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DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: September 8, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 20-00389
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Terry L. Goddard, Jr., Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 22, 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. During the course of the hearing, the SOR was amended to conform to the evidence presented. On June 28, 2022, after close of the record, Administrative Judge Paul J. Mason denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant asserts that the Judge was biased, misweighed the evidence, and misapplied the whole person concept. Consistent with the following, we affirm.

Judge’s Findings of Fact: The Judge’s factual findings are summarized below:

The amended SOR specifies five allegations: that Applicant failed to file federal and state tax returns for tax years 2015 through 2019; that Applicant failed to pay his federal taxes for tax

years 2011 through 2016; that Applicant failed to pay his state taxes for tax years 2011 through 2015; that Applicant is indebted to the federal government for approximately \$145,000 in unpaid taxes; and that Applicant is indebted to his state for approximately \$11,800 in unpaid taxes.

Applicant is 44, married, with two minor children. He is certified in the information technology (IT) field and has held a security clearance since 1999. From 2006 to 2012 Applicant worked two jobs. In late 2010, his wife's job was reduced to part time because of complications with the pregnancy of their first child. In early 2011, Applicant's wife lost her job while their newborn child was hospitalized for several months following birth. In 2012, Applicant quit his second job, but resumed a second employment in early 2013 after medical bills mounted. They had a second child in 2013.

For federal tax years (TYs) 2011 through 2016, Applicant owed taxes upon filing his returns in the following approximate amounts: 2011 – \$8,000; 2012 – \$9,800; 2013 – \$23,000; 2014 – \$69,000; 2015 – \$55,000; and, 2016 – \$6,205. The greater taxes due for TY 2014 were an unforeseen consequence of an early withdrawal from a 401(k) account to make a down payment on the family home. For the other years, Applicant believed that his W-4 withholdings were sufficient to cover the federal and state taxes, but they were not. In the month prior to his hearing, Applicant learned from his attorney that—although the withholdings that he and his wife established for their jobs appeared to be sufficient—their earnings pushed them into a higher tax bracket in which their withholdings were insufficient (i.e., “bracket creep”).

During this timeframe, Applicant and his wife discussed increasing their withholdings, but took no action to prevent the dramatic increase in the taxes they owed upon filing. It appears that Applicant established a tax plan for TY 2013. In his 2019 security clearance interview, Applicant alluded to payments made under a plan and, at hearing, Applicant referred to payment plans in place during this timeframe. However, there is no evidence of payments under any plan during this timeframe.

Applicant testified that he discovered in 2017 or 2018 that his 2016, 2017, and 2018 federal tax returns were not filed and that he submitted the necessary documents to his tax preparer to start the process. In March 2019, Applicant completed his security clearance application and disclosed the above tax problems. He subsequently filed his 2016 through 2018 federal returns in June 2020. He filed his 2019 and 2020 federal returns on time.

In November 2020, Applicant entered into a payment plan with the IRS and made 11 payments under that plan. His ultimate goal was to take out a loan against his home to pay the entire delinquent IRS balance, but he first had to improve his credit score to qualify for the loan. Applicant has now submitted documents confirming that he has satisfied his federal tax liability for TYs 2011 through 2020, the years alleged in the SOR.

In June 2020, Applicant also filed his 2016 through 2019 state tax returns. As of that date, he owed approximately \$11,900 for TYs 2014 and 2015. Applicant negotiated a repayment plan with the state tax agency and began making monthly payments. By March 2021, Applicant had paid all state tax delinquencies.

Judge’s Analysis: The Judge’s analysis is summarized and quoted below, in pertinent part:

Although Applicant’s failure to timely file his federal and state returns was willful and therefore criminal in nature, the criminal aspect of his conduct is not alleged in the SOR. Instead, Applicant’s tax issues are alleged under the financial considerations guideline. Applicant’s failure to file federal and state tax returns and his inability to pay his mounting delinquent income taxes for a number of years establish security concerns under Guideline F. His federal and state tax problems began in 2010, but Applicant did not make documented efforts to correct the problems until 2018 and did not completely resolve his tax problems until January 2022, after the hearing. That delay continues to cast doubt on his current reliability, trustworthiness and good judgment.

Several of the conditions that resulted in Applicant’s financial problem were largely beyond his control, to include his wife’s underemployment, unemployment, and problems related to pregnancy. However, Applicant’s failure to timely file his federal state returns and pay his taxes was not beyond his control. He resolved his delinquent state income taxes in March 2021 and his federal income taxes in January 2022, and is due some mitigation for acting responsibly under the circumstances. Similarly, Applicant receives limited mitigation for ultimately hiring a tax preparer to fix his returns.

Applicant’s long history of federal and state tax problems weakens any claim to have mitigated by adhering to a good-faith effort to repay his tax creditors. Moreover, while Applicant asserted that he had entered into earlier IRS payment plans, the scant evidence of any plans or payments until the November 2020 plan weakens his assertion.

Applicant blamed “bracket creep” for his escalating tax liability between 2010 and 2016, but “the irrefutable reason for the increase was the insufficient amount of taxes that Applicant had withheld from his pay during the tax years at issue[.]” Decision at 11. Although Applicant knew in 2011 that he could increase his withholdings, he took no action to fix his insufficient withholdings. Additionally, for TY 2014, Applicant exercised poor judgment by not investigating the tax consequences of his early withdrawal from his 401(k) account.

Discussion

In his appeal brief, Applicant alleges that the Judge was biased, but we do not find that argument convincing. 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. 18-02722 at 5 (App. Bd. Jan. 30, 2020). In this regard, the issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e. g.*, ISCR Case No. 20-02787 at 3–4 (App. Bd. Mar. 9, 2022).

Applicant cites several examples of bias. First, he contends that the Judge was dismissive of Applicant’s testimony concerning “bracket creep,” that is, his escalating tax liability in the early 2010s. To the extent that we understand this argument, the record amply supports the Judge’s conclusion that “the irrefutable reason for the increase was the insufficient amount of taxes that

applicant had withheld[.]” Decision at 11. The family income increased dramatically between 2011 and 2016, with foreseeable and avoidable tax consequences. (Applicant’s Exhibit G at 3–13.)

Second, Applicant asserts that the Judge—without warning—stated in his decision that Applicant’s failure to timely file his federal and state returns was willful and therefore criminal in nature. “This assertion clearly had an impact in the evaluation of Applicant’s clearance request and the Judge’s evaluation of Applicant’s proffered evidence and credibility.” Appeal Brief at 3. However, the Judge clearly stated that “the criminal aspect of his conduct is not alleged in the SOR.” Decision at 9. The Judge then proceeded to analyze Applicant’s conduct solely under the disqualifying and mitigating conditions of Guideline F. Moreover, contrary to Applicant’s assertion, the Judge was well within his authority to consider whether Applicant’s failure to file tax returns on time for TYs 2015–2018, as alleged on the SOR, was intentional, and the record evidence supports his conclusion. Applicant testified that he elected not to file because of the cost of the tax service and his concern that he could not afford the anticipated payment plan for the earlier tax delinquencies. (Tr. at 80–84.) In sum, upon our review of the record and decision, we find nothing that would lead a reasonable person to question the Judge’s fairness and impartiality.

Applicant asserts that the Judge’s decision “minimizes and dismisses Applicant’s efforts to fully satisfy his tax debts between 2020 and 2021.” Appeal Brief at 10. However, the fact that Applicant has corrected his state and federal tax problems, and the fact that he is now motivated to prevent such problems in the future, does not preclude careful consideration of Applicant’s security worthiness in light of his longstanding prior behavior evidencing irresponsibility. *See* ISCR Case No. 12-05053 at 5 (App. Bd. Oct. 30, 2014). Moreover, the timing of debt payments is relevant in evaluating an applicant’s case for mitigation. Applicant filed his delinquent tax returns in June 2020, more than a year after completing his SCA and being interviewed by a government investigator. He began payments to the IRS in November 2020, shortly after issuance of the SOR. An applicant who begins to resolve security concerns only after having been placed on notice that his or her clearance is in jeopardy may lack the judgment and willingness to follow rules and regulations when his or her personal interests are not threatened. *See, e.g.*, ISCR Case No. 17-01256 at 5 (App. Bd. Aug. 3, 2018).

The remainder of Applicant’s brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant’s arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

In conclusion, Applicant has not identified any harmful error in the Judge’s handling of his case or in his decision. The Judge examined the relevant evidence and articulated a satisfactory explanation for his 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board