

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 31, 2009, after the hearing, Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the hearing transcript contained errors that affected the outcome of the case; (2) whether certain of the Judge's formal findings do not coincide with the analysis in the body of his decision; (3) whether the Judge was biased; and (4) whether the Judge's decision was inconsistent with the facts of the case. For the following reasons, the Board affirms the Judge's unfavorable decision.

Some of Applicant's assertions on appeal rely on matters not contained in the record below. As such, the assertions are based on new evidence. The Board cannot consider new evidence on appeal. Directive ¶ E3.1.29.

The Judge found that Applicant was involved in numerous incidents with law enforcement between 1998 and 2006 resulting from criminal conduct. In 1998, an altercation between Applicant and his mother's boyfriend led to Applicant's being charged with brandishing a firearm. In 2002, Applicant was arrested and charged with Underage Possession of alcohol. In 2003, Applicant was arrested and charged with Assault and Battery. He was found guilty, and an appeal was resolved by a payment by Applicant of \$1,100 in fines and costs. In 2004, Applicant was charged with Possession of Marijuana, Possession of Narcotic Equipment, and an open container violation. In 2005, Applicant was charged with an Open Container violation. In 2006, Applicant was arrested and charged with Assault and Battery and Public Swearing/Intoxication. Applicant pled guilty to an amended charge of Disorderly Conduct and Public Swearing/Intoxication.

The Judge also found that Applicant completed a security clearance application in 2007. In response to a question about being charged or convicted of any offense related to alcohol or drugs, Applicant did not disclose the alcohol-related charges of 2002 and 2005, nor did he disclose the alcohol and drug-related charge of 2004. In response to a question asking about arrests, charges, and convictions for offenses not otherwise listed, Applicant did not list the 2003 arrest. In response to a question about illegal use of controlled substances, including marijuana, the Judge found that Applicant disclosed marijuana use that occurred between February 1998 and April 1998 but did not disclose marijuana use that occurred in 2004. On a set of interrogatories completed in March 2008, Applicant accurately disclosed his marijuana use, but did not disclose the 2002, 2003 and 2005 incidents.

The Judge concluded that the 1998 firearm brandishing incident was mitigated by Applicant's age and other circumstances. Regarding the other offenses that took place between 2002 and 2006, the Judge concluded that the offenses were minor, that they were committed while Applicant was in his late teens and early twenties as a college student. The Judge also concluded that Applicant had since obtained a job, gotten married, and volunteered in the community. The Judge concluded that there was evidence of successful rehabilitation, and that Adjudicative Guideline ¶ 31(d) applied.

Notwithstanding these conclusions, in his formal findings, the Judge found against Applicant under Guideline J for the 2002, 2003, 2004, 2005, and 2006 incidents.

Regarding the Guideline E allegations of falsification, the Judge concluded that Applicant falsified his responses to the questions about arrests or charges by not disclosing his involvement in the 2002, 2003, 2004, and 2005 incidents. The Judge concluded that Applicant also deliberately omitted the 2002, 2003, and 2005 incidents from his responses to the March 2008 set of interrogatories. The Judge concluded that these falsifications were unmitigated, and he did not accept Applicant's explanations that the omissions were the product of not reading the questions carefully or misinterpreting the questions.

Applicant questions the accuracy of the hearing transcript and asserts that these inaccuracies impeded the Judge's ability to make a fully fair, impartial, and properly weighted decision. Applicant claims that errors occur on 100 pages of the 301 page transcript. However, Applicant specifically identifies only one error in his brief. That alleged error, one which may have led the Judge to conclude erroneously that Applicant was taken to a police station following the 1998 incident, when Applicant says he was not, would in any case be harmless given the fact that the 1998 incident was not the subject of an adverse finding by the Judge under either Guideline J or Guideline E. Apart from this one instance, Applicant provides no information whatever concerning multiple transcript errors, or how any errors adversely affected the Judge's ability to properly evaluate the case. Moreover, Applicant relies heavily on transcript references in his exposition of the facts of the case in his brief. An appealing party must set forth its claims of error with specificity. *See, e.g.*, ISCR Case No. 99-0519 at 9 (App. Bd. Feb. 23, 2001). Applicant fails to establish that the contents of the hearing transcript improperly prejudiced his case.¹

Applicant claims that some of the language in the "Analysis" section of the Judge's decision is at odds with the formal findings made by the Judge. Specifically, Applicant states that subparagraphs 1.b-1.f. under Guideline J are mitigated in the narrative portion of the analysis, in contrast to the ultimate formal findings, where the Judge finds against Applicant under those same subparagraphs. Applicant's claim of error has merit.

Although the Judge does not discuss each allegation in his analysis, a reading of the overall discussion under Guideline J indicates that the Judge considered allegations 1.b.-1.f. to be mitigated.² This reading is supported by additional language at the end of the decision under the whole person analysis, where the Judge reiterates his conclusion that the arrests and charges which occurred during Applicant's college days were not predictive of future behavior. Thus, the adverse formal findings under Guideline J listed at the end of the Judge's decision do not accurately reflect the contents of the Judge's decision and are in error. However, this error does not require remedial action.

¹This should not be interpreted as an indication that the Board finds the transcript to be flawless. Rather, it is simply the case that Applicant has not alleged, and the Board does not see, any specific harmful errors resulting from the transcript.

²The Judge specifically found the allegation at subparagraph 1.a. under Guideline J to be mitigated.

Inasmuch as the Judge's findings and conclusions under Guideline E are independent of the error, and inasmuch as the Judge's findings and conclusions under Guideline E are sustainable, the error is harmless.

Applicant's claim of bias relates to the Judge's statements and rulings on the testimony of Applicant's mother who was called as a witness in Applicant's case. The mother was an eyewitness to the 1998 incident where Applicant ended up being charged with brandishing a firearm. The mother also attended Applicant's criminal court trial in 2003, where a video tape of the incident produced by the commercial establishment where the incident took place was shown in open court. At the security clearance hearing, the mother was asked to testify as to what she saw on the video tape. She was also asked to testify as to what she saw on a second video tape, also produced by a commercial establishment, of the 2006 incident. Department Counsel objected to the line of questioning and the witness's testimony regarding the video tapes of the 2003 and 2006 incidents.

The Judge's ruling on the matter is not a model of clarity. Initially, the Judge sustained the objection and indicated to Applicant's counsel that he wasn't going to allow counsel to ask the mother about what she saw on the videos. When discussing the ruling with Applicant's counsel, the Judge stated that Applicant was available to testify about the incident. The Judge then stated, "There is no probative value to that for him. You're drafting somebody's mom about what happened in a criminal case. It's at best so minimal, even if I were to allow it and it takes 10 minutes, I'm not going to consider it quite frankly."³ The Judge ultimately allowed Applicant's counsel to proceed with questioning of the mother while indicating that he was going to give the testimony such minimal value that "whether I actually allow you to go there or not is not going to make a difference in the decision that I render."⁴

Applicant notes correctly that injudicious language by an administrative judge may give rise to questions of bias. He states that the Judge voiced what was tantamount to a scolding to Applicant's counsel for calling Applicant's mother as a witness. Applicant states that the Judge had no reason to believe that the testimony given by his mother would be anything less than honest. Applicant insists that the appearance of bias damages the validity of the Judge's decision.

There is a rebuttable presumption that an administrative judge is fair and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. ISCR Case No. 03-03974 at 5 (App. Bd. Apr. 20, 2006). Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. *See* ISCR Case No. 03-07245 at 3-4 (App. Bd. May 20, 2005). Bias is not demonstrated merely because a party can demonstrate a Judge committed a factual or legal error. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but rather whether the record of the proceedings below contains any indication that the Judge

³Hearing Transcript at p. 53.

⁴*Id.*

acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *Id.* While Applicant raises non-frivolous concerns about the manner in which the Judge handled the evidentiary issue of his mother's testimony, Applicant's claim of bias is not persuasive.

The Judge's comment on the record about the witness being "drafted" was ill-advised. His statements on the record about his intentions to discount her testimony, particularly before that testimony was completed, was error. However, the Judge did not make these remarks gratuitously. He was engaged in an exchange with Applicant's counsel and was attempting to explain his reservations about receiving the witness's testimony. Irrespective of his method of communicating those reservations, the Judge's reservations had a basis, namely the fact that an applicant's mother, because of her likely loyalty to her child, might not provide objective testimony regarding disputed facts that went to the merits of the child's case. In determining whether the Judge demonstrated bias, the Board will not view the specified actions of the Judge in isolation. Rather, the Board will look to the totality of the record and the Judge's decision to determine whether or not the Judge was impartial. In this regard, there is nothing else in the record or in the Judge's decision that would cause a reasonable, disinterested person to question the Judge's fairness. In this case, while the record contains findings and conclusions against Applicant, it also contains numerous findings and conclusions favorable to Applicant. In fact, Applicant's mother's testimony involved incidents under Guideline J which the Judge ultimately concluded were no longer of security concern. When the case is viewed in its totality, Applicant has not met his heavy burden of establishing bias. Also, any error by the Judge in dealing with Applicant's mother's testimony was ultimately harmless.

Concerning the last issue raised on appeal, Applicant essentially argues that the record evidence does not support the Judge's ultimate adverse security clearance decision, specifically the Judge's findings and conclusions that Applicant engaged in falsification under Guideline E and that such conduct was not mitigated. Applicant's arguments do not establish error on the part of the Judge.

Although the Judge was required to consider Applicant's explanations as to why he answered the security clearance application and interrogatory questions the way he did, he was not required to accept those explanations. A case involving alleged falsification requires a Judge to make a finding of fact as to an applicant's intent or state of mind when the alleged falsification occurred. As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. It is not mere speculation or surmise for a Judge to make a finding of fact about an applicant's intent or state of mind based on circumstantial evidence. To the contrary, it is legally permissible to do so. *See, e.g.*, ISCR Case No. 00-0601 at 2-3 (App. Bd. Sep. 21, 2001). In this case, the Judge noted Applicant's educational background, job history, and other achievements when evaluating the plausibility of Applicant's claim that he either didn't read or misunderstood the questions regarding criminal involvements and drug use. The Judge also noted the unbelievable nature of Applicant's testimony regarding a particular arrest and indicated the negative effect that testimony had upon his assessment of Applicant's credibility. The Judge's conclusions in this regard are sustainable on this record. Applicant's disagreement with the Judge's weighing of the evidence, or Applicant's 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. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “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). Therefore, the Judge’s ultimate unfavorable security clearance decision under Guideline E 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
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