

KEYWORD: Guideline F; Guideline E

DIGEST: 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. Bias is not demonstrated merely because a Judge found against the appealing party. Nor is bias demonstrated merely because a party can show a Judge committed a factual or legal error. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party. Rather, as Applicant notes, the standard to demonstrate bias is whether the record of the proceedings contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. Based on our review of the record, we conclude that Applicant has failed to meet the heavy burden of demonstrating the Judge was biased against her. Adverse decision is affirmed.

CASE NO: 18-00110.a1

DATE: 03/31/2020

DATE: March 31, 2020

In Re:)	
)	
-----)	ISCR Case No. 18-00110
)	
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 January 18, 2019, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 8, 2020, after the hearing, Administrative Judge Mark Harvey 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’s findings were flawed, whether the Judge was biased, and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline E were not raised as an issue on appeal.¹ Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant, who is in her 60s, owns a company that provides services to the Federal Government. She is married with adult children. She has earned a master’s degree. She comes from a large family and has provided financial support to her mother and ailing siblings. She also experienced medical issues. In 2007, she expended a significant sum defending herself in a lawsuit. While starting a company, she reported losses to the Internal Revenue Service (IRS) for 2010-2012.

The SOR alleged that Applicant failed to file her Federal and state income tax returns for 2007-2016 in a timely manner; she was indebted to the Federal Government for delinquent taxes for 2007-2010, 2013, and 2015-2016, which totaled over \$170,000; she had a Federal tax lien filed against her for over \$50,000 in 2013; she had a state tax lien filed against her for about \$8,800; and she was indebted to her state for delinquent taxes in the approximate amount of \$17,700. In responding to the SOR, she admitted all of those allegations.

In her 2014 security clearance application, Applicant disclosed that she owed the IRS delinquent taxes. In a background interview, she made statements about her efforts to resolve her tax problems that were not accurate. At the time of hearing, Applicant’s delinquent tax returns had been filed, and she had payment plans in place with the IRS and the state. Her IRS tax transcripts reflect that, as of early 2018, she owed delinquent Federal taxes for 2007-2009, 2013, and 2015-2016 as alleged in the SOR; however, those delinquencies were eventually resolved. She stated her remaining tax debt was solely for 2018. She provided no proof of payments in 2019 even though Department Counsel requested proof of recent payments. The Judge requested Applicant provide her IRS tax transcripts for 2017 and 2018, but she did not provide them.

¹ Although they were cited by Department Counsel to refute the allegations of bias.

In October 2019, the state tax authority informed Applicant that she had a delinquency of about \$40,400. She established a payment plan with the state that requires her to make 36 monthly payments of \$1,300, which were scheduled to start in November 2019. Applicant's budget reflects that she has sufficient income to pay her tax debts. She described her tax problems as an unusual occurrence that have been resolved with the exception of her existing payment plans with the Federal and state taxing authorities.

The Judge's Analysis

Applicant filed some of her tax returns before the expiration of extension periods, and she may not have been required to file returns for other years. However, she did not file her tax returns for 2009, 2010, and 2014 as required. She did not pay Federal income taxes for 2007-2009, 2013, and 2015-2016 when they were due. The Judge entered favorable SOR findings on an allegation asserting she owed delinquent Federal taxes for 2010 because it was not true and on the tax lien allegations because that indebtedness was addressed in other alleged tax debts.

The Judge noted that, even though not alleged in the SOR, Applicant's current Federal tax debt for 2018 of about \$54,800, her state tax debt exceeding \$17,700, and her incorrect statements made to an investigator during her background interview could be considered for certain limited purposes; such as, in assessing her credibility or in evaluating the evidence offered in mitigation. He cited ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004) and other Appeal Board decisions in support of that proposition.

While Applicant experienced conditions beyond her control that adversely affected her financial situation, she failed to establish that she acted responsibly under the circumstances. Mitigating Condition 20(g), *i.e., the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements*, applies in part because Applicant has paid the alleged tax debts and has plans in place to address the remaining tax debts. However, the timing of her efforts to resolve her tax debts is an important consideration. Insufficient evidence was provided to explain why she was unable to file her tax returns for 2009, 2010, and 2014 on time or why she was unable to resolve her tax debts sooner. Given her current Federal and state delinquent tax debts, she has not shown her financial problems are under control. She failed to mitigate the alleged security concerns.

Discussion

Alleged Errors in the Formal Findings

Applicant argues that all of the Judge's adverse formal findings are contrary to the record evidence. For example, she asserts:

SOR ¶ 1.b. alleges that Applicant owed a delinquent tax debt in the amount of \$2,690.98 for tax year 2007, and that as of the date of the SOR, it remained unpaid. Applicant paid \$2,693 to the IRS in February 2018 and an additional \$26 to the IRS

in March 2018 satisfying her 2007 tax obligation. The SOR was not issued until January 18, 2019, and accordingly, Applicant did not have a delinquent debt as of the date of the SOR. [Appeal Brief at 3.]

In that paragraph, Applicant highlights a variance between an assertion in the SOR allegation (*i.e.*, her 2007 Federal taxes “remain unpaid”) and the evidence presented that establishes that debt was paid before the SOR was issued. This argument does not establish any harmful error.

An SOR is an administrative pleading and is sufficient if it places an applicant on notice of the security concerns to be addressed at the hearing so that he or she can prepare a case for mitigation. *See, e.g.*, ISCR Case No. 15-08255 at 3 (App. Bd. Aug. 22, 2017). Variances between SOR allegations and either the evidence or a Judge’s findings of fact occur from time to time. Such variances are material only when they are so great that the SOR fails to serve as reasonable notice, subjecting the applicant to unfair surprise. *Id.* In this case, the allegation in SOR ¶ 1.b was adequate to place Applicant on notice of the security concerns at issue, *i.e.*, her failure to pay her 2007 Federal taxes as required raised questions about her reliability, trustworthiness, judgment, and willingness to comply with rules and regulations.

The existence of a variance between an assertion in an SOR allegation and the record evidence does not necessarily establish that an adverse formal finding regarding that allegation is contrary to the record evidence. Depending on the nature and scope of an SOR allegation, not every assertion in the allegation need be established for security concerns to arise from it. Put differently, an adverse formal finding is not a determination that every assertion in the SOR allegation has been established but rather is a conclusion that security concerns arising from the SOR allegation have not been mitigated. From our review of the record, Applicant’s assertions that each of the Judge’s adverse formal findings is contrary to the record evidence lack merit and fail to establish any error that warrants relief. In this regard, it merits noting the Appeal Board has repeatedly stated that, even if an applicant paid or otherwise resolved a debt, a Judge may still consider the circumstances underlying the debt as well as any previous actions or lapses to resolve the debt for what they reveal about the applicant’s worthiness for a clearance. *See, e.g.*, ISCR Case No. 15-02957 at 3 (App. Bd. Feb. 17, 2017).

Alleged Error in Failing to Make a Formal Finding

In her appeal brief, Applicant notes that the Judge failed to make a formal finding regarding SOR ¶ 1.1, which alleged Applicant had a delinquent state tax debt of about \$17,700. Directive ¶ E3.1.25 provides that “[t]he Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . .” This provision does not on its face authorize a Judge to enter findings and conclusions only as to some of the allegations. Rather, by its plain language it requires the Judge to address all of them. *See, e.g.*, ISCR Case No. 08-07803 at 2 (App. Bd. Sep. 21, 2009). While the Judge erred in failing to make a formal finding regarding SOR ¶ 1.1, it was harmless error because it did not likely affect on the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). The Judge’s ultimate decision is sustainable based on his other adverse formal findings.

Alleged Errors Regarding Applicant's SOR Answer

Applicant contends the Judge erred in finding that Applicant admitted all of the SOR allegations in her Answer to the SOR. In this regard, we note that Applicant failed to comply with the requirements of the Directive in her Answer to the SOR because she did not “admit or deny each listed allegation.” *See* Directive ¶ E3.1.4. In fact, she did not specifically admit or deny any allegation. Instead, her lengthy answer contains arguments about the applicability of the whole-person factors and each of the disqualifying and mitigating conditions under Guidelines E and F. In her appeal brief, Applicant does acknowledge that her SOR Answer notes she failed to file tax returns in a timely manner for several years. Appeal Brief at 5. We also note that Applicant's SOR Answer contains statements in which she admitted other key aspects of the SOR allegations. For example, her SOR Answer indicated “[she] was late in paying taxes between 2007 and 2016 with the exception of tax years 2010-2012 and 2014 . . .” SOR Answer at 12. Even if the Judge may have erred by misinterpreting some of the statements in her SOR Answer as admissions to specific SOR allegations, this was a harmless error because the Judge's material findings and conclusions of a security concern are based on other substantial evidence in the record (particularly the IRS tax transcripts) or constitute reasonable inferences that could be drawn from that evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3 (App. Bd. Jun. 25, 2019).

Applicant also points out the Judge indicated in the Statement of the Case that Applicant filed her SOR Answer in August 2019 when she actually submitted it in March 2019. This discrepancy was also a harmless error.

Alleged Errors in Considering and Analyzing the Mitigating Evidence

In various arguments, Applicant contends that the Judge failed to consider all of the record evidence. In support of this contention, she argues, for example, that the Judge failed to address in the decision that she hired an attorney and tax relief agency to assist her with her tax problems, but they failed to take appropriate action to assist her. There is a rebuttable presumption that the Administrative Judge considered all of the record evidence, and the appealing party has a heavy burden when trying to rebut that presumption. *See, e.g.*, ISCR Case No. 02-07191 at 4 (App. Bd. Mar. 25, 2004). Moreover, a Judge is not required to discuss each and every piece of record evidence, which would be a practical impossibility. *See, e.g.*, ISCR Case No. 12-01500 at 3 (App. Bd. Aug. 25, 2015). In this case, Applicant's arguments fail to establish that the Judge overlooked evidence.

Applicant also contends that Judge committed errors in analyzing the mitigating evidence. For, example, she asserts the Judge misapplied a prior Appeal Board decision (ISCR Case No. 15-06640 at 4 (App. Bd. Dec. 26, 2017) standing for the proposition that the timing of the resolution of financial problems is an important factor to consider in evaluating an applicant's case in mitigation. She argues that prior Appeal Board decisions did not apply to her case because she resolved the delinquent tax debts before the SOR was issued. This argument is not persuasive. The record reveals that Applicant was required to disclose her tax deficiencies when she submitted her security clearance application in December 2014. (Government Exhibit (GE) 1). During

background interviews in July 2016 and September 2017, investigators questioned her about those deficiencies. GE 6 and 7. At some point (date unknown), DOHA sent her interrogatories requesting copies of her IRS tax transcripts for 2006 through 2016. In April 2018, she responded to the interrogatories. GE 5. The IRS tax transcripts that she provided reflect that, as of early 2018, she owed the delinquent Federal taxes for 2007-2009, 2013, and 2015-2016 as alleged in the SOR. *Id.* In short, the record supports a conclusion that Applicant was well aware that her security clearance was in jeopardy when she resolved some or all of her longstanding delinquent Federal tax debts in 2018. As we stated in ISCR Case No. 15-06640 at 4, an applicant who takes action to resolve financial problems only after being placed on notice his or her clearance is in jeopardy may lack the judgment, and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. The Judge's reliance on the cited Appeal Board decision was sustainable based on the evidence in this case.

In her appeal brief, Applicant cites to a Hearing Office decision for the proposition that payment of debts or compliance with payment plans can mitigate alleged debts. We give due consideration to that case; however, Hearing Office decisions are neither binding on other Hearing Office Judges nor on the Appeal Board. *See, e.g.*, ISCR Case No. 17-03363 at 3 (App. Bd. Nov. 29, 2018). She also argues that the Judge “disregarded favorable case law” (Appeal Brief at 9) but failed to identify any particular case in support of that argument.

Many of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. In those arguments, Applicant highlights evidence that supports the granting of a security clearance. As the Appeal Board has repeatedly stated, however, 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*. 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Alleged Bias

A theme running throughout Applicant's appeal brief is that the Judge was biased against her. She makes various assertions of that nature. First, she contends that the Judge was biased against her from the inception of the case because he found that she admitted all of the SOR allegations in her SOR Answer. She argues that purported error skewed his review of the case. Next, she contends the Judge conducted a “biased analysis” of the evidence “focused solely on the timing of payments without regard for circumstances in question.” Appeal Brief at 9. Finally, she contends that the Judge's overall actions amount to an “unintentional bias.” *Id.* She asserts:

. . . As noted above, there are errors throughout this decision specifically including the decisions being contrary to the record evidence, an unwillingness to consider

mitigating evidence and arguments, and a disregard for Applicant's past history of financial success coupled with a lengthy time processing a clearance without issue.

When reviewing the various errors in both law and fact made by the Judge in this case, we contend a reasonable, disinterested person would question the fairness and impartiality of the Judge. While we concede that no error on its own would likely trigger this conclusion, the record as a whole contains too many errors and too few references to the mitigating evidence provided. While we concede that there is a strong presumption to overcome when it comes to proving the bias of a Judge, that presumption cannot be used to negate any and all errors raised by an Appellant. [*Id.*]

We do not find Applicant's bias arguments persuasive. Bias involves partiality for or against a party, predisposition to decide a case or issue with regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). As Applicant notes, 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. *Id.* Bias is not demonstrated merely because a Judge found against the appealing party. Nor is bias demonstrated merely because a party can show a Judge committed a factual or legal error. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party. Rather, as Applicant notes, the standard to demonstrate bias is whether the record of the proceedings contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *Id.* Based on our review of the record, we conclude that Applicant has failed to meet the heavy burden of demonstrating the Judge was biased against her. We see no reason to conclude that the Judge did anything that would persuade a reasonable person to question his impartiality.

Conclusion

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying 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. 15-08782 at 3 (App. Bd. Apr. 5, 2017). "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