Date: March 8, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 21-01050
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Jeffrey D. Billett, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 15, 2021, 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 January 5, 2023, after the close of the record, 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.

The SOR alleged that Applicant carried a delinquent Federal tax balance of about $131,000 for tax years 2010 through 2016 and 2018, that he failed to timely file his Federal returns for tax years 2013, 2014, 2015, and 2018, and that he failed to timely file his state tax returns for tax years 2010 through 2015, 2017, and 2018. The Judge found against Applicant on all allegations. On appeal, Applicant asserts that the Judge was biased against him, made findings of fact that are either incomplete or unsupported by the evidence, and failed to properly apply the mitigating conditions. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his early 60s and has held a security clearance since 1991. He has been married since the late 1980s and has three adult children. Applicant has earned multiple advanced degrees, including a PhD in 1989. He has worked for the same academic institution for almost two decades, and also works as an independent contractor. As of the hearing, his salary was $258,000 per year and his consultant income varied annually. Between 2009 and 2017, his adjusted gross income ranged from a low of about $180,000 in 2009 to a high of about $456,700 in 2016.

The Judge found that Applicant enjoyed a substantial income but prioritized other expenses over his annual tax balance. She concluded that Applicant had a history of failing to timely file and pay his Federal and state income taxes and that, despite having clear notice of the deficiencies, he failed to take meaningful action to address them until after he completed his security clearance application at the end of 2018. The Judge acknowledged that Applicant appeared to have remedied his state tax problems but found that was insufficient mitigation in light of his past and ongoing tax problems.

Discussion

Bias

Applicant argues on appeal that the Judge was biased against him and takes issue with the content and method of her questions. We do not find his argument persuasive. 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. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes that the Judge was biased or prejudiced against him but, rather, whether the record "contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge." *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003).

Applicant cites several examples in which the Judge questioned him about his tax compliance history and the advice he received from tax professionals, while making comments about his credibility and what Applicant perceived as lectures about his financial decisions. To the extent that the Judge concurrently opined about the credibility of Applicant's testimony, that is permissible within the scope of her role. A Judge may form *and express* an opinion about the evidence at hearing, including the credibility of a witness, and does not demonstrate bias in doing so. *See, e.g.*, DISCR Case No. 94-0972 at 3 (App. Bd. Jul. 20, 1995) (The Judge is responsible for assessing witness credibility and "thinking out loud on [the] subject of that credibility is not improper."). The transcript in this matter reflects that the Judge's questions were often pointed; however, they were targeted to the issues to be determined at hearing. Even where the Judge's manner may be deemed "inconsistent with the decorum normally anticipated in the courtroom," that alone is insufficient to rebut the presumption that the Judge decided the case on the record evidence. *See, e.g.*, ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006) (no bias where the Judge's comments were "gratuitous and at times harsh"). *See also* ISCR Case No. 15-03162 at 3 (App. Bd. Jul. 25, 2017) (no impartiality although the Judge "questioned Applicant sharply at times); ISCR Case No. 16-03451 at 2-3 (App. Bd. Dec. 26, 2017) (no bias although Judge

"conveyed a certain testiness"); ISCR Case No. 20-02787 at 4 (App. Bd. Mar. 9, 2022) (no impartiality where the Judge's "questioning and comments were occasionally sharp").

Applicant also asserts that, beginning early in the hearing, the Judge inappropriately adopted both an aggressive and excessive questioning strategy towards Applicant and an overly cooperative posture toward Department Counsel. Applicant's Appeal Brief at 3, 9-10. He argues that the Judge's manner of asking questions "took the reins out of the hands of Department Counsel" and "circumvented [his] prerogative to present his case in the manner he preferred." Applicant's Appeal Brief at 9. He also contends that he "was not given a fair chance to present his case unfettered by interruptions and lengthy, aggressive questioning and gratuitous comments by the Judge." *Id*. at 4.

A review of the transcript reflects that Applicant began testifying by reading a prepared statement without any interruptions. Tr. at 23-29. As he started to address specific SOR allegations, the following exchange occurred:

> [Judge]: . . . I think the easiest way to go about this, if you both agree, is that, normally, you [addressing Applicant] would testify, sir, and when you're finished testifying, then [Department Counsel] would ask you questions.
>
> [Applicant]: Okay.
>
> [Judge]: To kind of stay organized, I think it might be easier that as we -- as you address each tax year, if I have any questions about 2010, I ask them, and [Department Counsel] asks hers, so that you don't have to go back and rehash everything. Are you both okay with that?
>
> [Applicant]: Okay.
>
> [Judge]: I don't know if that messes up your cross, [Department Counsel]. Is that all right?
>
> [Department Counsel]: I think I'll be able to make it work.
>
> * * *
>
> [Judge]: Both of you will have any opportunity to ask or answer anything you want. [*Id*. at 29-30.]

In responding to some of the Judge's basic questions regarding the first SOR allegation, Applicant expressed a lack of knowledge or uncertainty. *Id*. at 30-34. Considering those responses, the Judge decided to leave the record open for two weeks after the hearing to provide Applicant the opportunity to submit additional matters. *Id*. at 41. Later, the Judge asked Applicant whether he had any objection to turning the questioning over to Department Counsel because she was "pretty organized." *Id*. at 48. Applicant indicated he had no objection to proceeding in that manner. *Id*. The Judge noted that "you can explain whatever you want, and when she's done, we'll give you

more time to say whatever it is . . . that you may want to clear up, okay?" *Id*. at 48-49. Applicant again responded in the affirmative. *Id*. As agreed, Applicant testified in that manner with Department Counsel asking the initial questions about an allegation and the Judge asking clarifying questions before moving on to the next allegation. Upon completion of the questioning, Applicant was provided an opportunity to present any other testimony he desired, and he took advantage of that opportunity. *Id*. at 150-152.

Under the Directive, a Judge in a DOHA hearing is tasked with conducting the proceedings in a fair, timely, and orderly manner. Directive ¶ E3.1.10. As finder of fact, the Judge "enjoys considerable latitude in conducting the proceedings, to include asking questions to clarify the record." ISCR Case No. 11-08844 at 3 (App. Bd. Jan. 10, 2013). We find no bias or harmful error in the manner in which the Judge conducted the hearing.

Having examined the record, paying particular attention to the transcript, we find that Applicant's concerns are insufficient to overcome the rebuttable presumption that the Judge acted in an impartial and unbiased manner.

Errors in Findings of Fact and Failure to Apply Mitigating Conditions

Applicant next argues that the Judge made certain findings and reached conclusions that were either incomplete or not supported by the record. For example, Applicant takes issue with the Judge's finding that it was "likely" that the IRS terminated his prior installment agreement because he failed to file his 2013 tax return. Decision at 12; Applicant's Appeal Brief at 10. Applicant testified that he could not recall the reason that the earlier Installment Agreement was terminated and, without contradictory evidence in the record, the Judge's inference was reasonable based on the existing evidence. Moreover, the reason that Applicant's Agreement was terminated is a lesser concern to the fact that the Agreement was, in fact, terminated, along with Applicant's dilatory resolution efforts until 2019. Even if the Judge's inference in this instance was incorrect, the error would be harmless considering the magnitude of Applicant's tax deficiencies.

The remainder of Applicant's challenges to the findings fail to establish any harmful error. The Judge's material findings of security concern are "based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence," and Applicant has cited to no harmful error in the Judge's findings. *See* ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

The balance of Applicant's brief, including his argument that the Judge failed to give adequate weight to potentially mitigating factors, amounts to a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Applicant has not rebutted the presumption that the Judge considered all the evidence in the record, nor has he established that her conclusions were arbitrary and capricious.

In conclusion, Applicant has not identified any harmful error in the Judge's handling of this case or in her decision. The Judge examined the relevant evidence and articulated a satisfactory

explanation for her decision, and the record evidence is more than sufficient to support that the Judge's findings and conclusions are sustainable on appeal. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board