

KEYWORD: Guideline J; Guideline E

DIGEST: The Board need not agree with a Judge's rulings to conclude that they do not indicate bias. The Judge was at the hearing and need not wait for the arrival of the transcript to start the process of preparing a decision. Adverse decision affirmed.

CASENO: 09-01520.a1

DATE: 01/24/2011

DATE: January 24, 2011

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In Re: )	
)	
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)	
)	
Applicant for Security Clearance )	
_____ )	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James F. Duffy, Esq., Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 19, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under 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 October 27, 2010, after two hearings, Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether Applicant was given a fair and impartial hearing, and whether the Judge’s application of mitigating conditions and whole-person factors was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge’s adverse decision.

The Judge made the following relevant findings of fact: Applicant is 49 years old and has held a security clearance since 1998. In 1979, when Applicant was about 17 years old, he was arrested and charged with petit larceny and possession of burglary tools after he and some friends siphoned gasoline from a truck. The owner of the truck dropped the charges. Applicant believed his record was expunged, although he did not verify that had actually happened. Applicant’s parents came to live with him in 1987, and Applicant cared for his father until the father’s death in 1992. Applicant also cared for his mother until she moved into a nursing home in 2001. From 1992 until 2001, Applicant gave his mother her medication. After a heart attack in 1996, Applicant was prescribed and took Oxycodone until his prescription expired. In 1998, Applicant’s mother’s condition worsened. On occasion between 1998 and 2001, Applicant took his mother’s prescription pain killer, Percocet, because he was under stress. Applicant estimated that he took her medication about 20 times. Applicant knew that his use of her prescription medication was illegal, and he held a security clearance while he did so. In February 2004, Applicant stole a blank prescription form from his doctor’s desk. He made copies of the form and forged his doctor’s name to obtain 100 Oxycodone pills per month for approximately 21 months. Applicant held a Top Secret security clearance at that time. In December 2005, Applicant attempted to obtain 200 Oxycodone pills instead of 100. Applicant believes the pharmacist contacted the police and the doctor. In 2006, Applicant was arrested and charged in Federal Court with obtaining Oxycodone by fraud. He pleaded guilty and was placed on probation for three years. Applicant complied with the terms of the probation, including attending drug counseling and seeing a psychiatrist. Applicant believes he went through withdrawal when he stopped taking the pills, although he was never diagnosed as being physically dependent on the drug. Applicant’s probation ended in December 2008, although he is still prohibited from purchasing a weapon or voting. Based on testimony elicited at the hearing of September 8, 2010, Department Counsel amended the SOR to add an allegation of falsification in connection with Applicant’s security clearance application of 2002, for failure to disclose his illegal use of his mother’s pain medication. Applicant denied that his failure to disclose the information was intentional or deliberate. The Judge found Applicant’s explanation not to be credible and found against him in that regard. In the security clearance application Applicant completed in March 2008, he denied illegal use of drugs while possessing a security clearance. With regard to the 2008 application, the Judge found in Applicant’s favor, concluding that he provided sufficient information elsewhere on the application to put the government on notice of his drug use

while he held a security clearance. Applicant is regarded highly by colleagues and supervisors and receives high performance ratings at work.

Applicant contends that he was denied a fair and impartial hearing because the Judge “abandoned her role as Judge and assumed a role as co-counsel to the Government attorney. . .” Appeal Brief at 6-7. There is a rebuttable presumption that a Judge is impartial and unbiased, and the appealing party has a heavy burden when seeking to overcome that presumption. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). The issue is whether the Judge acted in a manner that would lead a reasonable person to question his or her fairness and impartiality. *See* ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006). In the case before us now, Applicant points to several instances when the Judge interrupted Department Counsel’s cross-examination to ask for additional information from Applicant. A Judge may question any witness to clarify ambiguities, or to better understand the evidence before him or her. *See* ISCR Case No. 94-1055 at 2 (App Bd. May 8, 1996). In this case the Judge chose to clarify Applicant’s testimony to a significant extent during Department Counsel’s cross-examination. (She also asked several questions during Applicant’s counsel’s examination.) The Judge’s actions do not rebut the presumption that the Judge decided the case on the basis of the evidence before her. Applicant also relies on the fact that several of his objections were over-ruled to buttress his case for bias. The argument is unpersuasive. The Judge’s rulings in this record are not evidence of bias. The Board need not agree with the substance of each ruling to conclude that they do not indicate bias.

Applicant argues that the Judge’s decision is arbitrary, capricious, or contrary to law. Applicant maintains that he has mitigated any security concerns that might exist under Guideline J and Guideline E and that the Judge either did not consider or did not give adequate weight to his evidence of mitigation. There is a rebuttable presumption that the Judge considered all the record evidence, and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). Applicant relies on the speed of the Judge’s final decision as evidence that she did not consider all the record evidence. The Board finds that argument unpersuasive. The second hearing transcript is stamped as received at DOHA on October 20, 2010. The Judge’s decision is dated October 27, 2010. There is no basis to conclude that this is too fast. Furthermore, the Judge was at the hearing; she did not need to wait for the transcript before starting the process of preparing a decision. Applicant admitted four of the SOR allegations against him. The burden then shifted to Applicant to extenuate or mitigate the security concerns raised by those allegations. Directive ¶ E3.1.15. The Judge concluded that Applicant did not present evidence sufficient to overcome the security concerns raised. 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. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance determination. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party’s disagreement with the Judge’s weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate that 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. 09-06540 at 2 (App. Bd. Nov. 19, 2010).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the Guideline J and Guideline E allegations against him and considered the possible application of relevant mitigating conditions and factors. Decision at 7-10. The Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Id.* The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). 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, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines 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.'" *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge's adverse decision is sustainable.

### **Order**

The Judge's decision denying Applicant a security clearance in 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