

KEYWORD: Guideline F

DIGEST: Applicant had one attorney representing him at the hearing. One of his witnesses was an attorney but that attorney did not represent Applicant at the hearing. Adverse decision affirmed.

CASENO: 14-04202.a1

DATE: 12/24/2015

DATE: December 24, 2015

In Re:)
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-----) ISCR Case No. 14-04202
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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

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 8, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant worked as an employee of a company from 2002 to 2005. For those tax years he filed and paid his taxes in a timely manner. In 2006, he established his own company and became an independent consultant, a job he has performed for various Federal contractors since. Except for two four-month periods of unemployment he has worked steadily since 2002. He has held a security clearance for about 33 years without incident of concern. His yearly earnings rose from \$120,000 in 2005 to about \$250,000 at the present.

Applicant did not file his Federal or state income tax returns for tax years 2008 through 2012. He eventually filed them in 2012. In addition, he did not pay his Federal or state taxes for tax years 2006 through 2012. He disclosed these failures in his security clearance application (SCA), attributing his delinquencies to lack of funds.

Applicant was discharged in Chapter 7 bankruptcy in 1994 and in Chapter 13 bankruptcy in 2002. He stated that he had experienced unemployment, a marital separation, and expenses due to his father-in-law’s funeral. In 2012 the IRS filed a lien against Applicant for \$93,000 and two liens in 2013 for about \$120,000. He owed his state about \$2,700 in back taxes as well.

Applicant supplied a number of reasons for his failure to have filed and paid his taxes. He had set up a restaurant that depleted his savings, he acquired extra expenses during his separation from his first wife, his children had medical problems and he had no insurance, his in-laws lived with him, and he paid his father-in-law’s medical and burial expenses. He also noted his periods of unemployment.

From 1996 on, Applicant made several purchases. He bought two time-shares, a boat and trailer, a 55-acre farm in another state, and three automobiles. He bought the farm as a retirement and investment property, intending to sell the gas rights in exchange for substantial royalties. However, political events intervened to make this not possible.

In 2010, Applicant began paying his taxes. The next year, the IRS undertook its collection efforts, and Applicant hired an attorney to assist him in resolving his tax problems. He established a payment plan, after which the IRS suspended its garnishment actions. Applicant also established

a payment plan with his state taxing authorities and is making payments on it. Applicant intends to sell some of his property to enable him to pay off his tax debt.

Applicant expressed remorse for his tax problems and admitted that he had not managed his finances properly. He testified that his knowledge and expertise make him a valuable asset, and his current employer supports his effort to remain eligible for a clearance.

The Judge's Analysis

The Judge resolved some of the SOR allegations in Applicant's favor. However, he entered adverse findings regarding Applicant's tax deficiencies. The Judge characterized them as ongoing and that the circumstances under which they were acquired continue to cast doubt upon Applicant's judgment and reliability. He noted that Applicant's problems had been affected by circumstances outside his control, such as a divorce and unemployment. He also noted that Applicant has earned a substantial salary for the past several years. He also stated that Applicant's having lacked medical insurance was due to his own decision. The Judge found Applicant's testimony that he had not been aware of the tax laws with which he was expected to comply to be lacking in credibility. Applicant had filed timely returns until 2007, evidencing an understanding of his responsibility to comply with the law. He also spent funds on various purchases, such as a boat, several cars, and a farm, that could have been directed toward paying his taxes. The Judge concluded that Applicant's recent efforts at resolving his tax problems are not enough to mitigate concerns about his judgment and reliability.

Discussion

Applicant argues that the Judge did not consider the testimony of his tax attorney concerning his plan to resolve his tax delinquencies. He states that the Judge did not mention this witness's name as having made an appearance on Applicant's behalf. Applicant argues that this is "a major flaw" in the Decision, insofar as this witness provided most of the facts about his repayment plan. Appeal Brief at 1. Applicant cites to other evidence, such as the circumstances underlying his debts, his various efforts at addressing them, his having held a clearance for many years, and the quality of his job performance in contending that the Judge's decision was erroneous.

Applicant was represented at the hearing by an attorney, whose name appears under the heading "Appearances" on the first page of the Decision. She identified herself at the beginning of the hearing, stating "I'm representing the Applicant." Tr. at 6. The tax attorney did not represent Applicant. Rather, he served as a witness. Applicant's attorney called him, stating "I would like to call my first witness[.]" Tr. at 25. This person did not make an appearance in the sense of providing representation and, therefore, was not listed as if he had. The Judge accepted the tax attorney as an expert witness, permitted him a wide latitude in testifying, and asked questions of him after Applicant's attorney had finished direct examination. Moreover, the Judge made findings about Applicant's repayment plan that appear to have been based, in large measure, upon the testimony of this witness.

Concerning the other evidence that Applicant has cited, the Judge made findings about it also and discussed the evidence in the Analysis portion of the Decision. Applicant's good prior security record is a matter that the Judge was required to consider, along with all the other evidence in the record. However, even those with good prior records can encounter circumstances in which their judgment and reliability might be compromised. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015); *Adams v. Laird*, 420 F. 2d 230, 238-239 (D. C. Cir. 1969), *cert. denied* 397 U.S. 1039 (1970). Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-08412 at 2 (App. Bd. Sep. 11, 2015). Applicant's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-05251 at 3 (App. Bd. Dec. 9, 2015). Applicant challenges the Judge's whole-person analysis. We conclude that the Judge satisfied the requirements of the Directive in that he considered the totality of Applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015). Applicant cites to the effect that a clearance denial will have on him and those who rely on him. The Directive does not permit us to consider the impact of an unfavorable decision. *See, e.g.*, ISCR Case No. 11-13180 at 3 (App. Bd. Aug. 21, 2013).

The Judge examined the relevant data 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board