KEYWORD: Guideline F

DIGEST: Applicant contends that he was not aware of his right to request a hearing. The record shows, however, that Applicant's SOR included an attachment by which he could request either a hearing or a decision on the written record. Adverse decision is affirmed.

CASE NO: 19-02207.a1

DATE: 05/20/2020

DATE: May 20, 2020

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
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 26, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline F of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. After considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Caroline E. Heintzelman denied Applicant's request for a security clearance in an undated decision.[1] Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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 is a high school graduate who served in the military–on active duty, in the Guard, and in the Reserves–and retired with a 30% disability rating. Previously divorced and now separated from his current wife, Applicant has two offspring. Applicant has been unemployed since late 2017. He worked for Defense contractors overseas from January 2008 until March 2017, at which point he returned to the U.S.

Applicant's SOR alleges that he did not file his Federal or state income tax returns for 2010 through 2017. He admitted these allegations in his Response to the SOR. He stated that he did not know that he had to file returns while living and working overseas, although he lived the majority of 2017 and 2018 in the U.S. In addition, Applicant failed to file his 2009 and 2018 returns in a timely fashion. In his Response to the File of Relevant Material (FORM), he submitted complete state and Federal tax filings for 2010 through 2018. They were signed by Applicant on November 8, 2019. On his 2017 tax return, Applicant claimed that he lived overseas for the entire tax year in question. However, in fact he returned to the U.S. and has lived here continuously since March 2017.

The Judge's Analysis

The timing of Applicant's steps to resolve his tax delinquencies–after he received the SOR and the FORM–does not support a conclusion that he engaged in a good-faith effort to resolve his financial obligations. Applicant's claim that he was not aware of his obligation to file the returns does not support a conclusion that he acted responsibly. The Judge cited to the non-alleged tax delinquencies for 2009 and 2018, observing that she had considered them on the issue of mitigation and not as independent security concerns. She found that Applicant's tax delinquencies have been ongoing for years and that he had provided "discrepant information" about his returns in his security clearance application, clearance interview, SOR Answer, and FORM Response.

[1]The Decision is undated. The DOHA cover letter to Applicant that accompanied the Decision was dated February 5, 2020.

Discussion

On appeal Applicant contends for the first time that he was entitled to filing extensions due to his continued service in a combat zone. The crux of his argument is that he did not have to file his returns until 180 days after leaving the combat zone, demonstrating that he had acted more expeditiously than the Judge found. In the first place, the record does not contain evidence sufficient to demonstrate the extent to which this contention may be true. We have no authority to grant Applicant's request to remand the case for the presentation of additional evidence. Appeal Brief at 2. *See* ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017). Furthermore, a person entitled to a filing extension due to service in a designated combat zone must file the return within 180 days of the last day of such service. *See, e.g.*, IRS Publication 3*, Armed Forces' Tax Guide*, dated January 4, 2013, at 24; IRS Pub. 3, dated December 22, 2016, at 29. The filing extension may be extended up to an additional 3 ½ months depending on when the individual entered the combat zone. Applicant returned to the U.S. in March 2017 and has remained here ever since. Nevertheless, he did not file any returns until late 2019. Even if Applicant had been entitled to a filing extension for at least some of his time overseas, his failure to file until long after the lapse of such grace period renders this argument meritless.

Applicant contends that he was not aware of his right to request a hearing. Appeal Brief at 1-2. The record shows, however, that Applicant's SOR included an attachment by which he could request either a hearing or a decision on the written record. Applicant passed over the choice which read: "In-person at a location within 150 miles of your home or workplace, or by video-teleconference (VTC) hearing before an Administrative Judge [.]" Applicant initialed the block that read "A decision based on the administrative (written) record, without an hearing before an Administrative Judge." He affixed his signature to the attachment in the presence of a notary and returned it to DOHA along with his Answer to the SOR. In addition, he received a copy of the Directive, which spells out an applicant's right as to choice of forum. The record demonstrates that Applicant was advised of his right to request a hearing. Applicant was not denied the due process afforded by the Directive.

Applicant's brief cites to Hearing Office cases involving applicants who received favorable decisions despite late tax returns. He argues that his circumstances are similar. We have given these case due consideration as persuasive authority. However, each case must be decided on its own merits. Hearing Office decisions are not binding upon other Hearing Office Judges or on the Appeal Board. *See, e.g.,* ISCR Case No. 18-02074 at 2 (App. Bd. Aug. 27, 2019). These cases have significant differences from Applicant's and provide no reason to conclude that the Judge erred in her analysis.

The balance of Applicant's brief consists of arguments that the Judge failed to consider all of the evidence in the record or that she mis-weighed the evidence. Given the extent of Applicant's delinquent filings and the timing of his efforts at addressing them, we find no reason to disturb the Judge's overall conclusions. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that she weighed the evidence in a manner that

was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02872 at 3 (App. Bd. Jan. 15, 2020).

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 Y. Ra'anan
Michael Y. 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