

KEYWORD: Guideline F

DIGEST: New national security adjudicative guidelines became effective on June 8, 2017, which was 21 days before Applicant’s hearing was held. Applicant claims that he first became aware of the new adjudicative guideline when he read the Judge’s decision. We conclude the best course of action is to remand the case to the Judge for him to determine whether Applicant was provided adequate notice of the new adjudicative guidelines prior to the hearing. Adverse decision remanded.

CASENO: 12-09421.a1

DATE: 11/15/2017

DATE: November 15, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 12-09421
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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 September 28, 2016, 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 August 18, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The SOR alleged that Applicant failed to file his state income tax returns for 1998, 2000, 2002, 2003, and 2004; that he owed delinquent state taxes for 2001, 2002, 2004, 2005, and 2008; that he had a Federal tax lien entered against him in 2011; that he was indebted on a collection account and a charged-off account; and that he was charged with false info to increase benefits, pled guilty, and agreed to pay back the amount of unemployment benefits he was not entitled to receive. In his Answer to the SOR, Applicant denied that he owed delinquent state taxes for 2001 and 2005 and that he owed the Federal tax lien. He admitted the other SOR allegations with explanations. The Judge found in favor of Applicant on most of the SOR allegations and against him on four allegations. In determining that Applicant did not mitigate the security concerns, the Judge stated that he was unable to conclude that Applicant's financial problems are unlikely to recur given his long history of not filing and paying his taxes in a timely manner.

Applicant claims the Judge was biased against him. He argues the Judge's behavior towards him was "accusatory" and was "meant to purposely intimidate and confuse him." Appeal Brief at 1. There is a rebuttable presumption that an administrative judge is fair and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. *Id.* Bias is not demonstrated merely because a party can demonstrate a Judge committed a factual or legal error. The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *Id.* Applicant's claim of bias is not persuasive. While the Judge stopped Applicant's opening statement because he began presenting evidence, asked Applicant pointed questions, and made some abrupt comments during the hearing, our review of the transcript does not reveal that the Judge acted in a manner that would cause a reasonable person to question his impartiality.

New national security adjudicative guidelines became effective on June 8, 2017, which was 21 days before Applicant's hearing was held.¹ Applicant claims that he first became aware of the new adjudicative guideline when he read the Judge's decision. He contends that he was not informed of the new guidelines or given an opportunity to review them. The record reflects that he was provided a copy of the Directive when he received the SOR in September 2016, which was before the new guidelines were issued. The record does not reflect that Applicant was provided a copy of the new guidelines before the hearing. We note the new guidelines contain a new

¹ Directive, Encl. 2.

mitigating condition that specifically addresses tax delinquencies, and the Judge applied that new mitigating condition in rendering his decision.²

The Appeal Board does not have fact-finding powers. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug. 17, 2015). We are unable to determine whether Applicant was provided adequate notice of the new adjudicative guidelines so that he had an opportunity to present evidence under those guidelines. Consequently, we conclude the best course of action is to remand the case to the Judge for him to determine whether Applicant was provided adequate notice of the new adjudicative guidelines prior to the hearing. If Applicant did not receive such notice, the Judge should reopen the record, ensure Applicant is provided a copy of the new adjudicative guidelines, give the parties an opportunity to present evidence under the new guidelines, and issue a new decision in accordance with the Directive.

We also note that Applicant claims he did not receive a copy of the transcript of the hearing. Directive ¶ E3.1.24 provides that Applicant shall receive a copy of the transcript, less the exhibits, without cost. The Hearing Office should ensure that Applicant was provided a copy of the transcript. Applicant raised other issues that are not ripe for consideration.

² Directive, Encl. 2, App. A. ¶ 20(g).

Order

The Decision is **REMANDED**.

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

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board