



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 14, 2025

In the matter of:)	
)	
-----)	ISCR Case No. 24-00114
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Grant Couch, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 6, 2024, 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 requested a hearing. On December 4, 2024, Defense Office of Hearings and Appeals Administrative Judge Charles C. Hale denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged four financial concerns: that Applicant failed to timely file his federal income tax return for tax year (TY) 2016; that he failed to timely file his federal income tax returns and pay his federal tax debt for TYs 2017 through 2021; that he failed to timely file his Maryland income tax returns and pay his Maryland taxes for TYs 2016 through 2021; and that he failed to timely file his California state return and pay his California state tax debt for TY 2017. Applicant admitted the allegations in his Answer to the SOR (Answer), and the Judge found adversely to Applicant on all allegations. Through appellate counsel, Applicant alleges ineffective assistance

of his prior counsel, who represented Applicant in answering the SOR and at hearing. Additionally, Applicant challenges several of the Judge's findings of fact and asserts that he misapplied the mitigation and Whole Person analyses. For the reasons detailed below, we affirm.

Judge's Findings of Fact: The Judge's findings of fact are summarized below.

Applicant is in his mid-sixties. He served on active duty and in the Reserve, earned a bachelor's degree in 2004, and has held a security clearance since that year. Married for over 30 years, Applicant has two adult children.

Applicant failed to timely file federal and state income tax returns for at least TYs 2016 through 2021 (SOR ¶¶ 1.a through 1.d). In July 2017, Applicant completed a security clearance application (SCA). Although he did not report his failure to file his 2016 federal and state income tax returns on his SCA, Applicant volunteered the information during his subsequent clearance interview and stated that he had filed an extension. He ultimately filed the 2016 federal tax return in February 2021.

In response to Government interrogatories in August 2023, Applicant accepted full responsibility for not filing his taxes in a timely manner and stated in explanation that he had moved five times in the past seven years. Applicant's evidence confirms the following: that he subsequently filed his federal returns for TYs 2018 through 2021 in January 2024; that he filed his Maryland state tax returns for TYs 2016 through 2021 in February 2024; and that he also filed his California state tax return for TY 2017 in February 2024.

Upon receipt and processing of the tax returns, Applicant's federal tax debt included: \$5,247 for TY 2018; \$15,235 for TY 2019; \$4,895 for TY 2020; and \$3,437 for TY 2021. His 2023 tax refund was diverted to his arrearage, and Applicant's delinquency for TY 2019 was reduced to \$13,691. Applicant is paying between \$5,000 and \$6,000 a year to pay off his \$23,000 federal tax debt, but he does not have a payment plan. Applicant owes approximately \$3,500 to Maryland and owes no taxes to California. As evidence of good-faith efforts to resolve his tax debts, Applicant submitted canceled checks paid to the IRS and the Maryland state comptroller. The checks were dated from May 2024 through November 2024 in amounts ranging from \$25 to \$75.

Applicant drives a \$60,000 luxury brand car, for which he has a \$1,700 monthly payment, and his wife also drives a luxury brand car. Both cars were bought in 2017, and his wife's car was paid off in 2019. The couple has a combined annual salary of \$240,000.

Judge's Analysis: The Judge's analysis is summarized and quoted below.

The Judge determined that the following disqualifying conditions were established: AG ¶ 19(c), a history of not meeting financial obligations; and AG ¶ 19(f), failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay federal, state, or local income tax as required.

In examining the potentially applicable mitigating conditions, the Judge determined that none was fully established, as detailed below:

AG ¶ 20(a) is not established. Applicant documented that he had recently filed his remaining outstanding Federal and state income tax returns in January 2024 and February 2024 respectively, which included the years alleged of 2018 through 2021. His behavior was recent, not infrequent, and he filed his Federal and state income tax returns only after his security clearance was in jeopardy, which casts doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 20(d) is not established. The diversion of his federal income tax refund to pay his Federal tax debt does not constitute good-faith efforts to resolve the debts.

AG ¶ 20(g) is not fully established. Applicant has not made arrangements with the appropriate tax authority to file or pay the amounts owed. Applicant has made recent voluntary payments towards his tax debts and also relied upon diversion of his tax refund to pay the amounts owed. [Decision at 6 (internal citation omitted).]

The Judge highlighted that Applicant acknowledged his failure to file his TY 2016 returns during his 2017 SCA process, that he told the investigator he had filed an extension, and that Applicant did not file the tax returns until several years later. Additionally, the Judge noted that Applicant filed his overdue federal and state income tax returns only after he realized that his clearance was in jeopardy. In concluding that Applicant had not mitigated the alleged security concerns, the Judge relied on Appeal Board precedent that the timing of remedial actions is a factor to be considered and that actions taken after one is on notice of security clearance concerns may be due less weight.

Discussion

Through appellate counsel, Applicant first asserts that his previous attorney rendered ineffective assistance of counsel at several stages of his clearance adjudication, to include: submitting an inadequate Answer to the SOR, asking a damaging question at the hearing, failing to object to a purportedly improper line of cross-examination, and failing to submit additional documents in mitigation post-hearing. In support of this argument, appellate counsel cites both to the Supreme Court's standard for ineffective assistance in a criminal case and to its recent application in a military court-martial, and he requests that the Board "grant him a Trial De Novo in order to receive a fair trial." Appeal Brief at 5-6. DOHA proceedings are civil in nature, and applicants are therefore not entitled to the procedural protections afforded to criminal defendants in either civilian or military prosecutions. *E.g.*, ISCR Case No. 04-04623 at 2 (App. Bd. Dec. 8, 2006). Appellate counsel's arguments regarding ineffective assistance are misplaced and without merit.

Next, Applicant asserts that the Judge erred in his findings of fact regarding particular tax years. Appeal Brief at 9, quoting Decision at 2. Our review of the decision reveals that appellate counsel is challenging as erroneous a paragraph in which the Judge listed Applicant's admissions to the SOR allegations, as reflected in Applicant's Answer. We conclude that this assignment of error is baseless and decline to address the particular "errors" that appellate counsel identifies.

Finally, Applicant asserts that the Judge's application of the mitigation and Whole Person criteria was arbitrary and capricious. A judge's decision can be found to be arbitrary or capricious if "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts 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. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In asserting that the decision is arbitrary and capricious, however, Applicant is simply arguing for the Judge to weigh the evidence differently. For example, Applicant argues repeatedly that the Judge failed to give appropriate weight to the fact that Applicant timely filed his returns for 40 years—from 1976 until 2016—and instead gave undue weight to Applicant's failure to timely file for TYs 2016 through 2021. Appeal Brief at 7, 8, 10, 12, and 14. We note first that there is no actual record evidence of Applicant's compliance with tax authorities from 1976 until 2016. Regardless, 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).

Similarly, Applicant argues that the Judge failed to give appropriate weight to his ongoing efforts to resolve his delinquent tax issues. However, the Judge's conclusion that Applicant took remedial action only after being placed on notice of the Government's security concern is supported by record evidence, which confirms that Applicant filed his delinquent returns for TYs 2017 through 2021 approximately five months after receipt of Government interrogatories regarding the same. Moreover, the Judge's determination to give those remedial actions comparatively scant weight is well-grounded in the Appeal Board precedent to which he cited.

In conclusion, Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which 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. 24-00114 is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board