

Date: March 23, 2023

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In the matter of:)	
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-----)	ISCR Case No. 20-00516
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 4, 2020, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 2023, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR, as amended, alleged that Applicant failed to timely file his Federal tax returns for tax years 2012 through 2018, 2020, and 2021, and his state returns for tax years 2017, 2018, 2020, and 2021. The Judge found against Applicant on both allegations. On appeal, Applicant asserts that the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law, and failed to properly apply the mitigating conditions and whole-person analysis. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his early 60s. He has worked for Defense contractors since the late 1990s and has held a security clearance since 2001. Applicant earned his bachelor's degree in 2005 and has taken courses towards a master's degree. As of the hearing, his salary was approximately \$130,000 per year.

In his 2019 security clearance application and interview, Applicant disclosed failing to file his Federal and state tax returns for tax years 2012 through 2018. He subsequently explained that his tax problems began when his home went to foreclosure in 2009. The sale resulted in a mortgage deficiency balance for which he received a Form 1099 from the lender forgiving the deficiency, but Applicant did not know how to report the amount on his return and believed it would result in a tax debt. Although he was advised to consult with a tax professional to ensure his returns were filed correctly, he declined and instead simply did not file.

As of the hearing, Applicant's 2012 through 2017, 2020, and 2021 Federal returns remained unfiled. IRS tax transcripts reflected that his Federal returns for 2018 and 2019 were received by the IRS in May 2020, and that he owed balances of approximately \$3,600 and \$1,000 for these tax years, respectively. He estimated owing approximately \$100,000 in Federal taxes. With respect to his state taxes, Applicant did not produce any evidence to prove that his delinquent state returns were filed. In January 2022, however, he entered into a payment agreement for his state tax debt, which required monthly payments of \$2,000 beginning in February. His bank statements reflected four state tax payments in varying amounts made between March and August 2022.

The Judge found that none of the mitigating conditions was fully applicable. Applicant's tax filing failures were numerous and recent, and he failed to establish that recurrence was unlikely. Nor did he establish that his tax problems resulted from circumstances beyond his control. He had just begun to resolve his Federal filing deficiencies and had not demonstrated a track record of compliance. Although Applicant had a plan in place to resolve his state tax problems and had taken steps to carry out that plan, it remained unclear if all his state tax returns were filed. Additionally, while Applicant engaged the services of a tax professional, it was still too early to find clear indications that the tax problems were under control. The Judge concluded that, in consideration of the foregoing, Applicant had "not yet reached the point where he has demonstrated rehabilitation sufficient to overcome the security concerns raised by his conduct." Decision at 8.

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in failing to comply with the provisions in Executive Order 10865 and the Directive by not considering all the evidence, and by not properly applying the mitigating conditions and Whole-Person Concept. For example, Applicant argues that the Judge "did not place appropriate weight on . . . the good faith efforts made and [the] articulated plan to file his past tax returns and pay off his tax debt." Appeal Brief at 5. However, the Judge's determination that Applicant did not make an agreement to resolve his delinquent state taxes until after the hearing and had still not filed the majority of his Federal returns is supported by the record, as is

his conclusion that Applicant had not demonstrated rehabilitation sufficient to overcome the security concerns raised by his conduct. Decision at 8. Applicant's arguments, implicitly and explicitly, advocate for an alternative weighing of the evidence, which is not enough to show that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).¹

Applicant also contends that the Judge did not weigh and consider all relevant evidence in applying the whole-person concept. In doing so, he asserts that, although the Judge "speaks to several favorable factors in [Applicant's] case specifically his military service, strong statements of support, and candid, sincere testimony which speak to the whole-person concept, it made no difference in the outcome of [Applicant's] case even though Judge Foreman could've found favorably solely on the whole person concept." Appeal Brief at 12. Applicant's own argument undercuts his suggestion that the Judge's whole-person analysis was lacking. Rather, the Judge clearly considered Applicant's military service, his personal and professional accomplishments and recommendations, and his candor at hearing. Decision at 8. Applicant's position in this regard amounts to a duplicative argument that the Judge incorrectly weighed mitigating evidence, which, as discussed above, is insufficient to establish error.

Finally, Applicant's brief relies on hearing-level decisions in unrelated Guideline F cases to argue that the Judge erred in his analysis of this case. His reliance on those decisions is misplaced. As the Board has previously stated, how particular fact scenarios were decided at the hearing level in other cases is generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021), setting forth a lengthier discussion of this issue. On appeal, Hearing Office decisions may be useful to highlight a novel legal principle; but only in rare situations – such as separate cases involving spouses, cohabitants, or partners in which the debts and the financial circumstances surrounding them are the same – would the adjudication outcome in another case have any meaningful relevance in our review of a case. The decisions that Applicant cites have no direct relationship or unique link to Applicant's case that would make them relevant here. *See also* ISCR Case No. 19-03174 at 2 (App. Bd. Feb. 10, 2021).

Our review of the record and Decision confirms that the Judge considered and discussed those issues highlighted by Applicant on appeal and complied with the requirements of the Directive in his whole-person analysis by considering the totality of the evidence in reaching his decision. Applicant failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

¹ "The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." *Id.* (citation omitted).

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board