

KEYWORD: Guideline F

DIGEST: Applicant contends he was denied due process, since the Judge did not give him more information about his right to counsel, and did not indicate that he had a right to object to or rebut Government exhibits. The Judge adequately explained to Applicant his rights and responsibilities at the hearing. Applicant's allegation of bias against the Judge is not established on this record. Adverse decision affirmed.

CASENO: 12-10122.a1

DATE: 04/22/2016

DATE: April 22, 2016

In Re:)	
)	
-----)	ISCR Case No. 12-10122
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Patrick McLain, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 5, 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 January 12, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Edward W. Loughran 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 Applicant was denied due process; whether the Judge was biased against Applicant; whether the Government failed to meet its burden of production; 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 did not file Federal or state income tax returns for tax year 2009. He did not file Federal income tax returns for tax years 2010 through 2013. When interviewed by a clearance investigator, Applicant stated that this failure was because he "[j]ust got too busy and kept putting it off." Decision at 2. He stated to the interviewer that he would file his returns within the next two weeks. Applicant filed his 2009 state income tax return and his 2009 through 2014 Federal returns in mid-2015, after he had received the SOR.

Other than his tax problems, Applicant's finances are in good shape. He has no delinquent debts and has about \$600,000 in savings, investments, and retirement accounts. He stated that he did not file his returns due to "stupidity" as well as to his being disorganized. *Id.* at 3. After completing his returns, he discovered that they were not difficult.

The Judge's Analysis

The Judge concluded that Applicant's tax problems raised Disqualifying Condition 19(g): "failure to file annual Federal, state, or local income tax returns as required[.]"¹ In evaluating Applicant's case for mitigation, the Judge cited to Applicant's admission that he had failed to file his returns due to laziness and disorganization. Although concluding that Applicant was not trying to avoid paying taxes, he stated that Applicant knew that he had a problem yet did nothing until after he received the SOR.

Discussion

Applicant contends that he was denied due process. He states that the Judge should have given him more detailed information about his right to counsel. He states that the Judge erroneously instructed him as to the rules of evidence, resulting in Applicant's not understanding that he could object to Government exhibits. He also states that he did not know that he could rebut the Government's evidence.

We do not find this argument to be persuasive. Prior to the hearing, Applicant received a memorandum from the Chief Administrative Judge that provided detailed guidance about his right to counsel; right to present witnesses and evidence; and right to object to evidence, among other things. Applicant received a copy of the Directive, which contains information about these rights,

¹Directive, Enclosure 2 ¶ 19(g).

as well as about an applicant's right to present evidence and about the burden of persuasion. Tr. at 5. In addition, the Judge explained to Applicant his rights and responsibilities for the hearing, each time Applicant acknowledging that he understood this guidance. Tr. at 5-8.² The Judge's instruction on the rules of evidence for the hearing was consistent with Directive ¶ E3.1.19. Applicant submitted several documents, all of which were admitted into evidence as Applicant Exhibits A through L (Tr. at 13), which suggests that he understood his evidentiary rights. Before admitting Government exhibits, the Judge asked Applicant if he objected. In particular, before ruling on the admission of a summary of Applicant's clearance interview, the Judge explained that if Applicant objected to the document, it would not be admitted but if he did not object then the Judge would consider it, and he explained the reason that the document might be inadmissible, its lack of authentication. Applicant stated that he did not object to this document. Tr. at 11-12. After considering Applicant's arguments in light of the record in its entirety, we conclude that Applicant received guidance sufficient to have apprised a reasonable person of his rights at the hearing. We find no reason to conclude that Applicant was denied the due process afforded by the Directive.

Applicant contends that the Judge was biased against him. He argues that the Judge acted in a prosecutorial manner, constantly interrupting Applicant and "employing leading questions to support a foregone conclusion." Appeal Brief at 6. 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). Bias involves partiality for or against a party, predisposition to decide a case or issue with regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 12-09545 at 3 (App. Bd. Dec. 21, 2015).

We have reviewed the transcript and conclude that the Judge did not act in a manner that would persuade a reasonable person that he was biased against Applicant. As stated above, he properly advised Applicant of his rights at the hearing and encouraged him to ask questions in case he did not understand something. During the course of Applicant's testimony, the Judge engaged in a colloquy with him. Applicant admitted that he had failed to file his taxes because he "had been too busy, lazy and disorganized" to do so. He testified that his circumstances had probably given him an ulcer. Tr. at 17-18. The Judge stated, "It's a lot of self-generated anxiety . . . You might have been better off spending a couple dollars and having somebody do it for you." *Id.* at 18. The Judge's observations were not leading questions but comments upon the evidence, in particular Applicant's testimony that his failure to have complied with tax laws was inexplicable.³ *Id.* at 19. The Judge appears to have expressed sympathy for Applicant when, after Applicant testified about his feelings after having filed his returns, the Judge finished the thought for him: "And it wasn't nearly as bad as you thought." *Id.* Toward the end of the hearing, the Judge made a joke that could have been interpreted as sarcastic or otherwise not befitting the circumstances. However, we do not

²Early in the hearing, Applicant stated that he did not fully understand the documents he had received. The Judge told him to be sure and ask any questions that may arise, and the Judge and Department Counsel would attempt to help him. Applicant stated in response that he had no questions at that time. Tr. at 6. The Judge continued with a detailed explanation of DOHA procedures, and Applicant stated that he understood them.

³Applicant had testified as follows: "I don't know how to explain it. I really don't, sir. . . I just cannot give you an answer that justifies anything."

conclude that this evidenced an inflexible predisposition to make an adverse decision. Examining the record in its entirety, we conclude that Applicant has not met his burden of persuasion that the Judge was biased against him.

Applicant contends that the Government did not meet its burden of production. He argues that his case does not raise concerns under Guideline F.⁴ The Government's burden of producing evidence arises only as regards facts alleged in the SOR that have been controverted. Directive ¶ E3.1.14. Applicant admitted the two allegations at issue here. Therefore, they were not controverted, relieving the Government of its burden of production. Nevertheless, the Government presented evidence in the form of Applicant's answers on the security clearance application and the summary of his clearance interview, which, when viewed in light of Applicant's testimony at the hearing, constitute substantial evidence of the SOR allegations, even without regard to Applicant's admissions.⁵ The Directive presumes a nexus between admitted or proved conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). Indeed, as the Judge found and as Applicant acknowledges, the Directive explicitly states that failure to file tax returns as required is potentially disqualifying under Guideline F. Applicant's arguments are not enough to rebut the presumption of nexus.

The balance of Applicant's argument is a challenge to the Judges's application of the mitigating conditions and whole-person factors. Applicant's brief asserts matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. He asserts that the Judge did not consider evidence favorable to him, for example that he has now filed his delinquent returns, that he has paid his tax obligations, etc. However, a Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant's arguments are not enough to rebut that presumption.

Applicant's brief consists in large measure in challenging the Judge's weighing of the evidence. In doing so, he cites to some other cases that he believes support his effort to obtain a clearance. However, each case must be decided on its own merits. Directive, Enclosure 2 ¶ 2(b). An ability to argue for an alternative interpretation of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016). We conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ 6.3, in that the Judge considered the totality

⁴Applicant argues, among other things, that he did not fail to file his returns, he simply filed them late. However, to file returns after the date upon which they are due, in this case years afterward, is obviously a failure to file them as the law requires. *See, e.g.*, ISCR Case No. 12-01266 (App. Bd. Apr. 4, 2014), in which the Judge entered adverse findings against an applicant upon an allegation that he had filed his 2004 through 2007 tax returns in 2013. *See also* ISCR Case No. 95-0578 at 4 (App. Bd. Oct 2, 1996): "Applicant's belated filing of his state and [F]ederal income taxes does not mitigate his earlier failure to file . . . [he] did not file his income tax returns until after he received the SOR . . . there is little mitigating value associated with Applicant's extremely belated filing of his . . . income tax returns."

⁵Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 13-01281 at 3 (App. Bd. Aug. 4, 2014).

of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

The Judge examined the relevant data and articulated a satisfactory explanation for the 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
Member, Appeal Board

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