

KEYWORD: Guideline F

DIGEST: Comments made by the Judge at hearing do not rebut the presumption that the Judge was unbiased. The record does not support a conclusion that Applicant was denied an opportunity to present his evidence in mitigation. Adverse decision affirmed.

CASENO: 09-06224.a1

DATE: 01/20/2011

DATE: January 20, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-06224
)	
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 April 28, 2010, 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 September 28, 2010, after the hearing, 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 against him; whether Applicant was denied an opportunity to present his case for mitigation; whether the Judge failed to consider record evidence favorable to Applicant; whether the Judge erred in her application of the mitigating factors; and whether the Judge's whole-person analysis was erroneous. Consistent with the following discussion, we affirm the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant served in the U.S. Marine Corps, as an enlisted person and later as an officer. He is married. He had two prior marriages that ended in divorce, and he pays child support to a previous spouse. While he was in the Marines, the Department of the Navy initiated action to deny Applicant a security clearance, based, in part, on financial problems. Ultimately Applicant was granted a security clearance conditioned on his resolution of a credit card debt. Applicant did not resolve this debt, which is alleged in the SOR. The credit card in question had been used by Applicant to take trips and buy gifts. When he and his former wife divorced, Applicant did not pay the debt, believing part of it was his wife's responsibility. This debt is still ongoing.

Applicant has other delinquent debts, for credit cards, a federal tax lien, a foreclosure on a time-share property, etc. In addition, the record demonstrates that Applicant incurred liens for delinquent state taxes in 2001, 2002, 2004, and 2005. These liens have been satisfied and are not alleged in the SOR. The federal tax lien referenced above is in the amount of \$11,800. The Judge's findings note that Applicant's statements to the OPM investigator concerning this lien are not consistent with his testimony at the hearing.¹

Applicant was recalled to active duty in 2001, with a concomitant reduction in his income. He was a victim of Hurricane Katrina, which had a devastating impact on his finances. In September 2006 he purchased a time share property, which later went into foreclosure because he could not make payments due to a job loss. He underwent a divorce in 2006, which cost him \$5,000 in attorney fees. He and his current wife maintain residences in different states. This is because he could not find employment where she lives. He has incurred some medical expenses and has used credit cards while unemployed to defray living expenses.

Applicant hired a debt remedy company, but he later canceled the contract because he concluded that the company was not reputable. He has also received financial counseling from a

¹"In his interview with an . . . OPM investigator in May 2009, he explained that he was not able to pay his taxes in 1999 and 2000 because he went from being employed as a financial planner to being recalled to active duty in 2001. His explanation was that his income decreased and he was not able to pay his taxes for those two years. At the time of his interview he stated that he was working to repay this debt but had not yet paid it. At the hearing, Applicant stated he is trying to determine why he owes this debt. He believes it is from a joint tax return for tax year 2004."

program through the Marines and has sought counseling through the IRS and from a taxpayer advocate. He has paid down certain non-SOR debts. He and his wife are making payments on nine credit cards, a credit union overdraft loan, and a personal loan.

Applicant has received numerous citations and awards from his military service.² His former employer considers him to be trustworthy and of good character, “the epitome of a good Marine.” Decision at 7. His former commander testified that Applicant had served courageously as an operations officer during combat operations. He has no reason to question Applicant on any security-related matter.³

Discussion

Applicant contends that the Judge was biased against him. He states that she constantly interrupted him and treated him rudely and with disrespect. As a consequence of this conduct, Applicant contends that he was impaired in presenting his case for mitigation.

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. 08-01306 at 4 (App. Bd. Oct. 28, 2009). The issue is whether the Judge acted in a manner that would lead a reasonable person to question his or her fairness and impartiality. *See* ISCR Case No. 03-24632 at 2 (App. Bd. May 19, 2006). In the case before us now, Applicant points to numerous instances in which the Judge made statements and comments that were not consistent with the decorum normally anticipated in a DOHA hearing. However, these comments do not rebut the presumption that the Judge decided the case on the basis of the evidence before her.⁴

Furthermore, the record does not support a conclusion that Applicant was denied an opportunity to present his evidence in mitigation. The hearing was over four hours in length. Applicant called two witnesses and testified in his own behalf. Applicant submitted numerous documents addressing all aspects of his financial condition. While the Judge did on numerous instances interrupt Applicant, it appears to have been in an effort to focus his testimony more clearly

²Applicant’s evidence includes a citation to accompany the award of the Bronze Star. Applicant served as a detachment commander during combat operations from January to May 2003.

³“In combat, you get to learn a lot about someone’s patriotism. You get to learn a lot about the person . . . I’ve seen men stand their post and in the time of missile attacks to type out a message . . . to get supplies to my Marines, and that individual was [Applicant]. I’ve seen a man stand there solid as a rock, and defend this country in one of the largest wars I think we’ve seen since World War II.” Tr. at 186-187.

⁴Among other things, Applicant claims that the Judge did not permit him to call his witnesses over halfway through the proceeding in order for them to be able to return to their jobs. However, as Department Counsel states in his reply brief, at no time during the hearing did Applicant advise the Judge that his witnesses were under a time constraint. *See* Tr. at 139-140: “[Applicant]: If it please the Court, Your Honor, at this time, I’d like to call the two witnesses that . . . [Judge]: Actually, it doesn’t at this time. [Department Counsel] still gets to ask his questions . . . [Applicant]: Oh, I apologize, Your Honor. [Judge]: and I get to ask my questions . . . So I think what might be best is to take about a five-minute recess . . . You can tell your witnesses it’ll be a little while longer.”

on the nature of his debts, the circumstances underlying them, and his efforts to repay or otherwise show mitigation. Applicant's appeal brief cites to no evidence that he was denied an opportunity to present. There is no basis in the record to conclude that Applicant was denied due process. *See, e.g.*, ISCR Case No. 07-07352 at 2 (App. Bd. Jul. 28, 2009).

Applicant contends that the Government failed to present evidence sufficient to establish Guideline F security concerns. In a DOHA hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. In this case the Government's evidence included Applicant's security clearance application, his admissions to SOR allegations, his answers to interrogatories, the prior Navy clearance decision, and five credit reports. Taken together, these documents are sufficient to establish security concerns, thereby placing the burden of persuasion as to mitigation upon Applicant. *See* Directive ¶ E3.1.15.

Applicant argues that the Judge did not consider record evidence favorable to him, such as his unemployment, his call to active duty, and his property losses caused by Hurricane Katrina. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). In this case the Judge made extensive findings covering all aspects of Applicant's financial condition, including findings regarding circumstances outside his control. *See* Directive, Enclosure 2 ¶ 20(b), which mitigates security concerns when the causes of an applicant's financial problems are outside his control and he acts responsibly under the circumstances. She also discussed these matters in the Analysis portion of the decision, but she reasonably concluded that Applicant had failed to demonstrate responsible action, given the totality of his circumstances. Applicant draws attention to evidence that he has held a clearance in the past and has never compromised classified information. However, the government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. ISCR Case No. 08-00435 at 3 (App. Bd. Jan. 22, 2009), (citing *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970)). While Applicant may disagree with the weight which the Judge assigned to his mitigating evidence, he has not rebutted the presumption that the Judge considered all of the record evidence.

We have considered Applicant's arguments concerning the Judge's treatment of the mitigating conditions and the whole-person factors. Her treatment of them is reasonable, in light of record evidence that (1) Applicant has not resolved the debt at issue in his conditional clearance granted by the Department of the Navy; (2) he has not resolved other significant debts alleged in the SOR; (3) he failed to pay his federal tax liability; (4) he made inconsistent statements concerning that tax debt; and (5) he made poor financial decisions, such as purchasing a time share despite substantial credit card debt. Applicant contends that the Judge did not give appropriate weight to his military service and his patriotism, asserting that he "was not allowed to adequately provide evidence to support the 'whole-person' concept." However, he provided significant evidence regarding his military service, to include testimony from his commander about his performance of duty during combat. The Judge made findings about these matters and stated explicitly that she had considered them. The Judge's whole person analysis complies with the requirements of Directive,

Enclosure 2 ¶ 2(a), in that the Judge considered the totality of Applicant’s conduct in reaching her decision. *See* ISCR Case No. 08-02464 at 3 (App. Bd. Jul. 16, 2009). Though Applicant may disagree with the weight which the Judge assigned to his evidence, the record does not support a conclusion that the Judge’s analysis was in error.

The record supports a conclusion 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 Judge’s adverse 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. 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