

KEYWORD: Guideline F

DIGEST: There is a rebuttable presumption that a Judge is impartial and unbiased. A party seeking to overcome the presumption has a heavy burden. Adverse decision affirmed.

CASENO: 14-00363.a1

DATE: 03/25/2015

DATE: March 25, 2015

In Re:	)	
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	)	
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 March 20, 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 determination on the written record. On August 21, 2014, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant's request for a security clearance. Prior to the issuance of the decision, and unknown to the Judge, a JPAS 562 was issued in Applicant's case on July 31, 2014, as a result of the termination of his employment. The Judge vacated his August 21, 2014, decision on August 28, 2014. During the week of October 27, 2014 it came to DOHA's attention that Applicant's employer was again sponsoring him for a security clearance. As a result, the case was reopened to provide Applicant with an opportunity to respond to the File of Relevant Material (FORM) that had been previously issued, which he did. The case was reassigned to Judge Cefola on December 5, 2014. The Judge issued a decision dated December 18, 2014, wherein he denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30

Applicant raises the following issues on appeal: (1) whether he was denied due process; and (2) whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 39 years old. The SOR alleges 26 debts, many of which he admitted. He has paid, made payment arrangements, or is reasonably disputing some of the debts, but he still has over \$68,000 in past-due indebtedness that he has yet to address. Applicant attributes the cause of his financial problems to a period of unemployment from December 2009 to November 2011. He further indicated that he was going through personal issues with his family.

The Judge reached the following conclusions: Applicant has significant past-due debts, which he has not yet resolved. No countervailing mitigating conditions are applicable. Although Applicant can attribute his past-due debts to his nearly two years of unemployment, he has failed to act responsibly under the circumstances with respect to the majority of his debt. Applicant has yet to address 18 debts totaling in excess of \$68,000. Accordingly, Applicant has not met his burden of persuasion.

Applicant has raised two arguments which appear to assert he was denied due process. First, he asserts that he was required to address the original SOR a second time, and the second decision was based on the original SOR, thereby implying that such a process was improper. Secondly, he appears to argue that assigning the original Judge to the revived case, after the Judge had vacated his original decision, was error. Applicant has failed to establish a denial of due process.

The Government was not obliged to issue a new SOR in this case. The Government was not relying on any matters of security significance that were not included in the original SOR. Applicant was given ample opportunity to respond to the SOR through the submission of an answer, which he did, and the submission of a response to the FORM, which he also offered. Absent a showing of some deficiency in the Government's notice to Applicant as to what matters it deemed of security significance, Applicant cannot demonstrate that the Government erred by basing the case on the original SOR.

Applicant argues that by considering his case a second time, the Judge was predisposed to find against him. The Board construes this argument as a claim of bias. 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. 10-03656 at 2-3 (App. Bd. Jan 19, 2011). Applicant bases this assertion on his perception that the second decision of the Judge is essentially a duplicate of the first, and that the Judge failed to review the matters Applicant submitted in his response to the FORM. Applicant's arguments are not persuasive. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.,* ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). The SOR listed 26 delinquent debts attributable to Applicant. Although the Judge found against Applicant on many of the same debts in his second decision, he also found in Applicant's favor on seven debts as to which he had found against Applicant in his first decision, including the tax lien that Applicant cites in his brief. In each instance in which the Judge found in favor of Applicant on an individual debt, the Judge's second decision references the evidence submitted by Applicant that supports the favorable finding. After a review of the record and the decisions of the Judge, the Board concludes that the Judge considered the material contained in Applicant's response to the FORM, and issued an ultimate decision that was based on the expanded record.<sup>1</sup> There is no basis to conclude that the Judge was biased or based his second decision on matters not contained in the record.<sup>2</sup>

Applicant asserts that several factors provide mitigation in his case. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.,* ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.,* ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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 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).

In this case, the Judge made sustainable findings that Applicant had substantial past-due indebtedness that he has yet to address. In light of the this, the Judge could reasonably conclude that Applicant failed to meet his burden regarding mitigation. Applicant has not demonstrated that the Judge erred when he weighed the mitigating evidence against the seriousness of the disqualifying conduct.

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<sup>1</sup>The Board notes that a significant portion of Applicant's response to the FORM was comprised of three credit reports that were submitted by Applicant and had not been part of the record previously. While the Judge based a number of favorable findings on the contents of these reports, he also based several negative findings on information contained in the reports Applicant submitted. The Judge's findings are supported by the evidence.

<sup>2</sup>The record indicates that at some point after Applicant's security clearance adjudication was renewed, he was told that the case would be assigned to another judge. While the failure to reassign the case may have led to the rise of legitimate questions in Applicant's mind, the Government's failure to reassign the case in no way impugns the decision of the Judge.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

### **Order**

The decision of the Judge 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