

Date: September 14, 2022

In the matter of:)	
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-----)	ISCR Case No. 20-01997
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 15, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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 issues on appeal: whether he was denied due process; whether the Judge’s findings of fact contained errors; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline E are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is 50 years old. Married, he has three children. He has worked for his current employer since April 2021. Before that he worked for other Federal contractors. His security clearance application lists no periods of unemployment.

Applicant's SOR alleges that he failed to file his Federal income tax returns in a timely fashion for 2010 through 2015, that he is indebted to the IRS for unpaid taxes, and that in 2017 the IRS filed a tax lien against Applicant in the amount of about \$52,000. The SOR alleges that Applicant's state tax authorities filed liens in 2013, 2014, and 2017 that were subsequently released. Applicant also had judgments entered against him in behalf of non-governmental creditors.

Applicant asserted that his wife had been responsible for handling the family taxes and that the couple had relied on an accounting firm to prepare and electronically submit the required returns. For each tax year, Applicant and his spouse were to sign an IRS form authorizing electronic filing of their returns, and, for those years in which they owed money, they were to make out a check to the U.S. Treasury and submit it along with the signed forms. Applicant submitted copies of the IRS forms in question, but these copies were unsigned. Applicant did not provide documentary corroboration for his claim that he had submitted these forms to his accountant.

Applicant asserted that he first became aware his returns had not been filed and he owed the IRS for back taxes when an IRS agent came to his door and advised him of that fact. Applicant hired a different accountant and his tax returns have now been submitted to the IRS. He stated that he was aware that he owed money but that he had delayed making payments in order to get together sufficient funds. He claimed that his wife was responsible for arranging a payment plan.

The Judge's Analysis

Applicant's "long history of failing to pay his financial obligations" raises concerns under Guideline F. In evaluating Applicant's case for mitigation, the Judge characterized his evidence as "somewhat confusing." Decision at 12. She noted that Applicant's tax transcripts showed that he had received notices from the IRS about delayed filing of returns. She cited to a paucity of evidence that Applicant had ever signed the requisite forms authorizing electronic filing of his returns. She also noted inconsistencies in Applicant's evidence regarding the dates that his returns were filed and the date his IRS lien was paid. She further commented:

The IRS repeatedly sent notices to Applicant regarding his unfiled tax returns. There is evidence that [Accountant 1] confirmed to Applicant in an October 2015 email that the 2014 tax return was submitted. I have considered that Applicant believed [Accountant 2] had filed his 2013, 2014, and 2015 tax returns. Even if he believed that [Accountant 2] had timely filed his tax returns on his behalf, he was receiving notices from the IRS regarding the unfiled tax returns and should have taken action. Decision at 13.

The Judge stated that there is insufficient evidence to show that Applicant's failure to have paid his taxes was due to circumstances beyond his control, and she found that Applicant had not explained why he was not able to pay judgments against him. In the whole-person analysis, the Judge cited to DOHA precedent that failure to file returns and pay taxes when due suggests that an applicant has difficulty abiding by Government rules and that repeated failure to fulfill legal obligations impugns an applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018). Although Applicant's Federal and state tax debts are now paid and some of his judgments satisfied, the Judge concluded that he had not demonstrated a reliable financial record.

Discussion

Applicant notes the Judge's characterization of his evidence as confusing. He argues that he had appeared *pro se* and that the Judge and/or Department Counsel failed to assist him in clearing up the evidence. However, as Department Counsel argues on appeal, neither a Judge nor a Department Counsel are obligated to assist an applicant in making his or her case for mitigation or otherwise serve as a surrogate for an applicant. *See, e.g.*, ISCR Case No. 17-04388 at 3 (App. Bd. Aug. 1, 2018); ISCR Case No. 12-02329 at 3 (App. Bd. Aug. 17, 2015). The Directive places upon an applicant the responsibility for presenting evidence in mitigation, and even *pro se* applicants are expected to take reasonable steps in protecting their rights. Directive ¶ E3.1.15. *See* ISCR Case No. 18-02689 at 2 (App. Bd. Jul. 26, 2019). The record shows that Applicant was notified of his rights under the Directive, including the rights to an attorney, to present evidence in his behalf, and to call witnesses. Prehearing Guidance dated January 15, 2019. He acknowledged receipt of this guidance at the hearing and advised that he was going to represent himself. Tr. at 5-6. He presented numerous exhibits, which the Judge admitted, and he testified in his own behalf. Tr. at 22-23. Applicant may be dissatisfied with the outcome of his hearing, but we find no reason to conclude that this outcome resulted from a deprivation of Applicant's due process rights by DOHA officials or that Applicant did not have adequate notice of those rights. Applicant was not denied any due process rights afforded by the Directive.

Regarding the issue of factual sufficiency, Applicant contends the following:

The Judge's failure to identify that the Applicant actually did not receive notice until 2017 [of his tax delinquencies] . . . articulates that the [Judge's] findings of fact are not supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. Appeal Brief at 15.

In essence, Applicant argues that the Judge should have found that he reasonably did not understand that his tax obligations had not been satisfied until an IRS agent showed up at his house. In fact, the Judge made findings about Applicant's testimony on this matter and addressed the findings in her analysis. However, as she also found and the record shows, Applicant's circumstances placed him on reasonable notice that his tax obligations may not have been satisfied, imposing on him a duty to inquire and ensure his compliance with his tax obligations.

[Judge]: Do you file jointly?

[Applicant]: Yes.

[Judge]: So you have to sign [the relevant IRS forms].

[Applicant]: Correct, although I think I was away. I don't know now—

[Judge]: For five years, for six years you were away every year? You never saw these taxes?

[Applicant]: No . . . I don't remember . . . I'm sure, you're right, I have to sign it. I don't remember having—

[Judge]: You don't remember signing your taxes . . . [Y]ou guys set up . . . I guess [in] '14, an installment agreement. So, you knew you owed then.

[Applicant]: Right. Tr. at 65-66.

The Judge also relied on Applicant's tax transcripts, which showed that he had received notice each year that his returns had not been filed on time. Tax Transcripts, included in Government Exhibit 3, Answers to Interrogatories. We have held in prior cases that reliance upon a spouse to fulfill a couple's legal obligations does not absolve an applicant from remaining aware of the extent to which those obligations have been satisfied. "The degree of ignorance claimed by [the applicant] suggests an indifference to the proper satisfaction of legal obligations that draws into question his willingness or capacity to comply with the sometimes complex rules governing the handling and safeguarding of classified information." ISCR Case No. 18-02914 at 4 (App. Bd. Jan. 8, 2020). Similarly, in the case before us, the record includes evidence of things that should have prompted Applicant to check on the state of his tax filings. The Judge's conclusion that Applicant's actual ignorance was not reasonable and was insufficient to mitigate the concerns in his case is consistent with the record that was before her. Applicant has not demonstrated that the Judge's findings of fact contained any errors that undermine her overall conclusions. *See, e.g.* ISCR Case No. 18-02581 at 3 (App. Bd. Jan. 14, 2020).

As this issue suggests, Applicant's brief as a whole consists of a challenge to the manner in which the Judge weighed the evidence. However, an ability to argue for an alternative interpretation of the record is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Applicant has not demonstrated that the Judge mis-weighed the evidence, nor has he rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 18-02872 at 3 (App. Bd. Jan. 15, 2020). Applicant argues that the Judge analyzed his case "in a fragmented fashion." Appeal Brief at 18. However, our review of the record convinces us that the Judge complied with the requirements of Directive ¶ 6.3, in that she considered the totality of the evidence in reaching her decision. *See, e.g.*, ISCR Case No. 18-02925 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board