KEYWORD: Guideline F

DIGEST: Applicant asserts, for the first time on appeal a question of bias growing out of a previous case.. Applicant was concerned about the issue but took no timely action to preserve his rights. Adverse decision affirmed.

CASENO: 14-03569.a1

DATE: 05/31/2016

DATE: May 31, 2016

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
Sheldon I. Cohen, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 8, 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 February 10, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 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 was educated in the U.S. and became a naturalized citizen in the early 2000s. He worked for a Federal contractor from 2001 to 2010 and for another one until 2013, when he was laid off. Applicant was unemployed for six months before being hired by his current employer. His wife has experienced medical problems and was unable to care for herself from 2002 until 2010. Applicant had to reduce his work load to take care of his family, and his wife's illnesses resulted in additional expenses as well as in her inability to work.

Applicant's SOR alleges financial difficulties, including failure to file Federal and state income tax returns for 2006 through 2011 and failure to pay taxes for 2006 through 2009. Applicant attributed his tax problems to difficulty in keeping up with his responsibilities due to his wife's illness. He stated that he had hired a tax consultant in 2008, but he did not provide corroboration. He and his wife filed for Chapter 13 bankruptcy protection to prevent foreclosure on his house. His attorney referred Applicant to an accountant who filed Applicant's tax returns for him.

Applicant's SOR includes other debts, such as mortgage accounts and medical debts, that were resolved through his bankruptcy discharge. Applicant testified that he had no prior financial problems, although under cross examination he admitted that he had previously filed for Chapter 7 bankruptcy protection. Applicant enjoys a good reputation for the quality of his work. His character references extol his judgment and trustworthiness.

The Judge's Analysis

The Judge concluded that Applicant's financial problems are recent and ongoing. He noted conditions outside Applicant's control that affected his debts, such as his wife's illnesses and his unemployment. The Judge concluded, however, that Applicant had not demonstrated responsible action in regard to his debts. He cited to Applicant's tax delinquencies, which, he observed, were not excused by his wife's medical condition. He stated that Applicant presented no evidence of having contacted the IRS to make payments or establish a payment plan. The Judge also stated that Applicant presented little evidence of debt resolution prior to his bankruptcy filing. Though noting

evidence of Applicant's good work performance and character, he stated that, as of the close of the record, Applicant had not yet been discharged through his bankruptcy petition. He also stated that it is not clear from the evidence the full extent of Applicant's tax liability.

Discussion

Applicant contends that the Judge was biased against him. In doing so, he asserts matters that are not contained in the record. Generally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, we will consider new evidence insofar as it bears upon threshold issues such as due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015). Applicant argues that the Judge's prior involvement as Department Counsel in another case deprived him of the requisite impartiality, as a consequence of which Applicant did not receive his right to a fair hearing. Accordingly, we will evaluate Applicant's argument as a claim of denial of due process.

Applicant's brief makes factual assertions that, on the whole, Department Counsel concedes. Department Counsel's disagreement with Applicant pertains to what conclusions may be drawn from these facts. We have no fact-finding power. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug. 17, 2015). However, given that Department Counsel has stipulated to the essential facts, we can resolve this issue without remanding the case for additional fact finding.

Applicant states, and Department Counsel concurs, with the following: this case was originally assigned to another Judge. The present one was substituted just before the hearing. Before going on the record, the Judge asked the parties if they had any objections to his serving as Judge, and neither did. After the hearing, Applicant recalled that, in 2003, he had been a party to a DOHA adjudication in which the Judge in the present case had served as Department Counsel.[1] Applicant asserts that, during the hearing in the case before us, the Judge questioned him about matters that were not relevant, and he argues that these questions evidence a lack of impartiality. Applicant did not object to the Judge's questions, on the ground of relevance or for any other reason. Tr. 86-91. This issue of bias has been raised for the first time on appeal.

As we read Applicant's own description of the events, during the September 2015 hearing he was concerned about questions the Judge asked which he perceived as lacking relevance to the financial concerns at issue. Soon after, Applicant recognized the possibility that the Judge in the current case had been the Department Counsel (the representative of Applicant's party opponent) in the earlier case. Also in September 2015, Applicant concluded that the Judge was indeed the same person as the previous Department Counsel. However, only after the Judge issued his decision, in February 2016, and after Applicant had filed a notice of appeal in February 2016, did Applicant finally advise DOHA in his Appeal Brief in March 2016, that there was an issue. We

[1]Applicant has attached the written Decision in the earlier case. It addressed security concerns under Guideline B, Foreign Influence, arising from Applicant's relatives living in foreign countries. ISCR Case No. 02-33265 (A.J. Dec. 30, 2003).

conclude based on these facts that Applicant did not take timely, reasonable steps to preserve his rights. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014).

Even if this issue had been timely raised, 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 conclude that Applicant's Appeal Brief has failed to present facts which, if true, would evidence bias. Applicant has not asserted that the Judge had any prior involvement in the case before us. Neither has he asserted that the earlier case in which the Judge served as Department Counsel arose from the same, or from substantially related, operative facts.[2] There is nothing in the record or in the Decision to suggest that the Judge even drew a connection between this case and the prior one. Moreover, the Judge's questioning of Applicant appears to have been an effort to clarify his testimony at the hearing.[3] It was not improper for the Judge to ask him about his education, employment history, and financial background, in order to perform a credibility determination and whole-person assessment. *See* ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014) for the permissible uses of non-alleged conduct in a DOHA hearing. That Applicant did not object to the Judge's questions suggests that he did not find them irrelevant or improper at the time. We have evaluated the record as a whole, paying particular attention to the transcript, finding nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. Applicant's Appeal Brief is not sufficient to overcome the presumption that the Judge was impartial and unbiased.

The balance of Applicant's arguments consist of disagreements with the Judge's weighing of the evidence, which 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). He takes issue with some of the Judge's findings, but he has not identified any harmful error therein.

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*

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[2]*See Grolier, Inc. v. Federal Trade Commission*, 615 F.2d 1215, 1220 (9th Cir. 1980), which considered the extent to which the Administrative Procedures Act (APA) requires an administrative law judge to recuse himself based upon prior involvement in a case. The court stated that Congress intended to preclude from administrative decision making anyone who, in that or in a factually related case, had developed a "will to win." In the case before us, Applicant has made no showing that the Judge's prior involvement falls within this prohibition. That is, there is no reason to believe that he entered the hearing room with a will to make adverse findings or that his decision was affected by any *ex parte* information he may have obtained during the earlier case. To the contrary, the record as a whole most reasonably suggests that he made no connection at all between this case and the prior one. Although the APA does not apply to DOHA adjudications, we find nothing in the Directive that imposes a stricter standard on DOHA judges than the APA imposes on those within its scope. *See also Wexler v. Department of the Interior*, 48 M.S.P.R. 513 (1991), in which an Administrative Judge was not divested of his impartiality simply by having adjudicated prior cases involving the same appellant in which he ruled against him.

[3]Applicant testified, among other things, that he had experienced no financial problems prior to his wife's illness. Department Counsel asked him about his having filed for Chapter 7 bankruptcy in the mid-1990s. Tr. at 78.

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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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

CONCURRING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I concur with the majority with one significant exception. Had the question of the Judge's prior role (as Department Counsel in an earlier and separate proceeding against Applicant which also involved his eligibility for a security clearance) been timely raised, it would have been a non-frivolous question of conflict of interest. At DOHA, we regularly expect Judges to recuse themselves for much less than having represented one of the two parties in a prior proceeding that involved both of the same parties and the same general subject. I disagree with the portion of the Majority opinion which suggests that the issue would have been of no consequence even if it had been timely raised.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board