

KEYWORD: Guideline H; Guideline E

DIGEST: Nothing would lead a dis-interested person reasonably to question the Judge's fairness and impartiality. Adverse decision affirmed

CASENO: 08-06605.a1

DATE: 02/04/2010

DATE: February 4, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-06605
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Erick M. Ferran, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 14, 2008, DOHA 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). The SOR was later amended to include allegations under Guideline J (Criminal Conduct). Applicant requested a hearing. On September 18, 2009, after the hearing, Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings of fact: Applicant served in the Marine Corps for six years before being honorably discharged due to a service-connected injury in 2006. Military records indicate that Applicant tested positive for illegal drugs in September 2005 (ecstasy) and February 2006 (marijuana). Two Marine sergeants testified regarding Marine Corps drug testing procedures, and one of them testified that he was present when the tests were administered to Applicant. Applicant testified that he was unaware of those positive test results. Applicant also testified that he has taken two drug tests in the five years that he has been with his current employer, a Defense contractor, and to his knowledge passed those drug tests.

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the 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). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors 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. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere

difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Applicant alleges bias on the part of the Judge. In particular, Applicant points to comments the Judge made expressing skepticism about Applicant's testimony as to his abilities in physical fitness tests. There is a rebuttable presumption that a Judge acts in a fair and impartial manner, and a party seeking to rebut that presumption has a very heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-15003 at 3 (App. Bd. Mar 17, 2005). When reviewing claims of bias or prejudice, the standard is not whether the appealing party believes the Judge was biased or prejudiced, but rather whether there is any indication in the record of the proceedings below (including the Judge's decision) that would lead a disinterested person to reasonably question the Judge's fairness and impartiality. *See, e.g.*, ISCR Case No. 02-33169 at 5 (App. Bd. Sep. 23, 2004). A statement in which the Judge questions an applicant's credibility is not by itself indicative of bias. Nothing in the record of the proceedings below indicates anything that would lead a disinterested person reasonably to question the Judge's fairness and impartiality in this case.

Applicant questions the Judge's credibility determinations. A Judge's credibility determinations are entitled to deference on appeal. *See* Directive ¶ E3.1.32.1. At the hearing, the Judge had the opportunity to personally observe Applicant's demeanor and that of the other witnesses when they testified and to form impressions as to their credibility. Applicant's disagreement with the Judge's negative assessment of Applicant's credibility and his positive assessment of the credibility of other witnesses is not sufficient to meet his burden of persuasion.

Applicant questions whether a government witness qualified to testify as an expert witness regarding the Marine Corps' drug testing procedures and whether those procedures were followed in Applicant's case. Although the subject was not explicitly discussed at the hearing, the Board will assume for the purposes of this appeal that Applicant was testifying as an expert. At the time the witness testified, Applicant did not challenge the witness's expertise. In cross-examining the witness, Applicant asked questions consistent with acceptance of the witness's knowledge of the procedures used in drug testing. Applicant did object on other grounds which are not raised on appeal. The Board concludes that Applicant waived any objection based on the witness's expertise. Even if the issue had not been waived, we conclude that the witness did not testify as to matters outside his competence.

Applicant contends that the government did not meet its burden of production with regard to the drug tests and did not demonstrate a nexus between alleged behavior and a legitimate security concern. The record demonstrates that on two separate occasions Applicant tested positive for illegal drugs, in one instance marijuana and in the other ecstasy. Applicant's urine was, on both occasions, subjected to an initial screening test. The positive results were then confirmed by gas chromatography-mass spectrometry, which "is the most accurate, sensitive, and reliable method of testing[.]" Applicant Exhibit P at 2. On both occasions Applicant's test results exceeded the cutoffs established by DoD policy. Government Exhibits 2, 4. Additionally, Applicant stated to the OPM

investigator that, prior to the positive marijuana urinalysis, he had attended a party at which marijuana was being used. His claim of passive inhalation of marijuana smoke implicitly acknowledges the accuracy of the subsequent urine test. The record demonstrates that the government has presented substantial evidence as to the allegations in the SOR. Once the government demonstrates a security concern, the burden is on an applicant to mitigate or rebut the concern; the Directive presumes there is a nexus between proven conduct under any of the guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 07-08113 at 3 (App. Bd. Jul. 15, 2008); and ISCR Case No. 03-18523 at 4 (App. Bd. Jun. 16, 2005). The record supports the Judge's conclusions in this regard. Furthermore, there is a presumption of good faith and regularity by federal officials in the fulfillment of their duties. Applicant failed to rebut that presumption.

Applicant contends that the Judge erred in his application of mitigating conditions and in his whole-person analysis. The Board finds that the Judge's discussion of mitigating conditions and the whole-person concept reflect a reasonable analysis of the sustainable findings of security concern, and the Board sees no reason to disturb them. *See, e.g.*, ISCR Case No. 08-10008 at 2 (App. Bd. Dec. 29, 2009).

Applicant questions whether the Judge's findings of fact and his adverse conclusions, including a conclusion that Applicant deliberately falsified his security clearance application, are sustainable in light of the record as a whole. After reviewing the record, the Board finds that the Judge's material findings are based on substantial evidence, or constitute reasonable characterization or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 06-24013 at 2 (App. Bd. May 23, 2008). The Judge met the standard discussed above by examining the relevant data and articulating a satisfactory explanation for his decision. The Judge's decision is therefore sustainable.

Alternatively, Applicant requests that the case be remanded to obtain further testimony regarding Applicant's positive drug tests and to establish proper testing procedures by the Naval Drug Testing Laboratory. A full hearing on Applicant's case was already held, and the Board is without authority to regulate the procedures of the Naval Drug Testing Laboratory.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge

Member, Appeal Board

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