

KEYWORD: Guideline F

DIGEST: The challenged finding is not sustainable, insofar as it was based upon evidence that was inadmissible under Directive ¶ E3.1.20, which requires authentication of a DoD ROI. However, it does not appear to have exerted an influence on the Judge's ultimate decision, which relied more on the timing of Applicant's remedial efforts than on any other factor. Therefore, this error is harmless. Adverse decision affirmed.

CASE NO: 19-01649.a1

DATE: 01/06/2021

DATE: January 6, 2021

In Re:)	
)	
-----)	ISCR Case No. 19-01649
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Joseph D. Jordan, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 15, 2019, 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 October 7, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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’s findings of fact contained errors 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’s SOR alleged that he failed to file his Federal income tax returns in a timely manner for tax years 2010 and 2013 through 2018; that he failed to file his state income tax returns in a timely manner for tax years 2010 through 2018; and that he owed tax debts both to the IRS and to his state. Applicant attributed his tax problems to marital difficulties. His now ex-wife left him in 2010, securing a decree of divorce in 2016. The divorce decree imposed child support obligations of over \$2,000 on Applicant, which he was not successful in getting reduced. He claimed that the stress of his marital problems resulted in him forgetting to file his tax returns. He further stated that his delay in filing was due in part to his having to obtain documentation that was in storage and to failure by his tax preparers. Applicant also advised that he provided financial support to his parents, who had medical problems. In his clearance interview, “Applicant said he did not timely file his tax returns because he did not want to pay the government.” In addition, when the interviewer drew his attention to his delinquent returns for 2015 and 2016, Applicant stated that he would file them “this month.” Decision at 3, 5. He did not file the returns until a year later.

Applicant has entered into payment plans with the IRS and with his state. Applicant has not been totally consistent in his payments. For example, he did not have an IRS approved payment plan from June 2017 until 2019. Nevertheless, the Judge stated that he “has taken important steps toward showing his financial responsibility . . . and [has] made substantial progress in addressing his tax debt.” Decision at 10. Applicant’s professional colleagues describe him as honest, reliable, trustworthy, and one who has contributed to his employers’ success.

In his analysis, the Judge cited to Applicant’s marital problems, his child support obligations, and to his parents’ medical problems. He stated that these things are circumstances beyond Applicant’s control. He also cited to evidence that Applicant has filed his delinquent tax returns and has made a meaningful effort to repay his tax obligations. However, he also cited to evidence that Applicant made only three payments to the federal government in 2019.

The Judge noted Applicant’s contention that he forgot about filing his federal and state tax returns due to the stress of his personal circumstances, concluding that this explanation was not persuasive, in light of the extended period of time over which these delinquencies occurred. He cited

to Appeal Board cases to the effect that even if an applicant has corrected his tax problems, a Judge may still consider the security significance of longstanding behavior. The Judge stated that the primary problem in Applicant's case is the timing of his remedial efforts. Applicant was on notice that he should file his returns and resolve his tax debts at least as of the date of his clearance interview. However, Applicant did not file returns for 2015 and 2016 for an entire year following the interview. All in all, the Judge concluded that Applicant's failure to have begun addressing his problems earlier on impugned his judgment and reliability.

Discussion

Applicant denies that he told his clearance interviewer that he had not filed his returns because he did not want to pay the government. He claims that he challenged the inclusion of this statement in the interview summary, but it made its way into the record anyhow. We find this argument persuasive. In his response to DOHA interrogatories, Applicant stated that the interview summary, part of a DoD report of investigation (ROI), was not accurate in several respects. He supplied corrections to the summary, which included explicit denials of having made the challenged statement about not wanting to pay the government. He certified that the interview summary was accurate only as amended. Government Exhibit (GE) 2, Answers to Interrogatories, at 5-6, 24-25. The challenged statement was not independently authenticated. Accordingly, the finding is not sustainable, insofar as it was based upon evidence that was inadmissible under Directive ¶ E3.1.20, which requires authentication of a DoD ROI.¹ However, it does not appear to have exerted an influence on the Judge's ultimate decision, which relied more on the timing of Applicant's remedial efforts than on any other factor. Therefore, this error is harmless. *See, e.g.*, ISCR Case No. 18-02581 at 3 (App. Bd. Jan. 14, 2020).

Applicant cites to evidence of circumstances outside his control that affected his tax problems as well as to evidence that he has filed his tax returns and made significant efforts at paying down his debts. This was evidence that the Judge was bound to consider, along with all the other evidence in the record. However, the Judge's conclusion about the timing of Applicant's remedial efforts is sustainable. The mere filing of delinquent tax returns or the existence of a payment arrangement with an appropriate tax authority does not compel a Judge to issue a favorable decision under Directive, Encl. 2, App. A ¶ 20(g). *See, e.g.*, ISCR Case No. 17-01213 at 4 (App. Bd. Jun. 29, 2018). To the contrary, a Judge may consider the timing of an applicant's efforts to resolve his security concerns, on the view that someone who is dilatory in addressing those concerns may be lacking in the judgment and reliability expected of those who hold security clearances. *See, e.g.*, ISCR Case No. 17-01256 at 5 (App. Bd. Aug. 3, 2018). Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence or 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. 18-02872 at 3 (App. Bd. Jan. 15, 2020). We have given due consideration to the Hearing Office cases that Applicant cites in his appeal brief. However, Hearing Office decisions are not

¹Applicant did not object to the admission of GE 3, which we interpret to mean that he did not object to the document as amended. Tr. at 11. Applicant's failure to object did not waive this issue.

binding on other Hearing Office Judges or on the Appeal Board. Each case must be decided on its own merits. *See, e.g.*, ISCR Case No. 18-02074 at 2 (App. Bd. Aug. 27, 2019). The cited cases do not undermine the Judge’s adverse decision.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. 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