



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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KEYWORD: Guideline F

DIGEST: The Judge found that Applicant told the government investigator he would resolve the issue by the end of 2017. He did not and now relies on his inability to obtain documents because the ten years has passed and the statute of limitations has tolled. He also told the investigator that his documents were in storage, and he was going to retrieve them and resolve the issue. He did not. Instead, he testified that he does not keep documents past seven years. At the time the issue arose, it was within seven years. It is disingenuous to destroy documents that may have pertained to 2010 when he put the government on notice that he had the issue in 2017. It is unknown why he could provide computerized 2006 tax transcripts, but could not provide 2010 tax transcripts. He did not provide any documents from the IRS corroborating any action he may have taken in the past resolving his 2010 tax return. Adverse Decision is Affirmed.

CASE NO: 18-02155

DATE: 10/19/2021

Date: October 19, 2021

<p>In the matter of:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 18-02155</p>
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brian A. Pristera, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 14, 2018, 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 July 23, 2021, 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 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 and Analysis

Applicant, who is in his fifties, has been working for a Federal contractor since 2017 and previously worked for others. He has served honorably in the military. He provided character letters describing him as an outstanding individual who is reliable, follows procedures, and has the highest integrity.

The SOR initially contains seven allegations, but the Government withdrew six of them. The Judge found against Applicant on the remaining allegation, *i.e.*, that he failed to file, as required, his Federal income tax returns for 2006 and 2010.

In his 2017 security clearance application (SCA), Applicant disclosed that he failed to file and pay his Federal taxes for 2007 and failed to file his Federal taxes for 2010. He also stated he would work with the IRS to correct this situation. In a subsequent background interview, he noted his tax deficiencies were not for tax year 2007 but instead for 2006. The IRS notified him that he owed \$6,000 to \$7,000 for 2006 and \$1,000 for 2010. He also indicated that he thought he filed his 2006 tax return while deployed to a combat zone. The majority of his files were in storage, and he would retrieve them to file the tax returns. At the hearing, he noted he was unsuccessful in obtaining his 2006 return from the IRS. He also testified that he had saved all returns but destroyed them after seven years and the running of the statute of limitations. In a post-hearing submission, Applicant presented an IRS tax transcript that shows he filed his 2006 Federal income tax return in August 2008 and owed about \$7,800 in taxes. It also reflects that adjustments for interest, penalties, and tax refund withholdings were made over the years, and the IRS had written off a balance of about \$7,200 in September 2017. Applicant’s failure to pay taxes was not alleged in the SOR but may be considered in analyzing the whole-person concept, in making a credibility determination, and in assessing the mitigative evidence.

In his SCA, Applicant indicated he failed to file his 2010 Federal income tax return because he did not have money to pay the taxes due to unemployment. “He put this debt on the ‘back burner[.]’” Decision at 4. He intended to resolve this issue by the end of 2017. At the hearing, he claimed he had filed his 2010 tax return but could not prove it. He also noted that, before his 2017 interview, the IRS informed him that he needed to file his 2010 tax return again because they did not have it. He tried to file again but stated that, due to the statute of limitations, the IRS would not accept it.

Applicant failed to provide his IRS tax transcript for 2010. He claimed he could not retrieve documents from the IRS that were older than 10 years and provided an IRS document showing transcripts were available for 2011-2021. “He did not provide an explanation for why he could request and receive in June 2021 the computer generated 2006 transcript and not the 2010 transcript.” Decision at 5. He testified that, to best of his knowledge, he had done everything to comply with the tax requirements given his deployments and the other issues. He failed to explain why he did not resolve this issue in 2017, as he earlier said he would.

After the hearing, Applicant provided his signed 2010 Federal income tax return with a receipt showing it was mailed on June 18, 2021. He noted he found a folder with his 2010 W-2s and receipts but did not indicate whether he had a copy of his Federal tax return for that year. His accountant recommended he re-file that return.

“Applicant’s testimony contradicted his disclosures in his SCA, his statement to the government investigator, and the 2006 tax transcript. I did not find Applicant’s testimony credible.” Decision at 6.

[Applicant] told the government investigator he would resolve the issue by the end of 2017. He did not and now relies on his inability to obtain documents because the ten years has passed and the statute of limitations has tolled. He also told the investigator that his documents were in storage, and he was going to retrieve them and resolve the issue. He did not. Instead, he testified that he does not keep documents past seven years. At the time the issue arose, it was within seven years. It is disingenuous to destroy documents that may have pertained to 2010 when he put the government on notice that he had the issue in 2017. It is unknown why he could provide computerized 2006 tax transcripts, but could not provide 2010 tax transcripts. He did not provide any documents from the IRS corroborating any action he may have taken in the past resolving his 2010 tax return. [Decision at 8.]

Applicant did not act responsibly in resolving his tax issues. He had years after submitting his SCA to resolve them, but failed to do so. His failure file his 2010 return in a timely manner continues to cast doubt on his reliability, trustworthiness, and good judgment.

Discussion

In his appeal brief, Applicant does not challenge any of the Judge's findings of fact. Rather, he contends the Judge's conclusions were arbitrary, capricious, and contrary to law because she improperly refused to apply Mitigating Condition 20(a) to conduct that occurred over 10 years ago without recurrence, she improperly articulated the security concern as a "failure to timely resolve his tax issues," she failed to conduct properly the whole-person assessment, and she misapplied Appeal Board precedent. Appeal Brief at 1-2. In deciding whether the Judge's conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 16-02322 at 2-3 (App. Bd. Mar. 14, 2018). *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (discussing the scope of review under the "arbitrary and capricious" standard). In deciding whether the Judge's conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable Federal law. *See, e.g.*, ISCR Case No. 02-20115 at 2 (App. Bd. Jul. 29, 2005).

Applicant's argument that the Judge erred in failing to apply Mitigating Condition 20(a) is not persuasive. Applicant correctly points out the evidence establishes that his failure to file his Federal tax returns as required occurred about 10 years ago and that no evidence was presented to show any recurrence. However, the mere length of time that has elapsed since the occurrence of his last tax filing delinquency is not determinative in deciding whether the alleged security concerns were mitigated. To receive full credit under Mitigating Condition 20(a), a Judge must not only conclude "the behavior happen so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur" but also that the behavior "does not cast doubt on the individual's current reliability, trustworthiness, and good judgment." *See* Directive, Encl. 2, App. A ¶ 20(a). In other words, when the behavior at issue occurred is only part of the analysis under this mitigating condition. The Judge should also consider all the circumstances surrounding that behavior to determine whether it reflects negatively on an applicant's reliability, trustworthiness, or good judgment. This includes consideration of delays in resolving financial delinquencies. As the Appeal Board has previously stated, "[t]he timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests." *See, e.g.*, ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). We find no basis for concluding the Judge misapplied Mitigating Condition 20(a).

Applicant's contention that the Judge failed to conduct properly the whole-person assessment is not convincing. He points out, for example, that the Judge did not discuss that he has held a security clearance for over 30 years without incident. Of note, the Judge made findings about Applicant's background, including his military service, and his character letters and stated in her whole-person assessment that she "considered the potentially disqualifying and mitigating

conditions in light of the facts and circumstances surrounding this case.” Decision at 9. Applicant’s argument fails to meet the heavy burden on him to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 18-00110 at 5 (App. Bd. Mar. 31, 2020). In short, we find no basis to conclude that the Judge’s whole-person assessment was arbitrary, capricious, or contrary to law.

We find no merit in Applicant’s contention that the Judge misapplied Appeal Board and Federal court precedent. This assignment of error involves the Judge quotes from ISCR Case No. 12-10933 at 3 (App. Bd. Jun. 29, 2016):

Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. August 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff’d*, 367 U.S. 886 (1961). [Decision at 9.]

Applicant argues that the facts in the cited Appeal Board decision (ISCR Case No. 14-01894) are distinguishable from those in his case. The Judge, however, did not cite that decision or *McElroy* to address the facts in those cases but instead she cited them for the legal principle stated in the quote. That legal principle applies equally to repeated failures to fulfill tax filing obligations. *See, e.g.*, ISCR Case No. 15-08782 at 3 (App. Bd. Apr. 5, 2017).

In summary, Applicant has failed to establish the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with 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 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