KEYWORD: Guideline E; Guideline F

DIGEST: From our review, the cited pages in the transcript, and the record as a whole, do not establish bias, *i.e.*, partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of lack of impartiality. Adverse decision affirmed.

CASENO: 17-00661.a1

DATE: 09/07/2018

DATE: September 7, 2018

In Re:	)	
	)	
----------	)	ISCR Case No. 17-00661
	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 8, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 9, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 affirm.

The Judge's Findings of Fact

Applicant, who is 57 years old, has worked for Federal contractors since retiring from the military. He has held a security clearance for about 40 years and has worked as a Facility Security Officer (FSO). He has Federal tax issues that date back a number of years. These include a Federal tax lien filed against him in the approximate amount of $21,800 for 2007-2009; past-due Federal taxes totaling about $17,800 for 2010, 2011, and 2014; and a failure to filed his 2013 Federal income tax return. He attributed the tax lien to his tax preparer's error in listing him as a 1099, instead of a salaried, employee. He believed he learned of that error in 2009. He claimed he could not pay his 2007 tax debt, had a payment plan for it, but could not remember when the repayment plan began. He provided no documents to substantiate the repayment plan.

Applicant testified that he did not owe Federal taxes for 2010 and 2011. Copies of IRS tax transcripts submitted after the hearing reflected that he owed about $15,500 in past-due taxes for those years. The transcripts reflected installment agreements for those years were established in late 2012 and early 2013, but ended in April 2013. In August 2013, the IRS issued Applicant two Notices of Intent to Levy. No documentation was provided to show these tax debts were paid. His 2014 IRS tax transcript submitted after the hearing also reflected that he still owed almost $3,000 in past-due taxes for that year. The IRS sent him an inquiry about the non-filing of his 2014 income tax return in November 2015 and he did not file that tax return until May 2016. He provided no documentation showing his 2014 Federal tax debt was paid.

Applicant testified that he filed his 2013 Federal income tax return on time. A copy of an IRS transcript submitted after the hearing reflected that, as of May 8, 2017, he had not filed a tax return for that year. In 2014, the IRS sent him an inquiry about the non-filing of that tax return. He testified he thought his tax consultant filed it.

In late 2013 or early 2014, Applicant contacted the tax consultant to help him with his tax issues that are attributed to other tax preparers. The tax consultant testified at his hearing. The tax consultant confirmed with the IRS that Applicant owed about $22,000 in Federal taxes for 2007-

2009 and learned he had not filed his Federal income tax returns for 2010, 2011, and 2012. He thought his previous tax preparer completed those tax returns. The tax consultant filed them for him. She also learned he owed Federal income taxes for 2010, 2011, 2013, and 2014 and noted there were filing errors in the tax returns made by the previous tax preparer. When the tax consultant first started working for Applicant, she discussed with him that he owed taxes for multiple years. She noted that Applicant previously had a payment plan with the IRS that ended when his 2013 income tax return was not received by its due date. The tax consultant testified that Applicant's 2013 Federal income tax return was filed on time, but was not received by the IRS. She resubmitted it. Although the record of the proceeding was left open, no document was submitted to confirm that his 2013 Federal income tax was filed. In April 2018, a new IRS installment plan for the past-due taxes was initiated with monthly payments of $400. It will be implemented until Applicant receives a response to an offer of compromise. The tax consultant estimated Applicant owes the IRS about $43,000.

In completing a security clearance application (SCA) in June 2016, Applicant responded "No" to the question that asked if, in the past seven years, he failed to file or pay Federal, state, or other taxes as required by law. During a background interview in 2016, Applicant also responded "No" to questions asking whether he had tax delinquencies. At the hearing, Applicant testified that he believed he had met his tax filing and paying requirements and his tax preparer has proof to substantiate his claim. However, no corroborating evidence was provided. He denied that he deliberately failed to disclose information.

The Judge's Analysis

Applicant did not provide documentary proof that he filed his 2013 Federal income tax return or that he paid or is paying his past-due taxes. While his tax consultant is working with the IRS to resolve his tax problems, he provided no documents that indicate a resolution has been negotiated. Government exhibits show installment payments were made over the years, but they are not sufficient to show he is adhering to good-faith efforts to pay his debts.

Applicant deliberately omitted information about his tax problems on his 2016 SCA. He also deliberately provided false information during his background investigation. Although he may have been unaware of the Federal tax lien that was filed against him in 2011, he was aware he owed Federal taxes for the years included in that lien, *i.e.*, 2007-2009. He discussed with a coworker his tax issues after returning from overseas in 2007. He hired the tax consultant in late 2013 or early 2014 to address his tax problems.

Discussion

Applicant contends the Judge was biased against him and his attorney. 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. 17-02391 at 2-4 (App. Bd. Aug 7, 2018). There are three aspects to Applicant's claim of bias. The first aspect involves Applicant's claim that the Judge showed bias "by threatening to disallow testimony of a material

witness if [Applicant's] representative did not call the witness in the specific order she wanted." Appeal Brief at 14. At the hearing, Applicant's Counsel intended to call the tax consultant as a witness before Applicant testified, and the following exchange occurred:

> [Applicant's Counsel]: . . . At this time, with your permission, I'd like to call [the tax consultant], who is on telephone standby.
>
> [Judge]: No. I think I want to hear -- this will not help me put things in context. I think we need to hear from the Applicant first. Otherwise I'm not going to understand the testimony. She is a tax preparer?
>
> [Applicant's Counsel]: Yeah. I have this case prepared to call witnesses in a certain sequence.
>
> [Judge]: Okay. But I would like to hear from the Applicant first because I'm not going to understand what she has to say until I hear what he says unless she then is on standby to be recalled. And that's what I intend to do, is you can recall her after him or you can call her now or whatever.
>
> But there is going to be a lot of questions I may have for her after I hear him testify.
>
> [Applicant's Counsel]: Okay.
>
> [Judge]: So if you want to call her twice and recall her, that's fine. But if she, based on your proffer that she's a tax preparer, then it makes sense to me that I need to know what his testimony is before we ask her questions.
>
> [Applicant's Counsel]: Okay. I just have the case organized a different way, so I will make --
>
> [Judge]: Well, I'll give you time [-] reorganize it then because unless I know what he has to say, I don't know what the context of her testimony is going to be.
>
> [Applicant's Counsel]: I'm going to ask her if she's available for two times around the block, so.
>
> [Judge]: Okay. If that's -- but I'm not going to have her after he testifies, because my guess is there will be additional questions.
>
> [Applicant's Counsel]: I understand. Thank you very much.
>
> [Judge]: And if she's not available, then I'm not going to accept any of her testimony, so it's either all or nothing.

* * *

(Telephone call placed, not answered by party.)

[Judge]: Okay. Let's go ahead and have your client testify.

[Applicant's Counsel]: I'd like to call these two character witnesses so they can be released.

[Judge]: And they're strictly character?

[Applicant's Counsel]: They're strictly character.

[Judge]: Okay.[1]

First, contrary to Applicant's assertions, the Judge did not threaten "to disallow testimony of a material witness if [Applicant's] representative did not call the witness in the specific order she wanted." The Judge essentially indicated that she would not accept any of the tax consultant's testimony unless she was subject to questioning after Applicant testified. Second, a judge is responsible for ruling on questions of procedure and evidence. Directive ¶ E3.1.10. Such rulings are subject to review on appeal to determine whether any harmful error occurred. Third, this issue became a moot point because the tax consultant, who was not available when originally called to testify, later testified after Applicant had done so. This incident does not establish that the Judge was biased.

The second aspect of the bias claim involves an exchange between Applicant's Counsel and the Judge at the beginning of the tax consultant's testimony. The record reflects the following exchange:

[Applicant's Counsel]: All right. What is your occupation?

[Judge]: Okay. Excuse me one second. I don't want you up here. You can stay over there. Right there. I don't care if the phone is here, but I don't want you looking over the bench. It's inappropriate.

[Applicant's Counsel]: Okay.[2]

A judge "shall conduct all proceedings in a fair, timely, and orderly manner." Directive ¶ E3.1.10. Within the confines of those requirements, a judge has latitude to decide the manner in which a

[1] Tr. at 22-24.

[2] Tr. at 166.

hearing is conducted. We do not find merit in Applicant's arguments that this exchange reflects that the Judge acted in a demeaning and inappropriate manner. The Judge acted within her authority to determine how close Applicant's Counsel could approach the bench during the questioning of a witness.

The third aspect of the bias claim involves Applicant's description of the Judge's behavior as "combative and argumentative" and as "creating a chaotic and confusing environment" that impacted his testimony. Appeal Brief at 5. In support of this argument, he cites to various pages in the transcript but does not identify the specific conduct that he is challenging. From our review, the cited pages in the transcript, and the record as a whole, do not establish bias, *i.e.*, partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of lack of impartiality. *See, e.g.*, ISCR Case No. 15-03162 at 3 (App. Bd. Jul. 25, 2017). The presumption that a judge is impartial and unbiased is not rebutted by the mere showing of a judge's adverse rulings (*Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010)); "expressions of impatience, dissatisfaction, annoyance, and even anger" (*Liteky v. United States*, 510 U.S. 540, 555-556 (1994)); "stern and short-tempered . . . efforts at courtroom administration" (*Id.*); harsh comments (ISCR Case No. 09-07395 at 2-3 (App. Bd. Sep. 14, 2010)); or extensive and sharp questioning of an applicant or witnesses (ISCR Case No. 12-09545 at 3(App. Bd. Dec 21, 2015)). In this case, Applicant has not shown how the Judge's conduct may have adversely impacted his testimony. It appears the Judge's questioning of Applicant was done to clarify his testimony. The record does not support Applicant's contention that the Judge created "a chaotic and confusing environment." We find nothing in the record to persuade a reasonable person that the Judge lacked impartiality. Applicant has failed to met his heavy burden of persuasion to establish bias.

Applicant argues that all of his tax returns have been filed and all of his taxes have been paid. Appeal Brief at 3 and 6-7. As the Board has previously noted, it is reasonable for a Judge to expect applicants to present documentation showing the resolution of their financial problems. *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008). We find no reason to disturb the Judge's conclusions that Applicant failed to present documentary evidence establishing that he filed his 2013 Federal income tax return and is paying his past-due taxes.

Applicant also argues that the Judge did not consider or properly weigh all relevant evidence and did not properly apply mitigating conditions. In support of these claims, he argues that he hired a tax consultant to assist him in resolving his tax problems, established a tax repayment plan, and was unaware of his tax problems when he submitted his SCA or underwent his background interview. The Judge, however, made findings of fact about those matters. Applicant's arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor 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. 17-00257 at 3 (App. Bd. Dec 7, 2017). We give due consideration to the Hearing Office case that Applicant cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.*

The Judge examined the relevant evidence 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, Encl. 2, App A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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