

KEYWORD: Guideline F

DIGEST: There is a rebuttable presumption that a Judge is impartial and unbiased and a party seeking to rebut that presumption has a heavy burden on appeal. Adverse decision affirmed

CASENO: 06-09462.a1

DATE: 07/19/2007

DATE: July 19, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-09462
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 24, 2006, DOHA 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 3, 2007, after the hearing, Administrative Judge Joseph Testan

denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process; and whether the Judge's unfavorable clearance decision under Guideline F is arbitrary, capricious, or contrary to law.

(1) Applicant argues that he was denied due process because he did not receive a full investigation of the case, and a fair and impartial common sense determination based upon a totality of the evidence. The Board does not find this argument persuasive.

The method and scope of background investigations are outside the scope of review of the Appeal Board. *See, e.g.*, ISCR Case No. 99-0293 at 4 (App. Bd. May 5, 2000). The hearing is the Applicant's opportunity to produce other evidence beyond that developed by his background investigation for the purpose of rebutting, explaining, extenuating, or mitigating facts to which he has admitted or which have been proven by Department Counsel. *See, e.g.*, Directive ¶ E3.1.15. The Judge is then duty bound to consider all of the evidence developed on the record of the case before him. Any attempt on the part of the judge to independently investigate allegations or develop facts would, of course, conflict with the judge's role as an impartial fact finder. *See, e.g.*, ISCR Case No. 02-32606 at 3 (App. Bd. Jan. 21, 2004).

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or unfair. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Lack of partiality is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or unfair. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999).

Applicant has not met the heavy burden of persuasion noted above, in that he fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness, impartiality, or professionalism of the Judge. *See, e.g.*, ISCR Case No. 03-00740 at 2 (App. Bd. June 6, 2006).

(2) Applicant contends that the Judge should have concluded that the security concerns raised by his multiple unpaid debts was mitigated because his debts were largely the result of circumstances beyond his control—loss of employment and unexpected medical expenses; they were isolated incidents that were not recent; and Applicant has received counseling and there are indications that the problem is under control. In support of his contention, Applicant essentially reargues his case

with respect to the evidence he presented at the hearing and provides additional statements as to his current financial situation.¹ Applicants' arguments do not demonstrate that the Judge erred.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. An applicant'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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by Applicant's unpaid debts had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge found that Applicant had a history of not meeting financial obligations which extended over many years. At the time the case was submitted for decision, he still had significant outstanding debts and had only recently begun to repay his debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were recent, not isolated, and still ongoing. *See, e.g.*, ISCR Case No. 06-00799 at 2 (App. Bd. Apr. 16, 2007). The favorable record 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. 02-28041 at 4 (App. Bd. June 29, 2005). The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline F is sustainable.

¹The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional explanations, and they do not demonstrate error on the part of the Judge.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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