KEYWORD: Guideline F

DIGEST: The Judge said or nothing that would persuade a reasonable person that he lacked the requisite impartiality. Adverse decision affirmed.

CASENO: 14-02207.a1

DATE: 05/27/2015

DATE: May 27, 2015

In Re:	)	
----------	)	ISCR Case No. 14-02207
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Pro se

Department of Defense (DoD) declined to grant Applicant a security clearance. On July 18, 2014, 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 3, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 him; whether the Judge denied him due process; 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

Applicant has served in the U.S. military, where in 1982 he was granted his first security clearance. He has worked with his current employer for over ten years. Applicant has a serious medical condition, along with other health problems. He has financial problems dating back to the mid-1990s. In 2006, Applicant's finances were the basis for a DOHA adjudication. The Judge in that earlier decision concluded that Applicant had mitigated the security concerns. He cited to evidence of Applicant's having settled several large debts and his December 2005 discharge in Chapter 7 bankruptcy. After this favorable clearance decision, Applicant amassed more delinquent debt. According to the IRS, he has federal tax liens totaling over $150,000 for 2006 alone. In 2014 the IRS notified him that his past-due tax debt for 2003-2004 and 2006-2011 was over $175,000. Applicant was not able to produce tax returns for the years at issue because they were "so long ago." Decision at 4. Applicant took no action on his debts because he was using his disposable income to pay tuition and living expenses for his daughter. Applicant has other delinquent debts, including credit cards that he opened in 2006 and stopped paying in 2008. He purchased an expensive vehicle that was repossessed due to non-payment. He also had two judgments against him that were satisfied through garnishment of his wages. Applicant has recently been discharged a second time in Chapter 7 bankruptcy. The bankruptcy petition listed about 60 overdue creditors.

The Judge's Analysis

The Judge concluded that Applicant's debt were not incurred under unique circumstances. To the contrary, Applicant appears habitually to incur debts and then refuse to pay them, despite having the means to do so. Although noting Applicant's serious medical condition, the Judge also found that the vast majority of his debts were not medically related and that Applicant had not demonstrated responsible action in regard to them. In the whole-person analysis, the Judge noted Applicant's military service and civilian employment, his having held a clearance for many years, and financial support he provided to an offspring. However, he stated that Applicant had been "evasive" at the hearing and that he actually submitted a credit report that he had altered so as to make it appear that he has resolved one of his SOR debts.

Discussion

Applicant contends that the Judge exhibited bias toward him. He cites to portions of the transcript in which the Judge repeated his warning to Applicant about his obligation to be truthful.

He argues, in effect, that this shows a predisposition by the Judge not to believe his testimony. A Judge is presumed to be unbiased, and an applicant who contends otherwise has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 11-05027 at 3 (App. Bd. Nov. 26, 2012). The record shows that, at the beginning of the hearing, the Judge advised Applicant of the requirement set forth in 18 U.S.C. § 1001 to be truthful in his presentation. Tr. at 15-16. The Judge made further reference to this advice during his general explanation of the procedures that applied to the hearing. Tr. at 18. He also referred to it at the beginning of Applicant's testimony:

> [Judge]: All right . . . give me a little bit of background information about yourself, then tell me how you got into financial trouble, and then tell me how you're–what evidence you have of financial reform . . . so again, do you recall my warning about telling the truth?
>
> [Applicant]: Yes, sir. Tr. at 25.

An examination of the entire transcript, with special attention to those portions cited by Applicant, disclose no reason to believe that the Judge was exhibiting bias. His language, viewed in its entirety, appears to have been an effort to ensure that Applicant, who acted *pro se*, understood the nature of the hearing and the procedures that would apply to it. The Judge said or did nothing that would persuade a reasonable person that he lacked the requisite impartiality.[1] Applicant has not met his heavy burden of persuasion that the Judge was biased against him.

Applicant contends that the Judge unreasonably limited his testimony, thereby impairing his ability to show mitigation. Specifically, he claims that the Judge erred by preventing him from reading aloud from his documentary evidence. The record shows that Applicant offered a substantial number of exhibits, all of which the Judge admitted. Moreover, the Judge permitted Applicant to testify at length about his financial problems and the circumstances underlying them, and he held the record open for thirty days after the hearing to enable Applicant to submit additional evidence. Tr. at 192, 198. Applicant offered additional evidence, and the Judge admitted it, including two exhibits that Applicant submitted beyond the allotted thirty days. Decision at 2. That the Judge curtailed Applicant's effort to read aloud from documents already admitted reasonably served the ends of judicial economy by preventing the inclusion into the record of merely cumulative evidence. Applicant was not denied the due process afforded him by the Directive. *See* Directive, Enclosure 1, SECTION 3. *See also* ISCR Case No. 12-02596 at 3 (App. Bd. Mar. 12, 2015).

Applicant argues that the Judge erred by admitting certain exhibits offered by Department Counsel. Applicant claimed unfair surprise, insofar as Department Counsel had not notified him of his intention to submit the documents. We examine a Judge's rulings on evidence to see if they are

[1]Applicant also suggests that the Judge exhibited bias due to Applicant's race. There is a rebuttable presumption that Federal employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). In the case before us, as in the one just cited, Applicant has not identified anything in the record that would lead a reasonable person to believe that the adverse decision was racially motivated. A bare assertion of such motivation is not enough to overcome the presumptions of good faith and impartiality. *Id.*

arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 10-08390 at 3 (App. Bd. Mar. 30, 2012). Department Counsel submitted the evidence in question to rebut the content of documents that Applicant had presented in his case in chief.[2] Tr. at 191. As stated above, the Judge left the record open for thirty days after the close of the hearing to enable Applicant to submit additional evidence, including documentary response to Department Counsel's rebuttal evidence. Tr. at 198. Moreover, in order to vitiate possible unfairness to Applicant, the Judge limited Department Counsel's scope of cross examination on the rebuttal evidence. Decision at 2. The Judge did not err in his ruling on the challenged evidence.

Applicant cites to favorable evidence, such as his having held a clearance for several years without incident, that he pays his current debts, etc. Applicant's argument is not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-04413 at 2 (App. Bd. Feb. 16, 2014).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. Applicant's having been previously discharged in bankruptcy, having received a favorable clearance DOHA adjudication that had addressed his financial problems, having subsequently amassed a significant amount of delinquent debt, and having filed a second time for bankruptcy protection supports the Judge's adverse 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge

[2]"[T]he evidence tended to counter and rebut Applicant's portrayal in his case-in-chief that his financial problems were of limited scope and duration. In addition, Applicant had previously been provided or had in his possession the documents offered in rebuttal." Decision at 2. The documents included a 2003 affidavit by Applicant concerning his debts, a copy of the 2006 DOHA adjudication, Applicant's 2005 bankruptcy filing, and a case summary of Applicant's 2014 bankruptcy filing.

Member, Appeal Board

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