



**DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759**

Date: September 9, 2024

<p>In the matter of:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 23-00254</p>
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 22, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant initially requested a decision based upon the written record but subsequently requested a hearing, which was held on May 13, 2024. On July 17, 2024, Defense Office of Hearings and Appeals Administrative Judge Pamela C. Benson denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we affirm the Judge’s decision.

Under Guideline F, the SOR alleged that Applicant had failed to timely file federal and state tax returns for tax years 2019, 2020, and 2021. Applicant denied the allegations and submitted documentation indicating that all the returns had been filed in February and March 2023.

On appeal, Applicant alleges that “[t]he Judge has committed harmful error based on her interpretation of the record and her decision that unequivocally misrepresented the facts. . . . The harmful error is based on the Judge’s failure to meet the burden of proof required by the government, falsifying the facts in the record, arbitrary application of the administrative guidelines, and not correctly applying the whole person concept.” Our review of the Judge’s decision confirms that she considered all relevant issues and properly applied the mitigating conditions. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant is a 58-year old, honorably discharged military veteran who failed to file timely federal and state tax returns for 2019, 2020, and 2021. He maintained that this was the result of a busy work schedule and his failure to make this obligation a priority. Decision at 2; Transcript (Tr.) at 28. Although Applicant understood that it was important to file, he felt that he could delay meeting that obligation because he believed he did not owe any additional taxes. Decision at 3; Tr. at 31. After submitting his Security Clearance Application (SCA) in which he acknowledged that he had not filed for 2020 and 2021 but did not admit the 2019 failure to file or the three years of unfiled state tax returns, Applicant was interviewed by an investigator who addressed the tax issues. Applicant advised the investigator that the returns would be filed by November 2022. He filed the returns in February and March of 2023. Applicant also owed federal taxes, interest, and penalties for tax year 2012, although this was not alleged in the SOR. This matter was the subject of a dispute with the IRS, and Applicant stated that he would not pay those taxes at this time but would do so if his second challenge to a U.S. Tax Court ruling is not resolved in his favor. Tr. at 25-36. This was not considered for disqualifying purposes but was appropriately considered in the application of mitigating conditions, in making a credibility determination, and in the Judge’s whole-person analysis.

In light of these facts, the Judge concluded that Applicant provided no plausible basis for his failure to file tax returns, and despite Applicant's subsequent tax filings, he had not established that he acted responsibly and in good faith to address and resolve his tax obligations.

Discussion

On appeal, Applicant challenges the Judge’s factual findings as well as her conclusions. When an administrative judge’s factual findings are challenged, the Board must determine whether the findings of fact are 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 and whether the judge’s findings reflect a reasonable interpretation of the record evidence as a whole. Directive, E3.1.32.1; ISCR Case No. 02-12199 at 2–3 (App Bd. Aug. 8, 2005). In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to 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. ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Applicant asserts that “the Judge failed to maintain the burden of proof required of the Government.” However, the government's burden is to prove its case by substantial evidence, which was clearly met in this instance. Once the government established a *prima facie* case against him, Applicant had the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance. Thus, the burden was on Applicant to present witnesses and other evidence to rebut, explain, extenuate, or mitigate the security concerns raised by his failure to timely file his tax returns. Directive E3.1.15.

Relative to mitigation, Applicant’s arguments broadly allege that the Judge made factual errors in her decision. This challenge largely conflates "facts" with "conclusions." Regardless, however, of whether considered to be facts or conclusions, the allegations of error are without merit because the Judge’s factual findings and conclusions are amply supported by the record. Beginning with admissions in Applicant’s SCA and following through to his SOR answer, his testimony at the hearing, the Government’s exhibits, and his own, it is undisputed that the tax returns at issue were not filed until February 2023 – years after they were due. Thus, the Government’s burden was met.

A person who repeatedly fails to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *E.g.*, ISCR Case No. 15-05478 at 4 (App. Bd Oct. 2, 2017). We have noted that “[a] security clearance represents an obligation to the Federal Government for the protection of national secrets. Voluntary compliance with rules and systems is essential for protecting classified information.” *Id* at 3. Accordingly, failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information as reflected in the Guideline F concerns that were alleged. *Id* at 4. Applicant’s failures to comply with Federal and state tax laws suggest that he has a problem with voluntarily abiding by well-established government rules and regulations, which calls into question his suitability for a security clearance. *See Id* at 3.

Applicant’s appeal is premised on the incorrect belief that he mitigated the Government’s concerns because he filed his delinquent tax returns prior to the issuance of the SOR and that his failure to timely file was justified because he believed he was owed refunds. However, the obligation to timely file Federal and state income tax returns is legally independent from whether the person is entitled to a refund or not. ISCR Case No. 97-0176 at 2 (App. Bd. Jan. 22, 1998). A security clearance adjudication is not a proceeding aimed at inducing an applicant to meet his or her duty to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness. *E.g.*, ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). Accordingly, even though Applicant eventually filed his tax returns, the Judge was obligated to consider the facts and circumstances surrounding the failure to timely meet tax obligations. *Id.*

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance eligibility is in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. ISCR Case No. 15-05478 at 4. In this case, Applicant's filing of his income tax returns for 2019 – 2021 after submitting his SCA and undergoing his background interview appear to have coincided with his effort to obtain a clearance and undercuts the weight such remedial action might otherwise merit. Tr. at 32, 29. Evidence suggesting that after years of apparent inattention, Applicant was finally energized to file his tax returns when his clearance eligibility might be imperiled raises questions about his willingness to follow the rules governing classified information when his personal interests are not at stake. *E.g.*, ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016) (an applicant who waits until his clearance is in jeopardy before resolving debts might be lacking in the judgment expected of those with access to classified information).

Overall, Applicant's brief advocates for an alternative weighing of the evidence. An applicant's "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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law." ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Moreover, there is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and a bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *E.g.*, ISCR Case No. 19-03344 at 3 (App. Bd. Dec. 21, 2020).

Applicant has failed to establish any harmful error below. The record supports a conclusion that 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." AG ¶ 2(b).

ORDER

The decision in ISCR Case No. 23-00254 is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board