DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: October 3, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 23-00157
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
S. Marshall Griffin, Jr., Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 30, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On August 5, 2024, Defense Office of Hearings and Appeals Administrative Judge Charles C. Hale denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant carried delinquent debt totaling approximately $33,000 across 18 consumer accounts. In response to the SOR, Applicant admitted all allegations, explaining that the debts were incurred by his now-estranged wife without his knowledge, and asserted that no payments had yet been made for any of the debts. The Judge found against Applicant on all allegations.

On appeal, Applicant contends that: 1) he was denied due process; 2) the Judge demonstrated bias against him during and after the hearing; and 3) the Judge failed to conduct a thorough analysis under the Whole Person Concept.

Judge's Findings of Fact and Analysis

Applicant is in his late 40s and has held a security clearance since 2015. He is a high school graduate and attended community college. He has been married three times and pays child support and insurance premiums for children from those marriages. A credit report obtained the day before the hearing showed Applicant's debt had increased from the amount alleged in the SOR to over $45,000. The majority of the debts became delinquent in mid-2022. Applicant testified that his wife, who has filed for divorce, was responsible for paying bills and that he did not know how to pay the bills when she became ill. Applicant contacted various debt relief companies and, on the day after the record closed, he enrolled with one and made an initial payment of $299.50.

The Judge found that Applicant's admissions and the documentary evidence established an inability to satisfy debts and a history of not meeting financial obligations under disqualifying conditions AG ¶¶ 19(a) and 19(c) of Guideline F. He further concluded that, although Applicant's financial difficulties may have been impacted by circumstances beyond his control, he had not acted responsibly under the circumstances.

Discussion

Due Process

Applicant alleges that he was denied due process with respect to his *pro se* status at the hearing. He does not claim that he was denied the opportunity to obtain counsel, but rather complains that the Judge "failed to ensure [Applicant] understood the process in which he was representing himself." Appeal Brief (AB) at 3. However, on at least four occasions, Applicant received notice of his right to retain counsel and his responsibilities at the hearing, giving him ample opportunity to seek clarification of any concerns he might have had.

First, he received a copy of the Directive along with the Statement of Reasons and was thereby informed of the "opportunity to present evidence on his or her own behalf, or to be represented by counsel or personal representative." Directive ¶ 4.3.4. Second, when the Government provided Applicant with copies of its proposed hearing exhibits, Applicant was informed that, "[a]t the hearing, you may represent yourself, retain an attorney, or be assisted by a personal representative, such as a friend, family member, or union representative." Hearing Exhibit (HE) II. That letter also provided Applicant with another copy of the Directive and specifically identified the Adjudicative Guidelines and the Additional Procedural Guidance that addressed the hearing process. Third, along with the Notice of Hearing, Applicant received a copy of the Chief Administrative Judge's Prehearing Guidance Memorandum which informed Applicant of his right to counsel and, again, explained the hearing process. HE I. Fourth, a May 8, 2024, e-mail from the Judge provided Applicant with additional guidance, a link to DOHA's Industrial Security Clearance web page, and another copy of the Directive. Finally, at the beginning of the hearing the Judge addressed many of the hearing's procedural aspects. Transcript (Tr.) at 4-10.

Applicant's brief cites as an overarching shortcoming the Judge's statement to Applicant at the beginning of the hearing that he "'assumed' that [Applicant] understood what was happening at the hearing" AB at 3, citing Tr. at 8. He asserts that this assumption was error and that the Judge should have conducted a detailed inquiry into Applicant's understanding of all matters of law and procedure pertinent to the hearing. However, such an inquiry is neither practical nor necessary. Viewing the record in its entirety, rather than only the excerpt selected by Applicant, it is clear that there was no error in the manner in which the Judge addressed Applicant's self-representation. Applicant's citation to a single sentence ignores both the pre-hearing information that had been provided and the next sentence in the partially cited colloquy which elaborates: "If you are confused or uncertain about anything, please request a moment." Tr. at 8. It also ignores the ensuing dialog in which the Judge explains various aspects of the hearing to which Applicant responds that he understands. Tr. at 8-9. Additionally, the Judge specifically asked if either party had any procedural matters to be addressed and Applicant answered, "No, your Honor." Tr. at 10. Throughout the hearing the Judge took additional steps to explain various aspects of the hearing. Tr. at 13-15 (addressing Government Exhibit 3); Tr. at 15 (explaining options regarding presenting testimony and documentary evidence); Tr. at 16-18 (focusing Applicant's attention on the specific disqualifying and mitigating conditions); Tr. at 41 (offering Applicant a final opportunity to augment his case).

Although applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights and interests under the Directive. *E.g.*, ISCR Case No. 00-0593 at 3 (App. Bd. May 14, 2001). There is a rebuttable presumption that applicants, as adults, are legally competent and capable of making rational decisions concerning their hearings. ISCR Case No. 01-20579 at 2 (App. Bd. Apr. 14, 2004). This would include, at a minimum, the capacity to inform the Judge of any concerns or confusion. Nothing in either the record or Applicant's appeal brief indicates that he lacked the basic mental competence to represent himself or make independent choices during the hearing.

This allegation of error does not invoke new evidence or facts that were not available at the hearing or suggest any impediment to Applicant raising concerns during the hearing. An applicant's failure to take timely, reasonable steps to protect their rights does not constitute a denial of rights. As such, because Applicant did not raise his concerns with the Judge during the hearing or otherwise object to proceeding, he was not denied due process. ISCR Case No. 03-21262 at 3 (App. Bd. Jul. 10, 2007). Furthermore, we conclude that having not raised any concerns at the hearing, Applicant has waived this issue for purposes of appeal. *See* ISCR Case No. 08-08085 at 3 (App. Bd. Apr. 21, 2010).

Even if this had not been waived, the assertion lacks merit. This case is factually dissimilar to and distinguishable from the case relied upon by Applicant. AB at 2-5 (citing ISCR Case No. 03-08257 (App. Bd. Feb. 8, 2007)). In that case there were numerous identifiable events reflecting the applicant's lack of understanding of parts of the proceeding. Unlike in that case, there is no indication in this record that Applicant "demonstrated considerable confusion." ISCR Case No. 03-08257 at 3. At no time before or during the hearing did Applicant object to proceeding *pro se* or raise a lack of understanding of the proceedings. Nor was there anything in Applicant's conduct during the hearing that would give rise to an inference that he was confused. Rather, he actively

participated in the hearing, testifying on his own behalf, making an opening statement and closing argument, and presenting post-hearing documentary evidence.

If Applicant did not seek assistance from counsel or raise any concerns with the Judge, it was not due to any defect in the guidance provided him. *See* ISCR Case No. 20-02999 at 2 (App. Bd. May 12, 2022). Any concerns Applicant may have had regarding the exercise of his rights and responsibilities cannot fairly be placed on the Judge. *See* ISCR Case No. 19-02819 at 4 (App. Bd. Dec. 21, 2020). While a judge is responsible for ascertaining an applicant's basic ability to participate in the hearing, judges cannot act as a surrogate advocate for applicants. ISCR Case No. 20-01622 at 2 (App. Bd. Jun. 27, 2022). Merely because Applicant now has decided that he might have presented a better case, it does not follow that he was denied the opportunity to prepare and present his case. ISCR Case No. 00-0250 at 3 (App. Bd. Feb. 13, 2001) ("Applicants are not entitled to be relieved of the consequences of decisions and choices they make on how to proceed with their case if they are not satisfied with the results.").

Bias

Applicant argues that the Judge "demonstrated implicit bias" against him and cites as an example that the Judge did not *sua sponte* intervene when the Government stated that Applicant was going to lose his job. AB at 5–6 (citing Tr. at 34). He extrapolates from this that the Judge was "predisposed to revoke [Applicant's] security clearance and already decided against [Applicant]" AB at 6. He also asserts that the Judge should have kept the record open for a longer period of time so that he could address his delinquent debts. We do not find his arguments 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. *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." ISCR Case No. 01-04713 at 2 (App. Bd. Mar. 27, 2003). Claims of error should be based on arguments having a reasonable basis in the record evidence and procedural history of a case, not innuendo or insinuation. *See* ISCR Case No. 03-14052 at 3 (App. Bd. Sep. 28, 2005). While the Government's gratuitous comment was unnecessary, there is no indication that it in any way impacted the proceedings or the decision, nor was it something that required the Judge's intervention.

Applicant's allegation that the Judge was biased because he did not leave the record open for a longer period of time also is meritless. His explanation for this assertion focuses on a theoretical potential mitigation case he might have built by addressing his debts after the hearing was completed. However, DOHA proceedings are not aimed at collecting an applicant's debts. Rather, a security clearance adjudication is designed to evaluate an applicant's judgment, reliability, and trustworthiness so that a sound decision is rendered. *See, e.g.*, ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). An applicant who waits until his clearance is in jeopardy before resolving debts might be lacking in the judgment expected of those with access to classified information. *See* ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016). An applicant is not

entitled to delay or defer adjudication of security eligibility to resolve debts. ISCR Case No. 20-03548 at 4 (App. Bd. Jan. 27, 2022).

During his testimony, Applicant stated that, "If you can give me [a] couple weeks and I can give you paperwork," documenting his past efforts to address his debts. Tr. at 16. At the conclusion of hearing, the Judge noted the Applicant had inferred that there might be documents supporting his testimony. He explained the importance of providing "documentary evidence of any debt payments, contacts with creditors, and efforts to resolve or otherwise address delinquent debts or evidence of extended deployments in Florida to establish the mitigating factors under the Directive." Tr. at 44-45. In furtherance of this, he kept the record open for two weeks to allow Applicant the opportunity to provide additional evidence. Applicant concurred and thanked the Judge for doing so. Tr. at 16, 45. At no time during or after the hearing did he ask the Judge to keep the record open for a longer period of time. The Judge was not required to provide Applicant with any post-hearing opportunity to present additional evidence, and it is beyond cavil and common sense to claim that providing Applicant with exactly what he requested reflected negative bias.

We find that Applicant's concerns are insufficient to overcome the rebuttable presumption that the Judge acted in an impartial and unbiased manner. There was no bias or harmful error in the manner in which the Judge conducted the hearing.

Whole Person Analysis

The remainder of Applicant's brief asserting that the Judge erred in his whole-person analysis merely advocates for an alternative weighing of the evidence. An applicant'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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law." ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Moreover, there is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and a bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *E.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020).

In conclusion, we have considered the entirety of Applicant's arguments and he has not identified any harmful error in the Judge's handling of this case or in his decision. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b). The Judge's adverse decision is sustainable on this record.

Order

The decision in ISCR Case No. 23-00157 is **AFFIRMED**.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board