

KEYWORD: Guideline G

DIGEST: The Judge's questions were relevant and temperate. Applicant has not rebutted the presumption that the Judge was impartial and unbiased. Adverse decision affirmed.

CASENO: 08-07618.a1

DATE: 01/26/2011

DATE: January 26, 2011

In Re:)
)
)
 -----) ISCR Case No. 08-07618
)
)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Kevin Barry McDermott, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 11, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the

basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 21, 2010, after the hearing, Administrative Judge Jennifer I. Goldstein 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 and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

Facts

The Judge found that Applicant is an employee of a Defense contractor. He is married and has a 14 year-old daughter. He has held a security clearance for 20 years.

Applicant, who began consuming alcohol at age 17, was arrested and charged with DUI in January 2005. He pled guilty to reckless driving and was given three years of probation. He was required to enter into a first offender program and pay a fine.

After this incident, Applicant abstained from alcohol for two years. However, he resumed his consumption of alcohol. From 1997 until 2007, excluding the two year abstention, Applicant would become intoxicated two or three time a week and then operate his car. He would often drink outside the home because his wife did not approve.

In November 2007 he was again arrested for DUI. Convicted, he was sentenced to 48 months of probation, conditioned on participation in an 18-month alcohol recovery program, 49 Alcoholics Anonymous (AA) meetings, and one day of confinement in the county jail. He fulfilled these requirements but was still on probation at the close of the record.

Although Applicant has also sought help through an assistance program provided by his employer. He attended a 15-week outpatient program, for a total of 125 hours. Applicant no longer associates with his drinking friends. He has never had a sponsor in AA. Although he completed the first three of the 12 recovery steps prescribed by AA, he was unable at the hearing to recall what they were. He was not able to identify the name of the book relied upon by AA.

Applicant has promised to his wife that he will not drink again, he made a similar promise after his 2005 arrest, yet, as stated above, returned to alcohol consumption. He enjoys a good reputation at his work place.

In the Analysis portion of the decision, the Judge noted that Applicant had returned to alcohol consumption in 2007 despite two years of abstinence following his first DUI and that he was still on probation. She noted favorable evidence, such as his completion of the alcohol treatment programs referenced above. However, she stated that she found Applicant’s testimony that he is committed to sobriety to be lacking in credibility. She gave as her reason for this conclusion: (1)

Applicant's inability to recall the first three AA steps; (2) evidence that he has no AA sponsor; and (3) evidence that he does not appear to be an active participant in AA.

She also concluded that Applicant's wife's testimony corroborating his claims of abstinence lacked credibility, in light of record evidence that Applicant had previously consumed alcohol away from her presence in order not to upset her. Moreover, she stated that Applicant had been a mature adult during the times pertinent to his case, and that his admitted incidents of driving under the influence of alcohol were more numerous than the two occasions upon which he was arrested. Accordingly, the Judge concluded that Applicant had failed to mitigate the security concerns in his case.

Discussion

Applicant contends that the Judge was biased against him. Specifically, he argues that the Judge divested herself of her impartiality by taking an active part in questioning him. He also argues that the Judge considered matters outside the record, specifically the name of the AA handbook. He also points to the Judge's statement that she was not convinced of his commitment to sobriety as demonstrating bias against him.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e. g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). We have examined the transcript and the Judge's decision. She did question Applicant fairly extensively. However, in a security clearance hearing, the Judge is the finder of fact and enjoys considerable latitude in clarifying the record. A review of the transcript shows that the Judge's questions in this case were relevant and temperate.

Additionally, the Judge reasonably supported the challenged credibility determinations by citations to record evidence, and we find no reason to disturb them. *See* Directive ¶ E3.1.32.1, which requires us to defer to a Judge's credibility determinations. Even if the Judge erred by considering extra-record evidence concerning the title of the AA handbook, the error was harmless.¹ All in all, we have found nothing that would lead a reasonable person to conclude that the Judge lacked the requisite impartiality. *See* ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006). Applicant's argument on appeal is not sufficient to rebut the presumption that the judge was unbiased.

The record supports a conclusion that the Judge examined the relevant data and articulated 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

¹During Applicant's testimony, there was some apparent confusion as to the title of the AA handbook. Applicant stated that it was called the Blue Book. However, during a brief recess, the court reporter advised that it was entitled the Big Book. Tr. at 82. The court reporter was not a witness and her statement was not evidence.

(1962)). The Judge's adverse 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).

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan _____

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

Signed: William S. Fields _____

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board