



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: December 6, 2022

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| In the matter of: |) | |
| |) | |
| ----- |) | ADP Case No. 20-02075 |
| |) | |
| Applicant for Public Trust Position |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On October 13, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline B (Foreign Influence) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. The Defense Office of Hearings and Appeals (DOHA) provided Applicant a copy of the Government’s file of relevant material (FORM), and Applicant responded to the FORM in a timely manner. On September 23, 2022, after consideration of the record, Administrative Judge Noreen A. Lynch denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline B, the SOR alleged that Applicant’s wife is a citizen of Tunisia, that her family members are citizens of Tunisia and reside in Tunisia and Kuwait, and that Applicant provides about \$500 a month in support to his mother-in-law, who lives in Tunisia. Applicant denied the allegation of support to his mother-in-law and admitted the other allegations with

explanations. Under Guideline F, the SOR alleged 11 delinquent debts, a garnishment of wages in 2019, and indebtedness to Federal and state tax authorities. Applicant denied all Guideline F allegations. The Judge found against Applicant on all Guideline E and F allegations.

On appeal, Applicant argues the Judge's decision is factually inaccurate and unfairly characterizes him as untruthful. For reasons stated below, we remand.

Judge's Findings of Fact: The Judge's findings are summarized below in pertinent part.

Applicant is in his early forties. He served in the U.S. military from 1997 to 2014. Since then, he has worked as a contractor, currently as an aircraft mechanic. Applicant has two children from his first marriage, which ended in divorce. He remarried in 2019 and has a young child from his second marriage. Applicant earned his undergraduate degree in 2022. He was granted a security clearance in 2007 while on active duty.

Foreign Influence

Applicant is a U.S. citizen by birth. While working overseas, Applicant met his second wife, who is a citizen of Tunisia. In 2019, they married and moved back to the United States. The couple has a newborn son. Applicant's wife received her resident alien card in July 2021. Applicant's wife speaks to her family, but the record does not establish the frequency.

Applicant's mother-in-law and father-in-law are citizens and residents of Tunisia. Applicant does not talk to them and has not for about one year. In his Electronic Questionnaire for Investigations Processing (e-QIP), Applicant noted weekly contact with his mother-in-law but stated he had a disagreement with her and no longer speaks to her. He does not communicate frequently with his father-in-law due to the language barrier. His parents-in-law have no connections with the Tunisian government. Applicant's sister-in-law is a citizen and resident of Tunisia. In his answer to the SOR, Applicant stated that he has no relation with her at all. She has no connection with the Tunisian government. Applicant's brother-in-law is a citizen of Tunisia, but now lives in the United States.

In his answer to the SOR, Applicant denied that he provides support to his mother-in-law, but he admitted that he sends her about \$500 each month to cover some of his wife's remaining expenses in Tunisia, to include a car loan and taxes on a business that his wife closed. In his response to the FORM, Applicant stated that he would no longer send money to Tunisia because he is now aware that doing so could jeopardize his clearance. Applicant also stated that he has never had any property, accounts, or other financial interests in Tunisia. He reported that his wife owns nothing in Tunisia other than the vehicle, which her parents now own.

Administrative Notice

Significant human rights issues exist in Tunisia including reports of unlawful or arbitrary killings, primarily by terrorist groups; allegations of torture by government agents; arbitrary arrests and detentions of suspects under antiterrorism law; undue restrictions on freedom of expression and the press; widespread corruption, although the government took steps to combat it; violence

targeting lesbian, gay, bisexual, transgender, and intersex persons; criminalization of consensual same-sex conduct; and child labor.

“The U.S. Department of State continues to assess Tunisia at Level 4 (out of 4) , which indicates that travelers should not travel in the country due to crime, civil unrest, poor health infrastructure, kidnapping, and arbitrary arrest and detention of U.S. citizens.” Decision at 7.

Financial Considerations

In his e-QIP of October 2019, Applicant disclosed several financial issues, to include a Federal and state tax debt of \$8,000, a vehicle repossession, and a wage garnishment in 2019.

In his clearance interviews of early 2020, Applicant stated that his Federal and state tax returns were filed and that he owed about \$11,000 for both. He stated that no wages were garnished. Regarding the other delinquencies, he either disputed the accounts or stated that they had been removed from his credit report.

The 11 delinquent accounts alleged in the SOR total about \$53,000 and remain unresolved. The largest debt is an automobile loan with an unpaid balance of \$46,000 that was placed for collection and charged off.

The SOR alleged that Applicant is indebted to the Federal government for delinquent taxes of \$7,000 for tax years 2017 and 2018. In his answer to the SOR, Applicant stated that he owed nothing for 2018 and is trying to file for 2017. However, in his 2019 e-QIP, Applicant disclosed that he owed about \$8,000.

The SOR alleges that Applicant owes \$5,500 for state taxes for TYs 2017 and 2018. In his subject interview, Applicant acknowledged that debt. In his Answer to the SOR, he stated that he did not owe anything. In his response to the FORM, Applicant stated that he had been mistaken about owing state taxes.

The SOR alleges a wage garnishment in November 2019 in the approximately amount of \$600 bi-weekly. “He denies that he ever worked for this company and that there was no garnishment.” Decision at 4.

Judge’s Analysis

Foreign Influence

[Applicant’s inlaws live] in Tunisia and she talks to her family on the phone. Applicant has spoken with his in-laws when they call to speak to his wife. He has met them in Tunisia. Applicant has in past years sent money to his mother-in-law to pay for his wife’s car loan and taxes. His wife’s close bonds of affection and obligation to her family in Tunisia must be imputed to Applicant as a result of their

marital relationship. . . . [Adjudicative Guidelines] 7 (a)¹ and 7(e)² [are established] based on the heightened risk associated with Tunisia and the potential conflict of interest that arises from his connection to them. A heightened risk is associated with Tunisia due to the continued repressive, authoritarian, and anti-American regime which supports known terrorist groups.

. . . .

Applicant is a U.S. citizen, who served honorably in the U.S. military. He met his second wife while serving abroad. He married her in 2019 and they both reside in their home in the United States, but there is no other information or details. . . . [T]he record contains insufficient facts to overcome the equally strong ties that he has to his wife’s family in Tunisia who are at a heightened risk of coercion or pressure from a foreign government. [Decision at 9–10.]

Financial Considerations

The SOR alleged 11 delinquent financial accounts totaling about \$53,000. The other SOR allegations concerned tax indebtedness for 2017 and 2018 to the Federal government in the amount of \$7,000 and to the state in the amount of \$5,500. Applicant denied owing these various accounts in his Answer to the SOR but admitted or denied them in his subject interview. Applicant stated that he had a plan to pay the taxes, but he presented no evidence of payments on the delinquent accounts or his tax debt. None of the mitigating conditions fully apply.

Discussion

In his appeal brief, Applicant contends that the Judge erred in several factual determinations and in her conclusions drawn from them. We conclude that Applicant’s argument has merit.

We examine disputed findings of fact to determine if they are supported by substantial evidence, *i.e.*, “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.” Directive ¶ E3.1.32.1. In conducting such an examination, the Board must consider not only whether there is record evidence supporting a Judge’s findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge’s findings reflect a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005).

In deciding whether the Judge’s conclusions are erroneous, the Appeal Board will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to

¹ AG ¶ 7(a): contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

² AG ¶ 7(e): shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

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. 14-02563 at 4 (App. Bd. Aug. 28, 2015).

Guideline B Errors: The Judge erred in her findings and conclusions regarding the Guideline B allegations.

First, the Judge concluded that Tunisia poses a “heightened risk” due to its “continued repressive, authoritarian, and anti-American regime which supports known terrorist groups.” Decision at 9. This conclusion is unsupported by any evidence of record. Indeed, the Government’s administrative notice regarding conditions in Tunisia directly contradicts the Judge’s conclusion. The administrative notice highlight Tunisia’s “partnership with the United States” and its commitment to counterterrorism efforts, which “have steadily degraded violent extremist organizations’ capacity within the country.” Administrative Notice (AN) Item 3 at 2. Moreover, Tunisia has implemented a strategy to prevent and counter violent extremism and has frozen terrorist assets, demonstrating “improvements in [counterterrorism] crisis response, coordination, and investigation.” *Id.*

Second, the Judge found that the U.S. State Department “continues to assess Tunisia at Level 4 (out of 4) . . . due to crime, civil unrest, poor health infrastructure, kidnapping, and arbitrary arrest and detention of U.S. citizens.” Decision at 7. This finding is unsupported by the evidence of record. Although the State Department cautions against travel to particular regions due to terrorism, it assessed the country at Level 4 due to its Covid 19 situation. The conditions cited by the Judge are not found in the State Department’s travel advisory for Tunisia. AN at 3; AN Item 2 at 1.

Regarding both of the above errors, we are unable to discern what record evidence the Judge relied upon to make those findings of fact. The Directive entitles applicants to have trustworthiness concerns adjudicated on evidence of record and not on evidence from unknown sources. *See, e.g.*, Directive ¶ E3.1.32.1. In short, the Judge’s findings in question run contrary to the record evidence.

Third, the SOR alleges that Applicant provides \$500 per month in support to his mother-in-law, a citizen and resident of Tunisia, and the Judge found against Applicant on the allegation as drafted. This allegation is not supported by record evidence. Applicant disclosed in his October 2019 e-QIP that he provided \$500 per month to his mother-in-law. FORM Item 3 at 43-44. However, in his February 2020 clearance interview, he explained the payments to his mother-in-law were to resolve bills that his wife owed in Tunisia, to include a car loan and costs associated with closing her business there. FORM Item 6 at 7.

In the FORM, Department Counsel recognized that the evidence did not support the allegation as drafted, but he neither amended nor withdrew the allegation. FORM at 6. The Judge also recognized that the evidence did not establish the allegation but instead established that Applicant “has in past years sent money to his mother-in-law to pay for his wife’s car loan and

taxes.” Decision at 9. However, the Judge neither amended the SOR nor, more importantly, addressed how paying a spouse’s bills raises a Guideline B trustworthiness concern. *Cf.* Guideline F, AG ¶¶ 18–19. The Judge’s adverse conclusion regarding this allegation is defective because she failed to articulate a satisfactory explanation for it, to include a rational connection between the facts found and the choice made.

Guideline F Errors: The Judge erred in her findings and conclusions regarding the Guideline F allegations.

First, the Judge found adversely to Applicant on the two tax delinquency allegations and the wage garnishment allegation. These alleged that Applicant is indebted to the Federal government for delinquent taxes in the amount of \$7,000 for tax years 2017 and 2018 (SOR ¶ 2.1); that he is indebted to his state for delinquent taxes in the amount of \$5,500 for tax years 2017 and 2018 (SOR ¶ 2.m); and that his wages at Employer A were garnished in about November 2019 in the approximate amount of \$600.00 bi-weekly and that the garnishment order is not completed (SOR ¶ 2.n). As noted above, Applicant denied each of these allegations in responding to the SOR. The summary of Applicant’s background interview is the only record evidence supporting the wage garnishment and certain aspects of the tax delinquencies.³ Regarding this issue, the Judge erred in finding that Applicant disclosed the wage garnishment in his e-QIP.

Directive ¶ E3.1.20 requires authentication of a DoD Report of Investigation, including the summary of an applicant’s interview, for it to be admissible in a DOHA proceeding. There is no indication in the record that Applicant was sent interrogatories requesting that he adopt his summary of interview as accurate. In the FORM, Department Counsel noted, “Applicant’s delinquent taxes and wage garnishment are established by his subject interview.” FORM at 5. In that document, Department Counsel also advised Applicant that the summary of his interview would be provided to the Judge and that Applicant may “make any corrections, additions, deletions, and updates necessary to make the summaries clear and accurate.” FORM at 2.

In his FORM response, Applicant did not object to the interview summary for lack of authentication, but he did make corrections to it. With regard to the state taxes, Applicant asserted, “I was previously mistaken about owing [State] tax money for any previous years. . . . In 2020 as I recall, I was asked to estimate my potential tax liability. As it turned out I owed nothing.” FORM Response at 3. With regard to Federal taxes, Applicant stated that he “still owe[s] back taxes for 2017 federal income tax but I’m waiting for a total and a settlement agreement.” *Id.* Regarding the alleged garnishment, he denied that his pay was currently being garnished in both his SOR and FORM responses and explained in his FORM response that he now works for a different company and that the garnishment is complete. FORM Items 6 at 9 and 2 at 3; FORM Response at 1 and 3.

In his SOR and FORM responses, Applicant effectively refuted portions of his summary of interview. Under these circumstances, the Judge had no basis for concluding that Applicant was authenticating or adopting the refuted portions of the interview summary or was waiving any objections to those portions. *See, e.g.,* ISCR Case No. 19-01649 at 2–3 (App. Bd. Jan. 6, 2021). The Judge erred by failing to exclude those refuted portions from evidence. In ruling adversely to Applicant on the tax and wage garnishment allegations, the Judge failed to address important

³ In his e-QIP, Applicant made disclosures about the tax delinquencies that prove aspects of those allegations.

evidentiary aspects of the case and failed to conduct a meaningful analysis of whether there was sufficient admissible evidence to establish those allegations.

Second, the Judge's findings exaggerate the amount of Applicant's delinquent debt. The largest delinquent debt alleged, by far, is an auto loan purportedly charged off for approximately \$46,790 (SOR ¶ 2.a). In the FORM, Department Counsel recognized that the charge off was instead approximately \$29,100, but he did not amend the SOR. FORM at 4. The Judge found against Applicant on the erroneously larger figure and relied upon it in her analysis by stating that Applicant's aggregate debt totaled about \$53,300. Decision at 12. Applicant's aggregate delinquent debt is instead approximately \$36,000.⁴ While this is still a significant figure, the Board declines under these circumstances to say that an error of \$17,000 is harmless, *i.e.*, that it did not likely have an impact on the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020). This charged off auto loan is Applicant's only sizable debt, and he disputes responsibility for the account, citing to a property division in his divorce decree. FORM Item 2 at 2.

Other Errors

In his appeal, Applicant contends the Judge erred in entering findings that call his honesty into question. For example, regarding the wage garnishment allegation, the Judge found that Applicant "denies that he ever worked for this company and that there was no garnishment." Decision at 4. Applicant claims this finding is "completely false." Appeal Brief at 1. Our review of the record confirms that Applicant disclosed the garnishment in his subject interview, denied that he was currently under garnishment in his SOR Response, and explained that he now works for a different company and that the garnishment was complete in his FORM Response. FORM Items 6 at 9 and 2 at 3; FORM Response at 1 and 3. Although the Judge did not explicitly make a credibility determination regarding Applicant, we conclude that her findings implicitly call his credibility into question.

Conclusion

Given these errors, we conclude that the best resolution is to remand this case to a different judge for reprocessing. Applicant should be provided the opportunity to request a hearing. Under Directive ¶ E3.1.35, the Judge assigned the case is required to issue a new clearance decision. The Board retains no jurisdiction over a remanded decision. However, the new decision may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

⁴ Additionally, the Judge erred in finding the debt of \$1,635 alleged at SOR ¶ 1.c unresolved (Decision at 3), as the Government's credit report reflects that the collection was paid. Item 4 at 7.

Order

The decision is **REMANDED**.

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