

Judge's Findings of Fact and Analysis

Applicant is in his early 70s and has worked for his current employer since 2016. He has six adult children from his first marriage, which ended in divorce, and has been married to his second wife since 2008. He earned a bachelor's degree in the late 1970s and subsequently completed some graduate coursework.

Applicant failed to timely file his Federal income tax returns for tax years (TYs) 2012 through 2018. He began filing his delinquent Federal returns in December 2019 and completed the process in November 2022. Applicant acknowledged that he was motivated by his desire to attain a security clearance.

Upon filing, Applicant owed the following approximate amounts in delinquent Federal taxes: \$31,200 for TY2012, \$27,300 for TY2013, and \$39,800 for TY2015. He scheduled a post-hearing payment of \$12,500 for early December 2022 towards the TY2012 arrearage. Applicant asserted that the delinquencies reflected on his tax account transcripts will be reduced when the IRS further examines his returns, but he provided no documentation from the IRS to corroborate lower tax balances. Applicant does not have a payment arrangement with the IRS.

Applicant failed to timely file his state income tax returns in State A for TYs 2014 through 2016 but claims that they are now filed. He provided documentation sufficient to prove that he filed for TY2015 in October 2020, but his evidence is insufficient to prove that he filed his State A returns for 2014 and 2016. Applicant failed to timely file his state income tax returns in State B for TYs 2015 through 2018 but claims that they are now filed. Although he provided some corroboration for TY2015, Applicant's evidence is insufficient to prove that he filed his State B income tax returns for TYs 2016 through 2018. Applicant acknowledged that he owed State A and State B taxes for the 2015 tax year in the combined amount of about \$1,300. He provided no evidence of payments towards this tax delinquency.

Applicant cited several reasons for not timely filing his Federal and state income tax returns, to include: multiple moves, a failed business in 2013, a job loss in 2014, and cancer diagnoses in recent years for both himself and his spouse. When he eventually began addressing the taxes, the pandemic and IRS backlog slowed his efforts to remedy the situation.

Applicant earned approximately \$200,000 per year through his salary and bonuses. He has relatively limited savings. Applicant planned to set up payment arrangements to resolve his remaining tax delinquencies once he and the IRS determine his tax indebtedness. He asserted that he has been saving about \$300 per month to address his tax delinquencies upon entering into payment plans with Federal and state authorities.

Although some of the circumstances that gave rise to Applicant's tax problems were arguably beyond his control, none of the reasons Applicant cited "can reasonably excuse his failure to comply with his tax filing obligations for seven years." Decision at 7. Applicant has filed his delinquent Federal returns, but he has not provided evidence of arrangements with the IRS to pay his significant delinquent taxes beyond one payment of \$12,500. Because that payment was made after Applicant realized his clearance was in jeopardy, he "failed to show this payment was a good-

faith effort to resolve his debt.” *Id.* Applicant has not provided sufficient evidence of filing his overdue state returns or of paying his delinquent state taxes. None of the mitigating factors is fully applicable.

Discussion

Due Process

At the heart of Applicant’s appeal are a number of claims that are best characterized as denial of due process—that he “had inadequate opportunity to provide information and evidence to support [his] case.” Appeal Brief at 1. As one example, Applicant states that the SOR did not provide him notice that his “general financial condition would also be targeted” in the hearing and decision and that consequently he “did not prepare and present additional, relevant information pertaining to [his] finances.” Appeal Brief at 3. To the extent that we understand this argument, Applicant is claiming that he was unfairly surprised by questions about housing expenses, how much he is saving to pay his delinquent taxes, and whether he follows a budget or has received financial counseling. In a related example, Applicant argues that he did not have an adequate opportunity to respond to questions about his plan to set aside \$300 per month to pay his delinquencies, citing to his “inexperience in legal proceedings.” *Id.* at 2. In a final example, Applicant complains that the Judge asked for his Federal tax transcripts at the close of the hearing, that Applicant provided the same, and that the Judge then based his decision—at least in part—on Applicant’s failure to provide state tax transcripts as well. Applicant asserts:

It appears that when evidence of State returns was not provided, the approach shifted from benign to hostile and, with this shift, Decision was expanded well beyond Statement of Reasons. . . . However, I feel that I have been denied a commensurately expanded opportunity to present my case, both in the production of evidence and in support of the “whole person” concept. [Appeal Brief at 4–5.]

We are not persuaded by Applicant’s due process arguments. First, Applicant is on constructive notice of the Directive, was provided a copy of the Directive with his SOR and a copy of the Chief Administrative Judge’s prehearing guidance for DOHA hearings, and was reminded by Department Counsel’s letter of April 18, 2022, to read the Directive carefully prior to hearing. The SOR itself put Applicant on notice that his financial issues were of security concern. The Adjudicative Guidelines provided further context and considerable detail about the factors that the Judge would consider in evaluating his case. In light of those documents, Applicant cannot reasonably assert that he was unfairly surprised by questions about the financial decisions he made during the seven years that he failed to file and pay required Federal and state taxes. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 17-02196 at 2–3 (App. Bd. Apr. 27, 2018). As a related matter, it merits noting that a Judge may consider unfavorable non-alleged matters (*i.e.*, failure to pay taxes as required) for certain purposes, such as (a) in assessing an applicant’s credibility; (b) in evaluating an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) in considering whether the applicant has demonstrated successful rehabilitation; and (d) in applying the whole-person concept. *See, e.g.*, ISCR Case No.

15-07369 at 3 (App. Bd. Aug. 16, 2017). We find no reason to conclude that the Judge erred in his consideration of non-alleged matters.

Second, we note the timeline of this case. Applicant completed his security clearance application (SCA) in March 2019, completed his clearance interview in May 2019, and received government interrogatories in late 2019 that required him to submit Federal and state tax account transcripts. In responding to those interrogatories, Applicant did not provide the required tax account transcripts. The SOR was issued in August 2020. Over two years later, at his November 2022 hearing, Applicant had still not secured Federal or state tax account transcripts. Although he testified that he had filed all delinquent returns, Applicant was unable to recall when he had done so. Tr. at 33, 43–44. The Judge then afforded Applicant an opportunity post-hearing to provide tax account transcripts that would corroborate his testimony that he had in fact filed. The record establishes that Applicant had ample time to prepare and present his case prior to hearing, that he was afforded a post-hearing opportunity to augment the record, and that he did not request any further extensions.

Third, the record does not support Applicant’s dual assertions that the Judge “asked” for Federal tax transcripts and that he did not ask for state transcripts. During the course of cross-examination, Applicant stated that he wished to “gather transcripts from the relevant agencies indicating . . . the status of the returns” in order to give the Judge “something more concrete than . . . [his] record of conversations.” Tr. at 36–37. At the conclusion of the hearing, the Judge asked Applicant if he wanted the record to be kept open, adding “I’m not requiring you to provide additional documentation. It’s entirely up to you whether you wish to do so. I’m merely giving you the opportunity to provide documents.” *Id.* at 60–61. Applicant responded in the affirmative. The Judge then provided instructions about how to submit any documents by email. In the course of that dialogue, the Judge specifically mentioned obtaining state tax documents as well, noting that Applicant testified that his state tax returns had also been filed. *Id.* at 61–62. Throughout the dialogue, the Judge reiterated that he was not requiring any documents. *Id.* at 60–63.

On appeal, Applicant requests additional time to “resolve matters cited in Decision . . . to allow for those efforts to complete, and for them to be documented.” Appeal Brief at 5. This remedy is not available, as the Appeal Board is prohibited from receiving new evidence and has no authority to remand a case for further proceedings unless it identifies an error below that needs correcting. Directive ¶¶ E3.1.29 and E3.1.33.2. Applicant is not entitled to another hearing and another chance to present his case, as he has not shown that he was denied either a reasonable opportunity to prepare for the hearing or a reasonable opportunity to present evidence on his behalf. *See, e.g.*, ISCR Case No. 04-01047 at 3 (App. Bd. Oct. 20, 2005).

Applicant refers to being “attacked” by Department Counsel at the hearing and by the Judge in his decision. Appeal Brief at 3 and 4. The record reveals nothing to support those allegations. The arguments of Applicant fail to establish the proceeding was conducted in an unfair manner, and they fail to rebut the presumption that the Judge was impartial and unbiased. *See, e.g.*, ISCR Case No. 19-02322 at 2 (App. Bd. Jul. 20, 2022).

Inaccuracies and Weighing of the Evidence

Applicant argues that the decision includes incorrect statements but points us to no specific inaccuracy. Instead, that portion of his brief amounts to a disagreement with the Judge's weighing of the evidence. His disagreement with the Judge's weighing of the evidence or an ability to argue for a different interpretation of the evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

As the Judge noted in his decision, failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules, raising questions as to whether he will comply with the rules for protecting classified information. Decision at 6, citing ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). The fact that Applicant has recently taken the initial steps to correct his Federal and state tax problems does not preclude careful consideration of Applicant's longstanding prior behavior and how it reflects on his security worthiness. *See, e.g.*, ISCR Case No. 12-05053 at 4-5 (App. Bd. Oct. 30, 2014). Moreover, as the Judge noted, the timing of Applicant's efforts to resolve his debts is relevant, as an applicant who begins to resolve financial concerns only after his clearance is in jeopardy may lack the judgment to follow rules and regulations when his personal interests are not threatened. Decision at 7, citing ISCR Case No. 17-04110 at 3 (App. Bd. Sep. 26, 2019).

New Evidence

Applicant also presents additional information about phone calls with state tax authorities in the weeks after the Judge's decision was issued. As noted above, the Appeal Board is prohibited from considering new evidence on appeal. Directive E3.1.29.

Applicant has 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 the record. "The general standard is that a clearance may be granted only when 'clearly consistent with 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: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board

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