

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant did not rebut the presumption that the Judge was unbiased. Neither did he rebut the presumption that the Judge considered all of the record evidence. Adverse decision affirmed.

CASE NO: 10-04136.a1

DATE: 05/01/2012

DATE: May 1, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-04136
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Raashid Williams, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 8, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). The SOR was subsequently modified to add an additional factual allegation under Guideline E. Applicant requested a hearing. On January 30, 2012, after the hearing, Administrative Judge John Grattan Metz, Jr. 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 against Applicant; whether the Judge erred in his credibility determination; and whether the Judge’s adverse

security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant deliberately failed to file state and federal income tax returns for tax years 2002 until 2009. He knew of his requirement to file his returns, but “he was paralyzed into inaction by his mistaken belief that he had to have his earlier tax returns completely correct” before he could submit returns for later years. Decision at 2. He set about to file his returns after the state garnished his wages.

In April 2010, Applicant refused to sign an Internal Revenue Service (IRS) release to enable Government investigators to examine his tax records as part of his background investigation. He refused to sign the release because it authorized access to tax returns that had yet to be filed. “[Applicant] was concerned that he would be accused of fraud if he signed a release for tax years for which there was no return filed.” *Id.* He offered to sign a release provided that he could annotate it with his concerns. However, the IRS would not accept a release that bore annotations. The investigator advised Applicant of the potential adverse consequences of failing to sign the release.

Applicant enjoys a good reputation for honesty and trustworthiness. He has an excellent work record.

In the Analysis, the Judge stated that there is no basis in the record for Applicant’s belief that merely by signing a release he would be committing fraud if no documents were found to be responsive. He stated that Applicant’s conduct in refusing to sign was not reasonable. He concluded that Applicant is a person who reaches conclusions without the application of common sense, without consulting persons who could properly advise him, and who persists in holding to erroneous conclusions despite being confronted with evidence to the contrary. The Judge stated that Applicant’s answers during the hearing were sometimes evasive, and he concluded that Applicant was not a credible witness. He stated that he did not know if Applicant was deliberately trying to mislead or whether his beliefs were honest though unreasonable. Either way, the Judge stated, Applicant had not demonstrated the judgment or reliability necessary for holding a security clearance.

Applicant’s brief cites to his testimony about his scrupulous desire to avoid committing fraud. To the extent that he is arguing that the Judge did not consider this evidence, a Judge is presumed to have considered all of the evidence in the record. *See, e.g.,* ISCR Case No. 10-10068 at 2 (App. Bd. Dec. 20, 2011). Applicant has failed to rebut this presumption. The Judge discussed Applicant’s explanations for his failure to sign the release, concluding that these explanations were not sufficient to mitigate the security concerns arising from his conduct. This conclusion was supported by the record.

To the extent that Applicant is taking issue with the Judge’s credibility determination, we are required to defer to the Judge’s evaluation of an Applicant’s credibility. Directive ¶ E3.1.32.1. In this case, the Judge’s evaluation of the reasonableness of Applicant’s explanations is consistent with the record that was before him. The Judge explicitly stated that he did not know if Applicant were being deceptive or whether he honestly, though unreasonably, believed he could not submit his tax forms or sign the release without committing fraud. He described Applicant’s views in terms

that were sometimes pointed. However, the Judge did not err in finding these explanations unworthy of belief.¹ Applicant contends that the Judge was biased against him. We have considered both the Judge's decision and his conduct of the hearing and find nothing that would cause a reasonable person to question the Judge's impartiality. An applicant who contends that a Judge is biased against him has a heavy burden of persuasion, and Applicant has failed to meet that burden. *See, e.g., ISCR Case No. 09-07395 at 2-3 (App. Bd. Sep. 14, 2010).*

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 (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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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

¹Applicant himself appeared to acknowledge that his conduct was not defensible: "Retrospectively, Sir, I can look at it and only shake my head in amazement at my actions." Tr. at 222-223.