

KEYWORD: Guideline G; Guideline J

DIGEST: Applicant argues that the fact that he and the Judge were both “prior Navy” had a negative impact on his case. There is a rebuttable presumption that a Judge is impartial and unbiased. Applicant has not overcome that presumption. Adverse decision affirmed.

CASENO: 09-02566.a1

DATE: 11/12/2010

DATE: November 12, 2010

In Re:)
)
)
 -----) ISCR Case No. 09-02566
)
)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 1, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 10, 2010, after the hearing, Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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

Applicant contends that the Judge’s adverse decision should be reversed because the Judge did not correctly weigh the evidence. Specifically, he argues that although he admitted to allegations in the SOR, the government did not present sufficient evidence to establish them. He also argues that the Judge did not give him sufficient credit under the whole-person concept for his many years of honorable service in the U.S. Navy and for having held a security clearance for more than 20 years without a security violation. In that regard, Applicant states that the fact that he and the Judge were both “prior Navy” had a negative impact on the case.

Applicant’s mentioning of the prior Navy status of himself and the Judge raises a claim of bias. 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. 07-02253 at 3 (App. Bd. Mar. 28, 2008); ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). In this case, Applicant has offered no evidence that overcomes that presumption.

Applicant’s arguments do not demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law. The government is only responsible for presenting evidence to establish facts alleged in the SOR that have been controverted. Directive ¶ E3.1.14. It is the applicant’s responsibility to present evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and the applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. *Id.* at ¶ E3.1.15. In this case, Applicant admitted much of the information in the SOR. The burden of persuasion then shifted to Applicant.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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 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).

In this case, the Judge found that Applicant had a long history of alcohol dependence. He had completed an inpatient alcohol treatment program in January 2007, but had resumed drinking alcohol in February of that same year. He continued to have alcohol-related incidents and did not abstain as recommended. He had not followed through on treatment advice, was regarded as a high

risk for relapse, and had not received a favorable prognosis by a duly qualified medical professional. Although Applicant had successfully completed an inpatient alcohol treatment program, he had not demonstrated an established pattern of abstinence or followed the aftercare program. He had only recently accepted that he was alcohol dependent, and it was unclear to the Judge whether his recent commitment to abstinence was truly long-term or a consequence of his pending deployment. Decision at 8.

In light of the foregoing, the Judge could reasonably conclude that Applicant's history of alcohol abuse still presented a security concern and that Applicant had not met his burden of persuasion as to mitigation. *See, e.g.*, ISCR Case No. 07-10953 at 2-3 9App. Bd. Oct. 29, 2008. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. Decision at 10. She found in favor of Applicant under Guideline J and as to one of the SOR factual allegations under Guideline G. However, she reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. *Id.* The Board does not review a case *de novo*. After reviewing the record, the Board concludes 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 (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 unfavorable security clearance decision under Guideline G is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____

William S. Fields

Administrative Judge

Member, Appeal Board