

KEYWORD: Guideline F

DIGEST: Applicant asserts the Judge was biased against her. She raises two issues regarding bias. First, she contends the Judge demonstrated bias when he admonished her twice to “Tell the truth” and “did not admonish anyone else to tell the truth to the same degree that he admonished the Applicant.” Appeal Brief at 3. In this regard, she also argues, “Bias in courtrooms and various judicial settings is a serious problem that affects the ability of African Americans to receive a fair result in a courtroom/hearing room setting.” Id. It merits noting the first admonition she cites is the standard advisement given to all applicants and witnesses pursuant to Directive ¶ E3.1.18, and the only other witness to testify at the hearing was her tax advisor. The second cited admonition occurred when Applicant was about to commence her testimony, and repeating the warning at that stage of the proceeding is also customary. In any event, there is no evidence to support the suggestion that race was a consideration in this case. Adverse decision is affirmed.

CASE NO: 19-01513.a1

DATE: 06/15/2020

DATE: June 15, 2020

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**

Cheryle Bernard-Shaw, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 31, 2019, 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 February 26, 2020, after the hearing, Administrative Judge John Bayard Glendon 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 her, whether the Judge erred in his findings of fact, and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge’s decision.

### **The Judge’s Findings of Fact**

Applicant, who is in her 60s, has worked for a Government contractor for about 17 years and has held a security clearance for about 12 years. She has earned a master’s degree. She is divorced with no children.

In her SOR Response, Applicant admitted she had not filed her Federal and state income tax returns for 2012 through 2017. At the time of hearing, these tax returns remained unfiled. She also had not filed her 2018 Federal and state tax returns, which was not alleged in the SOR and would only be considered in applying the mitigating conditions. She attributed some of her tax filing deficiencies to Internal Revenue Service (IRS) audits of her 2010 and 2011 Federal tax returns. The audits were concluded in 2016 and disallowed some of Applicant’s tax deductions for those years. Applicant claimed she paid the taxes for 2010, but an exhibit reflected she had an outstanding balance of about \$2000 that was “currently not collectable.” Decision at 3. She admitted she owed about \$16,000 for 2011 and claimed she was paying that debt, but an exhibit reflected the last payment was in April 2016. In early 2019, her 2011 Federal tax debt was listed as uncollectible. Applicant provided other explanations for delays in filing her tax returns, including problems with a mortgage lender seeking to foreclosure on her house, mold in her house, roof leaks, and flooding in her garage. She lived at other locations while contractors repaired recurring mold problems.

A week or two before the hearing, Applicant hired a tax advisor who testified the delinquent tax returns would be filed in early February 2020. The tax advisor indicated the IRS told her the Federal tax returns for 2012 and 2013 did not need to be filed. Home contractors were helping Applicant in removing boxes of financial records from her home so that they could be provided to her tax advisor. After the hearing, Applicant did not provide proof that the delinquent Federal tax returns were filed or explain the lack of such evidence. She did provide the first pages of state tax returns for 2014 through 2017, which do not show that they were filed or whether she owes any state taxes for those years. Neither Applicant nor her tax advisor made any representation that these

returns have been filed. Moreover, she did not provide an explanation for the missing state tax returns for 2012 and 2013. She did provide a document from the state tax authorities that her state taxes for 2014 through 2018 were paid.

### **The Judge's Analysis**

Applicant's admission, her testimony, and the documentary evidence establish a history of not meeting her financial obligations and a failure to file her Federal and state tax returns as required. Her excuses for failing to file her tax returns as required were not sufficient to persuade the Judge that they were the actual causes for those deficiencies. She receives some credit for hiring a tax professional days before the hearing. Her actions continue to cast doubt on her reliability, trustworthiness, and good judgment.

### **Discussion**

Applicant asserts the Judge was biased against her. She raises two issues regarding bias. First, she contends the Judge demonstrated bias when he admonished her twice to "Tell the truth" and "did not admonish anyone else to tell the truth to the same degree that he admonished the Applicant." Appeal Brief at 3. In this regard, she also argues, "Bias in courtrooms and various judicial settings is a serious problem that affects the ability of African Americans to receive a fair result in a courtroom/hearing room setting." *Id.* It merits noting the first admonition she cites is the standard advisement given to all applicants and witnesses pursuant to Directive ¶ E3.1.18, and the only other witness to testify at the hearing was her tax advisor. The second cited admonition occurred when Applicant was about to commence her testimony, and repeating the warning at that stage of the proceeding is also customary. In any event, there is no evidence to support the suggestion that race was a consideration in this case. Second, Applicant contends the Judge's assistance to Department Counsel at the hearing, while offering Applicant no assistance, shows an appearance of bias. This latter assertion involved the Judge asking Department Counsel at the hearing whether she wished to amend SOR ¶ 1.c to conform to the evidence. SOR ¶ 1.c alleged:

c. The Internal Revenue Service selected your federal income tax returns for tax years 2010 and 2011 for audit. As of the date of this Statement of Reasons, the taxes for these years remain unresolved.

As a result of the Judge's question, Department Counsel made a motion to delete the second sentence of that allegation. In his decision, the Judge indicated that he granted her motion. This amendment to the SOR inured to Applicant's benefit because it removed any tax indebtedness from consideration in applying the disqualifying conditions. Although the Judge was authorized under Directive ¶ E3.1.17 to amend that SOR allegation on his own motion to conform to the evidence of Applicant's currently uncollectible taxes for 2010 and 2011, he did not do so and eventually concluded that Disqualifying Condition 19(a) – *inability to satisfy debt* – did not apply "because

there is no SOR allegation that Applicant had a tax debt or that she was unable to satisfy it.” Decision at 6. Based on the circumstances presented in this case, Applicant has failed to show the Judge committed any error by merely asking if Department Counsel intended to amend the SOR to conform to the evidence.

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. 18-02722 at 5 (App. Bd. Jan. 30, 2020). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *Id.* Our review of the record reveals nothing that would persuade a reasonable person that the Judge lacked the requisite impartiality. *Id.* Applicant has failed to meet her heavy burden of persuasion on this issue.

Applicant raises the issue of ineffective assistance of counsel. She argues that her hearing counsel did not meet with her in advance of the proceeding and failed to prepare her to testify. She also states her hearing counsel did not make appropriate objections to questions that could have been damaging to her case. She believes her hearing counsel’s actions compromised her ability to receive a fair hearing. However, the ineffective assistance of counsel doctrine is not applicable in a DOHA proceeding. *See, e.g.*, ISCR Case No. 15-07941 at 2-3 (App. Bd. Nov. 29, 2018). None of her arguments are sufficient to establish either that she was denied any due process rights under the Directive or that she was denied a fair hearing.

Applicant claims the Judge erred in finding she did not provide proof of filing her Federal and state tax returns for 2012 through 2017. She asserts that she provided receipts showing such filings in her post-hearing submission. Based on our review of Applicant’s post-hearing submission, we conclude the Judge’s finding that Applicant provided no proof of filing her Federal tax returns for 2012 through 2017 is sustainable. Applicant also appears to argue the state tax authorities advised her that she was no longer required to file tax returns for 2012 and 2013; however, that claim constitutes new evidence that we cannot consider. Directive ¶ E3.1.29. In her post-hearing submission, she provided the first pages of her state tax returns for 2014 through 2017, which were stamped “SD FEB 07 2020 REC’D.” Who or what entity received these state tax returns is not clear from the stamps, but the stamps could possibly reflect receipt by an office of the state taxing authority. While the Judge may have erred in failing to address the significance of those stamps, this was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No 11-15184 at 3 (App. Bd. Jul. 25, 2013). Applicant’s Federal tax filing deficiencies, standing alone, are a sufficient basis for denying her security clearance eligibility. Also, Applicant appeals the “synopsis” at the beginning of the Judge’s decision for not citing evidence she presented in her post-hearing submission. The paragraph in question is merely a summary or digest of the opinion as a whole. Even if it were error for the synopsis to have omitted citation to specific evidence, the Board has held such error is normally harmless. *See, e.g.*, ISCR Case No. 06-23384 at 2 (App. Bd. Nov. 23, 2007).

Applicant also disagrees with the Judge’s weighing of the evidence. For example, she contends that the Judge failed to address adequately her extenuating circumstances and failed to apply the whole-person factors. Her arguments are not sufficient to demonstrate the Judge weighed

the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

Applicant has failed to establish the Judge committed any harmful errors. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The 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