

KEYWORD: Guideline F; Guideline E

DIGEST: As to Applicant’s “hidden bias” claim, the Appeal Board has previously indicated that bias involves partiality for or against a party or a predisposition to decide a case or issue without regard to the merits. Bias is generally a claim raised against the Judge who is required to render an independent, fair, and impartial decision (Directive ¶ 5.2.13) as opposed to a Department Counsel who represents the Government’s interests in the case (Directive ¶ 5.2.7) and, as an advocate for a party opponent, is not required to be neutral or impartial. Furthermore, there is a rebuttable presumption that a Department Counsel, as a Federal employee, carries out his or her duties in good faith. Adverse Decision Affirmed.

CASE NO: 20-00113.a1

DATE: 07/13/2021

DATE: July 13, 2021

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**

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 15, 2020, 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 September 30, 2020, Department Counsel sent Applicant’s Counsel an Amendment to the SOR that changed a sentence in one of the three initial allegations and added three other Guideline F allegations and a single allegation under Guideline E (Personal Conduct). On October 13, 2020, Applicant responded to the SOR amendment and submitted an Addendum to Amended SOR that provided explanations regarding the new allegations. On April 21, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey issued a decision denying Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on the three initial Guideline F allegations. Department Counsel did not challenge those favorable findings on appeal. In his appeal brief, Applicant raises the following issues: whether the Judge erred in his rulings on challenges to the SOR amendment; whether the Judge failed to consider key evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

### **The Judge’s Findings of Fact and Analysis**

Applicant, who is in his 40s, works for a defense contractor. He has earned three master’s degrees, including in business and finance. His employer considers him a highly valued employee who is trustworthy and reliable.

Under Guideline F, the SOR amendment alleged that Applicant was indebted to the Federal Government for delinquent taxes in the approximate amounts of (1) \$1,622 for tax year 2010 that remained unpaid until 2016, (2) \$5,400 for tax year 2013 that remained unpaid until 2017, and (3) \$5,245 for tax year 2014 that remained unpaid until 2018. In responding to the SOR amendment, Applicant admitted those three allegations with explanations. The Judge concluded that Applicant failed to mitigate the security concerns arising from those allegations, noting that Applicant had substantial income and failed to establish that he was unable to pay the delinquent taxes sooner.

Under Guideline E, the SOR amendment alleged that Applicant falsified his security clearance application (SCA) in April 2019. In that document, he responded “Yes” to the question that asked whether he failed to pay Federal, state, or other taxes when required by law and disclosed he underpaid his state taxes for 2016 that resulted in a wage garnishment. He responded “No” to a follow-up question that asked, “Are there any other instances **in the last seven (7) years** where you failed to file or pay Federal, state, or other taxes when required by law or ordinance[.]” Decision at 11, quoting from Government Exhibit (GE) 1 at 37. In doing so, he failed to disclose that his

Federal taxes for 2010, 2013, and 2014 were delinquent and remained unpaid until 2016, 2017, and 2018, respectively.

Applicant denied he intended to deceive the Government about owing delinquent taxes in his SCA . He claimed that he did not believe his taxes were delinquent because he had an ongoing payment plan since around 2013 and was making payments in accordance with the plan. Applicant made some payments under the payment plans but a major portion of the alleged tax debts were paid through the withholding of his refunds for tax years 2015, 2016, and 2017. Although not alleged, Applicant also owed delinquent Federal taxes in the approximate amounts of \$2,700 for 2018 that was not paid until early 2020 and \$5,260 for 2019 that he intends to pay. Applicant did not provide convincing evidence that he honestly answered the SCA question at issue. He is an intelligent person with exceptional experience in financial matters. The SCA question was clear and easy to understand. He elected not to disclose his history of having delinquent Federal tax debts. The record evidence establishes AG ¶ 16(a), *i.e.*, “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities[.]”

## **Discussion**

### Challenges to the SOR Amendment

The SOR amendment was not signed by a Government official, dated, or printed on Government letterhead, although Department Counsel’s cover letter forwarding the SOR amendment was signed, dated, and on letterhead. At the hearing, Applicant raised three objections to the SOR amendment. The objections claim (1) the amendment was “fundamentally lacking reliability” because it was not signed, (2) the amendment was not issued in a timely manner, and (3), the falsification allegation was defective because it did not assert Applicant had an intent to deceive. Tr. at 11-14. In the decision, the Judge concluded these objections merited no relief.

In his appeal brief, Applicant renewed his objections to the SOR amendment and stated, “that fundamental fairness required the identity of the charging official be disclosed to the applicant . . . [and] an identity is needed so he can determine whether there is some hidden bias at play.” Appeal Brief at 1-2. We find no error in the Judge’s rulings on the objections.

Applicant cites no Appeal Board decisions or other authority supporting his objection to the SOR amendment’s authenticity. The Judge ruled that Department Counsel’s letter forwarding the SOR amendment to Applicant’s Counsel was sufficient to authenticate the amendment.<sup>1</sup> Hearing Exhibit 5. Applicant has failed to establish that ruling was arbitrary, capricious, or contrary to law. See Directive E3.1.32.3. As to Applicant’s “hidden bias” claim, the Appeal Board has previously

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<sup>1</sup> The Department Counsel that signed the forwarding letter is different from the one who represented the Government at the hearing.

indicated that bias involves partiality for or against a party or a predisposition to decide a case or issue without regard to the merits. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). Bias is generally a claim raised against the Judge who is required to render an independent, fair, and impartial decision (Directive ¶ 5.2.13) as opposed to a Department Counsel who represents the Government's interests in the case (Directive ¶ 5.2.7) and, as an advocate for a party opponent, is not required to be neutral or impartial. Furthermore, there is a rebuttable presumption that a Department Counsel, as a Federal employee, carries out his or her duties in good faith. *See, e.g.*, ISCR Case No. 06-26704 at 2 (App. Bd. Jun. 19, 2008). A party seeking to rebut that presumption has a heavy burden of persuasion. Applicant's bias claim fails to meet that burden. It amounts to mere speculation and is not sufficient to raise any fairness or due process concerns.

Regarding the objection to the timing of the SOR amendment, Applicant asserted that, if the hearing occurred when he originally "thought" it was going to be held, the amendment "would have been essentially at the last minute." Tr. at 11-12. The record does not reflect that the hearing was originally proposed to held at an earlier date. The SOR amendment was sent to Applicant's Counsel more than two months before the date on which the hearing was held. Applicant had adequate time to prepare for the hearing. He cites no authority to support his contention that the Government should have issued the SOR amendment at an earlier date.

Regarding the objection to the falsification allegation, an SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment, and it does not have to allege every possible fact that might be relevant at the hearing. *See, e.g.*, ISCR Case No. 15-08255 at 3 (App. Bd. Aug. 22, 2017). In this case, the falsification allegation asserted that Applicant "falsified material facts" on his SCA, and that he "deliberately" failed to disclose delinquent Federal taxes. The Judge noted the definition of the word "falsified" means "falsely created or altered in order to deceive." Decision at 4, quoting from <https://www.merriam-webster.com/dictionary/falsified>. It also merits noting that Applicant responded to the falsification allegation by stating, "I adamantly deny that I had any intent to falsify the form." Addendum to Amended SOR at 1. This response shows that Applicant was not misled by the allegation. It sufficiently placed him on notice that his intent at the time of completing the SCA was a important issue in case. Applicant has failed to establish the falsification allegation was defective.

### Debt Allegations

Applicant asserts the Judge failed to consider that he "relied on legal advice to stop making payments on student loans because they were predatory[.]" Appeal Brief at 5. This assignment of error lacks merit. The Judge discussed that evidence, noted Applicant made a final settlement payment on the student loans, and found in favor of him on those allegations. On the other hand, Applicant's brief does not challenge any of the Judge's adverse findings of fact and conclusions regarding the Federal tax debts, other than his challenge to the amendments to the SOR which were about the tax debts.

### Falsification Allegation

In challenging the Judge’s adverse finding on the falsification allegation, Applicant asserts the “original due dates” of the tax debts “were overwritten” by the IRS installment agreements. Appeal Brief at 4. His challenges to the adverse falsification findings are not persuasive for various reasons. First, he is making the assertion that the “original due dates were overwritten” for the first time on appeal. At the hearing, he testified that he thought he did not fail to pay the taxes because he had a payment plan. Tr. 53-55. During his testimony, he did not assert that the IRS had changed the due dates. He did not offer into evidence the IRS installment agreements in question and does not identify any record evidence that corroborates his assertion that the original due dates were overwritten. The IRS repayment plans for tax year 2019 that were admitted into evidence (AE I and T) do not corroborate that assertion. Also, it merits noting Applicant’s Federal taxes became delinquent when they were not paid as required by law. A reasonable person, not to mention one with advanced business degrees, would understand that past-due taxes remain delinquent until they are paid or otherwise resolved. Furthermore, the Judge discussed evidence in his analysis that reflected adversely on Applicant’s credibility. Decision at 20-21. As stated in Directive ¶E3.1.32.1, “the Appeal Board shall give deference to the credibility determinations of the Administrative Judge.” In short, Applicant has failed to establish the Judge committed any error in his analysis of the evidence regarding the falsification allegation.

Applicant also contends the Judge “proclaimed near the end of the hearing that he would find that Applicant had overcome the falsification allegation” and that he committed reversible error by his “flip flop” on that allegation in the decision. Appeal Brief at 4-6. In support of this contention, Applicant quotes the following comments of the Judge:

. . . You gave a pretty good reason. It has to be a true reason. Okay? If it’s the true reason, I’m pretty much satisfied that you were answering in good faith. But if it’s not a true reason, then that really undercuts against good faith, and honesty, and candidness, and all those things we look for in security clearances.

So need more information on the IRS, need more information on those [student] loans. And if we can get that information, we’re going to have a pretty clear answer on what’s appropriate to do in this case. [Tr. at 80.]

When read in context, the quoted comment does not support Applicant’s contention. At the hearing, the Judge did not commit to find in Applicant’s favor on the falsification allegation. Rather, the Judge made clear that his decision was to be based on Applicant’s post-hearing submissions regarding the IRS installment agreements. We find no error in the Judge’s assessment of the post-hearing evidence.

Applicant further contends that the Judge erred in failing to consider the substantial evidence regarding his reputation for honesty in analyzing whether he incorrectly answered the SCA question. The Judge, however, made findings of fact regarding Applicant’s character evidence and discussed that evidence in his whole-person assessment. Applicant’s arguments are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the

Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01649 at 3 (App. Bd. Jan. 6, 2021).

### 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. “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 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