KEYWORD: (Guideline F; Guideline H)

DIGEST: The record reflects that Applicant was not informed adequately at the hearing about the process for amending the SOR, was not explicitly informed the SOR was being amended, was not informed of the exact wording of the SOR amendment, was not asked whether he admitted or denied the amendment, was not asked whether he would like additional time to respond to the amendment, and was not advised he could submit additional matters pertaining to the amendment while the record remained open for a month following the hearing. Applicant was never asked at the hearing if he had any additional testimony or evidence to present on the Xanax allegation. The wording of the SOR amendment is not reflected in the transcript. The amendment is handwritten on the SOR and contains two marginal insertions. We are unable to determine with certainty its exact wording; specifically, it is unclear where one of the insertions is to be incorporated in the allegation. There is no indication in the record that Applicant was ever provided or shown the handwritten amendment. The Decision reflects that the Judge "granted the amendment without objection." The amendment, however, was not presented at the hearing as a motion to amend the SOR Adverse decision remanded.

CASE NO: 18-01212.a1

DATE: 10/23/2019

DATE: October 23, 2019

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 6, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. At the hearing, the SOR was purportedly amended by adding a Guideline H (Drug Involvement and Substance Misuse) allegation. Tr. at 71-74 and 85-87. On July 19, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson 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 erred in considering the evidence of drug involvement; whether the Judge was biased; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

The SOR alleged, as amended, that Applicant had nine delinquent debts totaling about $43,000, that he had three alcohol-related driving arrests between 2015 and 2018, and that he used a drug, Xanax, that was not prescribed to him while holding a security clearance. The Judge found in favor of Applicant on four of the debts totaling about $4,200 and against him on the remaining allegations.

Applicant challenges the Judge's adverse conclusion under Guideline H, which was not part of the SOR prior to the hearing. For the reasons discussed below, we conclude that Applicant was not provided the due process the Directive affords in amending the SOR.

At the hearing, Department Counsel questioned Applicant about a Xanax pill that was found on his person during the 2018 arrest. Applicant testified that he used Xanax about three or four times without a prescription while holding a security clearance. He also stated the he obtained the pill from a friend to help him sleep. Tr. 71-74. At the end of Applicant's testimony, the following exchange occurred:

> [Judge]: I don't have any other questions. Do you have any other questions, Department Counsel?
>
> [Department Counsel]: I don't, Your Honor, but I'm going to list one on the SOR.
>
> [Judge]: Okay.
>
> [Department Counsel]: So, this would be, yeah, be a new paragraph under Guideline H.
>
> [Judge]: Okay.
>
> [Department Counsel]: And I would propose that you don't use Xanax, which was not prescribed to you while holding a secret security clearance.

[Judge]: Okay, so do you understand what she just did? The evidence shows, and your testimony also supports that I did use Xanax; maybe not a lot, but it's a prescription pill that was not prescribed to you, which is a no-no. And you held a DoD security clearance at the time.

So, again, that's a concerning to the Government. You know, you're telling me your trustworthy, you reliable, but it's instances like this where the Government says wow, you know, this person was doing this, and they know it's wrong. They know they shouldn't be doing this. You have annual training, don't you, as a security clearance holder?

[Applicant]: Yes. I was doing, I, like I say, it's not a regular occurrence. And I didn't really think about that not being a prescription drug. And I know that it's for pain and help you sleep. I didn't, but I know --

[Judge]: It's for anxiety.

[Applicant]: -- with the high on opioid crisis now, I know that, I think that's considered an opioid.

[Judge]: No, it's not It's a benzodiazepine, or whatever that is.

[Applicant]: Okay.

[Judge]: It is not an opioid. I do know that.

[Applicant]: Okay.

[Judge]: But Xanax, I mean, if you get it from a friend, you don't know where that came from. It could have been bought off the street. And you know they're mixing fentanyl. Have you heard about that crisis; they're mixing fentanyl with drugs now.

[Applicant]: Yes.

[Judge]: So, you take your life in your hands when you take something that's not prescribed to you from a pharmacy. If you just take a drug, you don't know what you're ingesting. I would give, that's very concerning, okay? And I'm just cautioning you because I've experienced that, personally, and don't wish that on anyone, okay?

[Applicant]: Yes.

[Judge]: I had a family member pass away from taking Xanax that had fentanyl. And there's an ongoing criminal investigation going right now. So, please be careful. Please make better choices in your life, okay?

[Applicant]: Okay.

[Judge]: You're a father. You have kids. You should know better.

[Applicant]: I do.

[Judge]: Okay, I'm not going to preach anymore, but there is a crisis going on with drugs in our society, and it's out of control.

[Applicant]: Yes.

[Judge]: All right, so do you want to call your next witness? [Tr. at 85-87.]

Directive ¶ E3.1.17 provides:

> The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. 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.

Compare that paragraph with ¶¶ E3.1.3 and E3.1.4, which provide that "a written SOR . . . shall be as detailed and comprehensive as the national security permits" and that an applicant has 20 days from receipt of the SOR to respond to it.[1] As we have previously stated, an applicant is entitled to receive reasonable notice of the allegations being made against him so that he or she can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004).

In this case, the record reflects that Applicant was not informed adequately at the hearing about the process for amending the SOR, was not explicitly informed the SOR was being amended, was not informed of the exact wording of the SOR amendment, was not asked whether he admitted or denied the amendment, was not asked whether he would like additional time to respond to the amendment, and was not advised he could submit additional matters pertaining to the amendment while the record remained open for a month following the hearing. After the above-quoted exchange, Applicant was never asked at the hearing if he had any additional testimony or evidence to present on the Xanax allegation.[2] The wording of the SOR amendment is not reflected in the transcript. The amendment is handwritten on the SOR and contains what amounts to two marginal insertions. From our review of the handwritten amendment, we are unable to determine with certainty its exact wording; specifically, it is unclear where one of the insertions is to be incorporated

[1] An applicant is also provided at least 15 days from receipt of the Notice of Hearing to prepare for the hearing. *See* Directive ¶ E3.1.8.

[2] After the witness mentioned in the last sentence of the above-quoted exchange testified, Applicant was not asked whether he had any additional evidence to present or whether he rested his case. At that point, the proceeding moved directly to closing statements. Tr. at 94.

in the allegation. There is no indication in the record that Applicant was ever provided or shown the handwritten amendment. The Decision reflects that the Judge "granted the amendment without objection." Decision at 2. The amendment, however, was not presented at the hearing as a motion to amend the SOR as provided in ¶ E3.1.17. The transcript neither reflects that the Judge "granted the amendment" or a motion to amend the SOR nor does it indicate that Applicant was ever asked if he had any objection to the amendment. Finally, the version of the amendment reflected in the Judge's Decision does not exactly match the handwritten amendment. Given these deficiencies, we conclude that Applicant was not provided adequate notice of the SOR amendment nor was he given an adequate opportunity to respond to it. We conclude the case should be remanded to correct these due process deficiencies.

Applicant also contends that "[t]he Judge did wrong interjecting that she lost a family member to Xanax or drug issues and how the pill was mixed with fentanyl which killed a family member making my case personal to her which shows bias." Appeal Brief at 2. 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 on appeal. *See*, *e.g.*, ISCR Case No. 10-09607 at 4 (App. Bd. Nov. 18, 2011). The standard is not whether the appealing party personally believes that the Judge was biased, but whether the record of the proceeding contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness of the Judge. *Id.* While the Judge's comments about her family member passing away from Xanax were apparently intended to assist Applicant, they were inappropriate. Judges should refrain from interjecting their personal affairs into the proceedings and refrain from providing applicants with unsolicited personal advice or opinions. *Id* at 3-4. Here, given the Judge's injudicious comments that could reasonably cause a disinterested person to question her impartiality on the drug allegation, we conclude the best course of action is to remand the case to another Judge for a new hearing.

We also note that the Decision reflects that Applicant submitted three post-hearing exhibits that were marked as Applicant's Exhibit N-P. We are unable to find those exhibits in the record. On remand, the new Judge should ensure that the missing exhibits are located or replaced.

Applicant has asserted additional errors. Because of the Board's disposition of the issues discussed above, it is unnecessary for the Board to address the remaining appeal issues.

Order

The Decision is remanded with the recommendation that the case be assigned to another Judge for a new hearing and proceedings consistent with the Directive.

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