



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

DIGEST: Applicant contends that the Judge “failed to rule correctly on the Government’s meeting of the burden of proof.” Appeal Brief at 2. The Government is required to produce evidence only regarding allegations that have been controverted. Directive ¶ E3.1.14. In this case, the Government had no burden to produce evidence to prove the SOR allegations because Applicant admitted each of them. On the other hand, Applicant was responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate the security concerns arising from the admitted SOR allegations and he had the ultimate burden of persuasion in obtaining a favorable clearance decision. Directive ¶ E3.1.15. This assignment of error lacks merit. Adverse Decision is Affirmed.

CASE NO: 19-02593

DATE: 10/18/2021

Date: October 18, 2021

In the matter of:)	
)	
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-----)	ISCR Case No. 19-02593
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Dan Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 18, 2020, 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 16, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley 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 Government met its burden of proof, whether the Judge erred in the findings of fact, whether the Judge erred in a credibility determination, 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 and Analysis

Applicant, who is in his late thirties, has been working for a defense contractor since late 2020, earning about \$98,000 annually. While working previously for another defense contractor, he earned about half that amount. Never married, he has a child. He has attended college classes but has not earned a degree. He was granted a security clearance previously. Friends and former colleagues attest to his diligence, trustworthiness, reliability, and honesty.

The SOR alleged that Applicant failed to file, as required, his Federal and state income tax returns for 2012-2015; that he owed nearly \$2,300 in Federal income taxes for 2016 that remained unpaid; and that he had three other delinquent debts totaling over \$300. He admitted the SOR allegations with explanations. He sought the assistance of tax firms to help him resolve his tax problems. He documented that he signed his Federal income tax returns for 2013-2015 in October 2019. He was provided the opportunity to present Federal and state tax transcripts showing he filed the tax returns at issue, but he failed to do so.

Applicant owes the IRS about \$19,300 for tax years 2014-2017 and 2019. In January 2021, he entered into an installment agreement with the IRS in which he is to pay \$100 per month during 2021 and \$200 per month starting in 2022. To date, he has made the scheduled payments. Any Federal tax liability he may have for 2012 and 2013 remains uncertain. He also entered into an installment agreement to pay a state tax liability of about \$20,300 and is making the required biweekly payments of \$300.

Applicant claimed he satisfied a judgment against him for \$170 in 2017, but failed to provide any documentation of its satisfaction. He provided documentation that he resolved one of the two delinquent utility debts alleged in the SOR, but presented no documentation regarding the resolution of the other.

“Applicant’s history of financial difficulties associated with his multiple failures over a number of years to file his federal and state income tax returns as required by law, combined with

his accumulated delinquent federal and state tax and other debt delinquencies that have only been recently addressed, preclude his taking advantage of any of the potentially available extenuating or mitigating benefits covered by the financial considerations guideline.” Decision at 8.

Discussion

Burden of Proof

Applicant contends that the Judge “failed to rule correctly on the Government’s meeting of the burden of proof.” Appeal Brief at 2. The Government is required to produce evidence only regarding allegations that have been controverted. Directive ¶ E3.1.14. *See also* ISCR Case No. 13-01281 at 3 (App. Bd. Aug. 4, 2014). In this case, the Government had no burden to produce evidence to prove the SOR allegations because Applicant admitted each of them. On the other hand, Applicant was responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate the security concerns arising from the admitted SOR allegations and he had the ultimate burden of persuasion in obtaining a favorable clearance decision. Directive ¶ E3.1.15. This assignment of error lacks merit.

Findings of Fact

Applicant contends that the Judge erred in the findings of fact, but he does not identify any specific finding that is unsupported by record evidence or otherwise flawed. This generalized assignment of error fails for a lack of specificity. The Appeal Board does not review cases *de novo*, but rather is tasked with addressing “the material issues *raised by the parties* to determine whether harmful error occurred.” Directive ¶ E3.1.32, emphasis added in quote. *See also* ISCR Case No. 17-03372 at 2-3 (App. Bd. Oct. 19, 2018) (discussing the reasons why assignments of error must be set forth with specificity).

Hearing-Level Decisions

Applicant’s brief relies extensively on hearing-level decisions in unrelated Guideline F cases to argue the Judge erred in his analysis of this case. His reliance on those hearing-level decisions is misplaced. Hearing-level decisions are not legally binding precedent on the Appeal Board. The Board is neither required to justify why it chooses not to follow hearing-level decisions nor required to reconcile its decisions with such lower decisions. *See, e.g.*, ISCR Case No. 19-00327 at 2 (App. Bd. May 20, 2020). Nor are Judges at the hearing level required to follow—or otherwise justify or reconcile their decisions with—other hearing-level decisions. *Id.* “Each case must be judged on its own merits[.]” Directive, Encl. 2, App. A ¶ 2(b).

The Appeal Board’s scope of review is narrow. We examine a Judge’s challenged conclusions to determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. *See, e.g.*, ISCR Case No. 04-07766 at 2 (App. Bd. Sep. 26, 2006) for the proposition that the Appeal Board may not substitute our judgment for that of the Judge, which is what Applicant, in effect, is advocating by citing other hearing-level decisions. *See also*, ISCR Case No. 11-13965 at 3 (App. Bd. Aug. 6, 2013) (“We do not have to agree with a Judge’s decision to find it sustainable.”). It is also fair to state that other hearing-level decisions involving arguably

similar Guideline F fact scenarios to the one in this case could be identified in which Judges reached unfavorable security clearance decisions. To highlight this latter point, we note the Judge discussed in his decision an Appeal Board decision (ISCR Case No. 17-01256 at 2-5 (App. Bd. Aug. 3, 2018)) that he indicated had “a fact pattern similar to the one detailed in Applicant’s case.” Decision at 8. In that case, the Appeal Board reversed a Judge’s favorable clearance decision. Applicant does not address that prior Appeal Board decision in his appeal brief. As the Board has previously stated, how particular fact scenarios in other cases were decided at the hearing level are generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-03344 at 3-4 (App. Bd. Dec. 21, 2020). In short, Applicant’s arguments based on favorable hearing-level decisions in cases involving different applicants and different facts do not establish that the Judge’s conclusions and analysis in this case are arbitrary, capricious, or contrary to law.

Credibility Determination

Applicant asserts “[b]y not properly assessing the credibility and weight of such evidence, the lower tribunal has made his negative assessment of applicant’s credibility a substitute for record evidence.” Appeal Brief at 15. We do not find this assignment of error persuasive. First, we note the Judge did not make a specific credibility determination. We do not agree with Applicant’s assertion that his disagreement with the Judge’s weighing of the unidentified “such evidence” establishes the Judge made a negative credibility determination. In this regard, a Judge’s decision to not accept an applicant’s claim of having resolved a financial allegation does not equate to a negative credibility determination. As the Appeal Board has previously stated, it is reasonable to expect applicants to present documentation corroborating actions taken to resolve financial problems. *See, e.g.*, ISCR Case No. 19-01599 at 3 (App. Bd. Jan. 15, 2020). A Judge’s adverse conclusion regarding an SOR allegation in the face of an applicant’s uncorroborated claim of having resolved that allegation may simply amount to a determination that the applicant did not meet his or her burden of persuasion. Second, Applicant does not explain how the Judge’s purported negative credibility determination constitutes a substitute for record evidence. We are unable to discern what evidence was substituted by that purported credibility determination and note, as discussed above, the Government had no burden of producing evidence in this case. Finally, we are required to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. If the Judge made a negative credibility determination in this case, Applicant’s bare assertion of error without explaining the reasoning behind it or citing supporting evidence fails to establish why we should not give that credibility determination deference.

Weighing of the Evidence

As noted above, Applicant contends the Judge improperly assessed and weighed the evidence. He argues, for example, that his past-due taxes originated during a period of low income when he was living paycheck-to-paycheck, that he is now getting professional assistance, and that he has created a track record of paying his debts. He also asserts the Judge failed to consider significant evidence but does not identify that evidence. His 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. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Conclusion

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