

KEYWORD: Guideline F

DIGEST: Evidence was adduced at the hearing that Applicant had not filed his 2016 Federal income tax return in a timely fashion. Department Counsel moved to amend the SOR to add an allegation to that effect, the SOR being silent on the point. The Judge overruled Applicant's objection and granted the motion. Applicant requested three months in which to address the new allegation. The Judge held the record open from August 9, 2018, the date of the hearing, until September 27, 2018. Accordingly, the amendment was founded upon evidence that was properly before the Judge, and it rendered the SOR in conformity therewith. We find no error in the Judge's decision to grant Applicant less additional time than he requested, although he allowed him well over a month and a half after the hearing to present evidence in mitigation of the new allegation. The Judge did not abuse his discretion in amending the SOR. Adverse decision affirmed.

CASENO: 17-02588.a1

DATE: 03/05/2019

DATE: March 5, 2019

In Re:)	
)	
-----)	ISCR Case No. 17-02588
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Allison R. Weber, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 22, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 6, 2018,, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 utilized an improper standard in making his findings of fact; whether the Judge abused his discretion in amending the SOR; whether the Judge denied Applicant due process; whether the Judge’s findings of fact are supported by substantial evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant is the president of a Defense contractor. He has a bachelor’s degree and is an ordained minister. Applicant has held a secret clearance since 2005. He also has held a top secret clearance with access to sensitive compartmented information in the past. He is married and has four adopted children.

Applicant’s SOR alleges that he failed to pay his Federal taxes for 2010 through 2013 and for 2015; that he failed to pay his state taxes for 2010 through 2015; and that he is indebted to the Federal Government for six tax liens secured against him in 2014, 2015, 2016, and 2017. The total amount of the alleged liens is nearly \$204,000. Applicant admitted all of the SOR allegations, and the Judge incorporated these admissions into his findings.¹

Applicant attributed his tax delinquencies to several factors: his company has struggled through the years; his wife has experienced serious health problems; Appellant’s wife lost income as a realtor during the poor housing market; he lost rental income on property that he owned; he received poor tax advice from his accountants; and the adoption of his children took two years longer than anticipated. His loss of income, failure to pay payroll taxes in a timely manner, and failure to maintain monthly payments under installment agreements eventually led the IRS to cancel those agreements and file liens.

Although Applicant failed to pay his tax obligations as due, he filed his Federal returns in a timely fashion, except for tax year 2016. He eventually filed his 2016 return several days after the hearing. The IRS initially rejected this return due to errors but finally accepted it in August 2018.

¹During the hearing, the Judge amended the SOR to include an allegation that Applicant failed to file his 2016 income tax returns in a timely manner. Tr. at 81-83. Applicant neither admitted nor denied this additional allegation. See below for discussion of Applicant’s assignment of error on this matter.

For all of the years in question, except for 2014, Applicant's adjusted gross income was about \$200,000 or more. His AGI for 2014 was about \$85,500. As stated above, Applicant had an installment agreement with the IRS, who cancelled it after Applicant failed to make a required payment. Applicant presented some documentary evidence in corroboration of his claim to have made payments over \$44,000 under this agreement.

Applicant made an offer in compromise to the IRS, but the agency rejected it. Applicant claimed that he had made \$16,000 in payments during that time, but he only corroborated about \$14,500. Applicant entered into another payment plan covering 2010 through 2013. He made only two payments under the plan because a client stopped paying him. During this time, Applicant's balance due to the IRS for 2010 through 2013 increased to nearly \$118,000. Applicant stated that as of August 2018 his unpaid individual income taxes totaled nearly \$154,000 for 2010 through 2013 and 2015. However, at the hearing he testified that his 2010 through 2013 taxes had been paid and that only his debts for 2014 and 2015 remained due, both of which were covered under an installment agreement.

Regarding the liens entered against him, Applicant told his clearance interviewer that he had not been aware of any liens at the time he completed his security clearance application (SCA). However, this contention is not consistent with the contents of his installment agreements, which show that liens had already been filed. These agreements predate the SCA. Applicant contended that he had disputed some of his liens with the IRS but did not corroborate that claim. Applicant also failed to corroborate his claim to have resolved his state tax obligation. He did present evidence of an installment agreement, dated January 2018, showing a balance owed of nearly \$17,000. He did present evidence of six payments under this agreement.

Applicant also has other delinquent debts, such as a mortgage, credit card, automobile loan, and medical expenses. Has paid off most of the \$38,480 that these debts amount to. In addition, he owns a residence where his mother lives and pays about \$600 a month toward the mortgage. His financial statement shows that he has a net monthly income of about \$15,500, with about \$800 left after ordinary expenses. There is no evidence that he has received financial counseling. He failed to provide corroboration for his testimony about the various causes underlying his financial problems. However, as noted above, Applicant's gross income has almost consistently exceeded \$200,000. He found that his claims about his wife's loss of income is unsupported by documentary corroboration, as is his testimony about lost rental income and poor advice from accountants.

Applicant enjoys an excellent reputation for his duty performance, knowledge, and experience. He recently received an award for his "consistent record of excellence." Decision at 8.

The Judge's Analysis

The Judge concluded that Applicant's tax problems raised the following concerns: inability to satisfy debts, unwillingness to satisfy debts regardless of ability to do so; a history of not meeting

financial obligations; and failure to file and pay taxes when due.² He further concluded that Applicant had not met his burden of persuasion as to mitigation. He noted that Applicant's unpaid debts are ongoing and, therefore, recent. He also reiterated his finding that Applicant had not corroborated his testimony about the causes of his problems or his efforts to resolve them. The Judge stated that, as president of a corporation, Applicant was charged with understanding the various financial requirements that went with the position. Applicant had a significant income for the years in question, and yet his difficulties are still unresolved. The Judge cited to his finding that Applicant had not received financial guidance, and he also concluded that Applicant's payment history does not equate to a good-faith effort to resolve his debts. He also stated that inability to pay taxes is not an excuse for having failed to file his 2016 return on time. He concluded that Applicant's recent efforts at addressing his tax problems suggest that he has done so simply because his clearance is in jeopardy and that Applicant's evidence, viewed as a whole, amounts to a promise to resolve his debts in the future, which is not enough to establish mitigation.

In the whole-person analysis the Judge stated that Applicant had established "an extremely poor track record of debt reduction . . . until well after the SOR was issued." "Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance." *Id.* at 15.

Discussion

Bias

Applicant contends that the Judge was biased against him. He cites to various aspects of the record which he believes demonstrate that the Judge was not impartial. A Judge is presumed to be unbiased and a party who alleges otherwise has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 17-02391 at 2 (App. Bd. Aug. 7, 2018). Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. ISCR Case No. 12-09421 at 2 (App. Bd. Nov. 15, 2017).

Among the things that Applicant asserts in support of this assignment of error is the claim that the Judge directed him to present evidence from which the Judge later drew unfavorable conclusions. Applicant is referring to a portion of the hearing in which Department Counsel questioned him about his yearly income. Applicant did not provide a clear answer, and his counsel expressed a concern that Applicant was being required to "do math in his head on the stand." Tr. at 79. At this point, the Judge interjected, proposing that the issue could be resolved if he could have the first two pages of every income tax return for the years in question. He advised that he did not need "the rest of the stuff," meaning the entire tax documents, only those that would address the matter of Applicant's income. *Id.* In the end the Judge concluded that this evidence showed that Applicant had sufficient income to have resolved his financial problems.

²Directive, Encl. 2, App. A ¶ 18 (a-c, f).

Contrary to Applicant's argument on appeal, on this record we construe the Judge's motive in seeking the tax returns to have been an effort to clarify the evidence on a material point rather than to hobble Applicant in his effort to establish mitigation or otherwise to place an undue burden upon him.³ We have examined the other things that Applicant has cited as evidence of bias and conclude that they constitute rulings, interpretations of the record, findings, etc., with which Applicant is dissatisfied. A party cannot demonstrate bias merely by showing that the Judge ruled against him or her. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017); *See also Bixler v. Foster*, 596 F.3d 751 at 762 (10th Cir. 2010). Applicant has directed our attention to nothing that would likely persuade a reasonable person that the Judge was lacking in the requisite impartiality.

Improper Standard for Making Findings

Applicant contends that the Judge did not utilize the proper standard in making findings and drawing conclusions therefrom. Noting the Judge's comments that he had not corroborated his testimony about the difficult circumstances underlying his financial problems or about his effort at repayment, Appellant argues that the Judge, in effect, wrongfully denied to his testimony the status of evidence. We construe this argument to mean that the Judge did not comply with the criteria set forth in the Directive for making and evaluating findings of fact.

The standard that we use in evaluating the sufficiency of a Judge's findings is set forth in Directive ¶ E3.1.32.1: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." *See* ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018). Of course, testimony is evidence and, in an appropriate case, it can support sustainable findings on its own. However, it is not unreasonable for a Judge to expect an applicant to corroborate his claims that he has mitigated the concerns set forth in an SOR. *See, e.g.*, ISCR Case No. 15-07062 at 2 (App. Bd. Nov. 21, 2017). In a DOHA proceeding, the applicant bears the burden of persuasion that he or she should have access to classified information, and corroborating evidence can go a long way toward enabling an applicant to meet that burden. In the case before us, the Judge did in fact make findings drawn from Applicant's testimony. However, he apparently did not find Applicant's uncorroborated assertions to be sufficiently credible so as to satisfy the mitigating conditions set forth in the Directive, and we are required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. Moreover, a Judge is not required to give conclusive weight to any kind of evidence, even if it is un-rebutted.⁴ The Judge did not contravene the Directive in making his findings of fact.

³By stating or implying that a party should not present certain evidence, the Judge runs the risk of infringing on a party's responsibility to present evidence. Directive ¶¶ E.3.1.14. and E.3.1.15.

⁴*See* ISCR Case No. 98-0592 at 5 (App. Bd. May 4, 1999): A "Judge must consider the record as a whole and use common sense . . . in evaluating the absence of corroborating evidence." This case quotes ISCR Case No. 98-0265 at 4, n.2 (App. Bd. Mar. 17, 1999): An "Administrative Judge is not required to accept un rebutted evidence uncritically or without considering it in light of the record evidence as a whole."

SOR Amendment

Applicant contends that the Judge erred in amending the SOR.

The SOR may be amended at the hearing by the Administrative Judge on his own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence . . . When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause. [Directive ¶ E3.1.17.]

We review a Judge's decision to amend an SOR for an abuse of discretion. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014).

As noted above, evidence was adduced at the hearing that Applicant had not filed his 2016 Federal income tax return in a timely fashion. Tr. at 35-37; Applicant Exhibit (AE) Y. Department Counsel moved to amend the SOR to add an allegation to that effect, the SOR being silent on the point. The Judge overruled Applicant's objection and granted the motion. Tr. at 81-83. At the close of the hearing, Applicant requested three months in which to address the new allegation. The Judge held the record open from August 9, 2018, the date of the hearing, until September 27, 2018. Tr. at 94. Accordingly, the amendment was founded upon evidence that was properly before the Judge, and it rendered the SOR in conformity therewith. We find no error in the Judge's decision to grant Applicant less additional time than he requested, although he allowed him well over a month and a half after the hearing to present evidence in mitigation of the new allegation. The Judge did not abuse his discretion in amending the SOR.

Remaining Issues

We find no support for Applicant's contention that the Judge improperly limited his ability to present evidence in mitigation. Neither do we conclude that the Judge made improper use of the non-alleged conduct noted in his findings. A Judge may consider non-alleged conduct on such things as evaluating an applicant's case for mitigation, performing a whole-person analysis, and making a credibility determination. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). Applicant was not denied the due process that the Directive affords.

The Judge did not err in finding that Applicant had not received financial counseling. The record does not support Applicant's argument that, under the facts of this case, his use of a CPA satisfied the requirements of Directive, Encl. 2, App. A ¶ 20(c). After reviewing the record, we conclude that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018).

Applicant’s brief is, to a large extent, a challenge to the manner in which the Judge weighed the evidence. 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. 17-02463 at 2 (App. Bd. Sep. 10, 2018). A person who fails to file tax returns and pay taxes when due does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 17-01256 at 3 (App. Bd. Aug. 3, 2018).

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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

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

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board