

DATE: June 27, 2022

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In the matter of:)	
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-----)	ISCR Case No. 20-01622
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel
Allison Marie, Esq, Department Counsel

FOR APPLICANT

Christopher Czaplak, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 7, 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 March 8, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant raises a due process issue and provides documents from outside of the record in support of that issue. Although the Appeal Board is generally prohibited from considering new evidence (Directive ¶ E3.1.29), we have considered new evidence on threshold

issues, such as those involving jurisdiction and due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul 8, 2015).

Applicant contends the Judge improperly influenced his decision not to hire counsel. In emailed correspondence dated mid-January 2022, Applicant requested a 15 to 30-day continuance of the hearing scheduled for later that month. He noted he “may be over [his] head with how this process works[,]” and asked whether he should hire counsel to represent him. He also asked whether a “public defense counsel” was available. Attachment 1 to Appeal Brief. The Judge responded to Applicant’s email on the same day, denying his continuance request and further stating:

As I am the administrative judge, I do not offer advice regarding retaining counsel. This is not a criminal matter, so there are not public defenders. Do not be concerned about the procedural matters associated with the hearing. Most Applicants do not have attorneys, I understand that, and I will walk you through all of those matters. If you choose to hire any attorney now, you must advise me and Department Counsel immediately of the name and contact information and forward all correspondence to your counsel immediately. [*Id.*]

DOHA personnel have no authority to provide advice to applicants concerning what rights they should exercise. They should refrain from going beyond the language of the Directive and, if applicable, the current Prehearing Guidance in their interactions with applicants. *See, e.g.*, ADP Case No. 18-00329 at 3 (App. Bd. Dec. 14, 2018). Judges cannot act as a surrogate advocate for applicants. *See, e.g.*, ISCR Case No. 98-0685 at 3 (App. Bd. May 20, 1999). DOHA personnel must avoid making comments that may influence applicants in exercising their rights under the Directive. In this case, Applicant may have thought, based on the Judge’s statements, that she would assist him in presenting his case. Although the Judge apparently did not intend to influence Applicant in deciding whether to hire counsel, it is reasonable to conclude her statements could have had that effect. Remand is warranted to correct this error.

Applicant also contends the Judge was biased against him. 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). Adverse rulings alone do not demonstrate judicial bias. *Id.* Based on review of the record, we find nothing that would likely would lead a reasonable, disinterested person to question her fairness and impartiality. *Id.* In her decision, however, the Judge made what amounts to an adverse credibility determination by categorizing Applicant’s position on a key issue as “disingenuous.” Decision at 10. Having made such a determination, we conclude that the best resolution is to remand this case to a different Judge.

On remand, the judge shall offer Applicant the opportunity to have a new hearing and shall issue a new decision in accordance with Directive ¶ E3.1.35. The Board retains no continuing jurisdiction over a remanded decision. However, a Judge’s decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28. and E3.1.30.

Order

The Decision is **REMANDED**.

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

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

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board