case No. 11-08546 at 4 (App. Bd. Feb. 27, 2013). In any event, Applicant has not rebutted the presumption that the Judge was impartial.

Applicant challenges several of the Judge's findings of fact. We evaluate a Judge's findings of fact to see if they are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 11-13948 at 3 (App. Bd. Feb. 26, 2014). Applicant argues that the Judge erred in her description of the contents of his letter of recommendation, stating that the information actually came from his character witness who testified at the hearing. Applicant appears to be correct in this assertion. However, even if the Judge had not made this error, she would not likely have issued a different decision. Applicant argues that the Judge erred in her description of facts underlying the deadly weapon charge. In his clearance interview and in his response to the SOR, Applicant explained the incident in the same way that the Judge found. However, at the hearing, he testified that these prior versions were not correct and that his weapons charge resulted from a different incident.¹ We find no reason to disturb the Judge's resolution of this conflict in the evidence. *See, e.g.*, ISCR Case No. 11-00180 at 4 (App. Bd. Jun. 19, 2012) ("It is the job of the Judge to resolve conflicts in the record evidence"). Again, any error in this finding did not likely affect the outcome of the case. We have considered the balance of Applicant's challenges to the Judge's findings and conclude that the findings are based upon substantial evidence or that they constitute reasonable inferences that could be drawn from the evidence. Applicant has not presented any putative error that would likely have affected the Judge's overall adverse decision.

Applicant challenges the Judge's application of the mitigating conditions. He contends, among other things, that some of his conduct, such as the Article 15, was too old to be of security significance. He argues that his incidents of criminal conduct either did not result in convictions or were addressed through probation, etc. He argues that the Judge erred in her treatment of his drug use and that she also erred in her opinion that his employment difficulties evidenced poor judgment. We have considered the totality of Applicant's argument on this issue. To a great extent Applicant's argument entails a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 11-03302 at 3 (App. Bd. Apr. 23, 2013). Given the record that was before her, we find no reason to disturb the Judge's treatment of the mitigating conditions.

Applicant challenges the Judge's whole-person analysis. A whole-person analysis requires a Judge to evaluate an applicant's conduct as a whole in reaching a clearance decision. *See, e.g.*, ISCR Case No. 08-09511 at 2 (App. Bd. Mar. 3, 2010). In this case, we conclude that the Judge has done so. Some of the allegations do address matters that occurred many years in the past. However,

¹As stated above, the Judge found that Applicant had been found with a nightstick in his car upon entering a military installation to deliver pizza. Applicant had provided this information during his interview and in his SOR response. Subject Interview Summary at 4, included in Government Exhibit (GE) 2, Answers to Interrogatories; SOR Response at 2. At the hearing he testified that the weapons charge was related to his DUI stop, during which the police found a knife that subject used for digging buried up artifacts. Tr. at 41-42. However, he also testified that the night stick incident did in fact occur, though presumably at a different time.

evidence of conduct spanning three decades, such as marijuana use, public drunkenness and violation of military regulations, conduct resulting in criminal arrests, and conduct resulting in two lost jobs within a single year are sufficient to indicate a pattern of behavior and to produce lingering doubts in a reasonable mind as to Applicant's judgment and reliability. We conclude that the Judge's whole-person analysis complied with the requirements of the Directive.

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