

KEYWORD: Guideline F

DIGEST: We have reviewed the Judge’s conduct of the hearing. The Judge questioned Applicant extensively and even sharply. However, it appears that she did so to clarify evidence that Applicant had presented. Many of the Judge’s questions were in response to vague answers by Applicant. The Judge left the record open for two weeks in order for Applicant to present additional evidence that might corroborate her testimony about debt payment. She resolved the majority of SOR allegations in Applicant’s favor. Adverse decision affirmed.

CASENO: 12-090545.a1

DATE: 12/21/2015

DATE: December 21, 2015

In Re:)	
)	
-----)	ISCR Case No. 12-09545
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 21, 2015, 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 October 8, 2015, after the hearing, 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.

Applicant raised the following issues on appeal: whether the Judge was biased against Applicant and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: Applicant has three bachelor’s degrees and a master’s degree. Earlier this year she divorced her husband from whom she had separated in 2005. Applicant has changed jobs over the past several years, with salary increases. However, she experienced unemployment between October 2010 and February 2011. When she started working with her current employer, her salary was nearly \$100,000. This was less than she had earned during her previous employment.

When Applicant and her husband separated, she sold two investment properties that she owned, realizing a profit of \$300,000. She did not pay the capital gains tax on this profit, spending the vast majority of it as a down payment on a new residence. She did not pay the tax because she and her husband did not have a property settlement at that time.

In addition, Applicant did not file her Federal income tax returns for 2005, again due to the lack of a property settlement with her spouse. She also failed to file for 2006 through 2009. In 2010 she sought assistance from a CPA, after which she filed her delinquent returns. She incurred additional tax debts upon the sale of another property. Applicant also borrowed money from her 401(k) account. She failed to repay the loan within the specified time, incurring additional taxes and penalties. Applicant owed taxes for three of the years that she had failed to file her returns.

A tax resolution service negotiated an installment agreement for payment of Applicant’s tax debts. As of 2012, she owed about \$149,000. She has made consistent payments since 2013, although the IRS suspended her payment obligation from January to June of 2015.

Applicant received no child support from her husband and paid the mortgage on the house where he lived. She had an unexpected expense in 2013, when a road repair caused damage to the foundation of her home. She had to borrow money to fix the problem.

Applicant has a net remainder of about \$340 each month and about \$2,000 in her 401(k). She has completed paperwork to modify her current mortgage loan, but it has not been approved. She has two credit cards with balances of \$800 and \$200. She makes at least the minimum payments on each.

The Judge's Analysis

The Judge resolved a number of delinquent debts in Applicant's favor. A number of these were for medical expenses. However, she resolved against Applicant three allegations addressing her tax debts and delinquent filings. The Judge noted evidence that Applicant had failed to pay the capital gains tax on the sale of her properties, choosing instead to make a down payment on a home. The Judge commented that Applicant could have made a lesser down payment and paid the taxes. In the whole-person analysis, the Judge stated that Applicant had ignored her responsibility to file and pay taxes. She concluded that Applicant's conduct raised questions about her judgment reliability, and trustworthiness.

Discussion

Applicant contends that the Judge was biased against her. She argues that the Judge's questions were what one would have expected from an opposing counsel. As a consequence, the Judge failed properly to apply the whole-person concept. 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. 14-03108 at 3 (App. Bd. May 20, 2015).

We have reviewed the Judge's decision in light of the record as a whole, paying particular attention to the Judge's conduct of the hearing as reflected in the transcript. The Judge questioned Applicant extensively and, at times, rather sharply. However, it appears that she did so in order to clarify the evidence that Applicant was presenting through her testimony. For example, at the beginning of her testimony, Applicant admitted that she was nervous and the Judge undertook questioning her to "help you get through some of the preliminary." Tr. at 22. Many of the Judge's questions were in response to vague or imprecise answers by Applicant. At the end of the hearing the Judge left the record open for two weeks in order for Applicant to present additional evidence that might corroborate her testimony about debt payment. Tr. at 117. In addition, she resolved the majority of SOR allegations in Applicant's favor. While recognizing the limitations in reviewing a transcription, we find nothing about the Judge's remarks that reflect an impropriety on her part. Viewing the Decision in light of the evidence as a whole, we conclude that the Judge did not perform her duties in such a way that a reasonable person would believe that she had an inflexible predisposition to make an adverse decision. Applicant has not met her burden of persuasion that the Judge was biased against her.

Applicant also notes that she was not represented by counsel. To the extent that she is arguing that she did not receive due process, we note that she received a letter from the Chief Judge advising her of her right to representation. She also testified that she understood this right. Tr. at 5-6. Applicant's apparent dissatisfaction with her presentation cannot fairly be attributed to a lack

of notice as to her rights nor to any improper conduct by DOHA personnel. *See, e.g.*, ISCR Case No. 14-03062 at 3 (App. Bd. Sep. 11, 2015).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person concept. A person who fails repeatedly to fulfill his or her legal obligations, such as filing and paying taxes, 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. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See also Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Although Applicant demonstrated that she had a repayment plan for her tax debts, it was reasonable for the Judge to consider the underlying reasons for Applicant's delinquencies, and the sufficiency of her explanation for them, in evaluating Applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015). 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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