

KEYWORD: Guideline F, Guideline E

DIGEST: The Board concludes there is merit in Applicant's claim that the Judge misconstrued a piece of evidence. However. The Judge's adverse decision is supported by sufficient record evidence. Adverse decision affirmed.

CASENO: 05-00412.a1

DATE: 04/06/2007

DATE: April 6, 2007

In Re:)	
)	
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SSN:-----)	ISCR Case No. 05-00412
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 5, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 25, 2006, after the hearing,

Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant timely appealed pursuant to Directive E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's findings of fact under Guideline F are based in part on a misunderstanding of one of Applicant's exhibits. Finding no harmful error, we affirm the decision.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following findings that are pertinent to this appeal: Applicant is indebted to the Internal Revenue Service (IRS) on three tax liens for unpaid federal taxes, interest, and penalties. The first allegation is in the amount of \$92,733.00; the second \$22,445.00; and the third \$80,209.00.

Applicant hired an attorney to represent him in his attempts to resolve his tax liabilities. A letter from his attorney (Exhibit L) states that, after February 9, 2007, Applicant will owe only \$25,000.00, the remainder being uncollectible due to the statute of limitations. Applicant introduced a check in the amount of \$24,932.00, which he stated would be the means whereby he pays off this reduced amount. The Judge stated, "At this time, until the IRS responds, I find that Applicant still owes the full amount alleged" in the SOR.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Applicant states that the Judge misunderstood the significance of Exhibit L. It "is not a proposal to the IRS, it is a factual statement from my attorney that there is a plan in place with the IRS that will totally have my debt paid in full in February 2007."

We have examined the document in question. Although it is entitled "Tax Relief Proposal for [Applicant]," it is not addressed explicitly to the IRS. It advises the reader that Applicant's tax liabilities are expected to be reduced to the extent and for the reasons described above. Its language is not that normally associated with offers for settlement drafted by lawyers but appears designed to advise any interested party that Applicant will be free of legally enforceable tax debt by the specified date.

Applicant, in explaining the document, testified as follows: "[My lawyer] has come to a resolution with the IRS, which is stated in the letter that I presented to you . . . We have a resolution

to all the tax problems that—February 9th [2007], which is seven months away, I won't owe the IRS anything. I'll be totally paid.” Transcript at 50.

Given the record evidence, we conclude that there is merit in Applicant's allegation of error. The Judge appears to have interpreted the document as an offer to the IRS. However, we read it to be a statement of the attorney's professional opinion that, due to operation of the statute of limitations, Applicant's enforceable tax debt was, as of the hearing, soon to be reduced by a substantial amount. Of course, this error does not impair the Judge's finding that, as of the date of the decision, Applicant still owed the full amounts alleged.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. V. United States*, 371 U.S. 156, 168 (1962)). The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. We review matters of law *de novo*.

We must examine whether the erroneous finding identified above is harmful. In his Conclusions section, the Judge stated the following: “The evidence shows that Applicant has . . . made a good faith effort to resolve his debt with the IRS. Unfortunately at this time he still owes the IRS approximately \$200,000.00. It is Applicant's hope that this debt may be satisfied in February 2007. But at this time there is no way to know if the IRS will accept Applicant's offer in compromise.” Decision at 6.

The Board reads the evidence to show that Applicant is executing a plan to eliminate his indebtedness which is heavily dependent upon the running of the statute of limitations. Such reliance does not normally absolve an applicant of his responsibilities for security clearance purposes, absent other mitigating circumstances. *See* ISCR Case No, 03-04779 at 4 (App. Bd. Jul. 20, 2005). The Judge's mischaracterization of Applicant's plan is harmless error which if anything benefitted Applicant.

Moreover, the Judge noted the following in his Conclusion: “An additional point of concern is that Applicant again exhibited the conduct that got him into trouble previously. It was his failure to file his tax returns in 1989 through 1993 that was the cause of the initial debt to the IRS. The fact that he again filed his returns late for tax years 2001 through 2003 shows that he may still be subject to some irresponsible financial behavior.” Decision at 6.

In light of the forgoing there is sufficient record evidence to support the Judge's overall adverse clearance decision. We therefore conclude that the factual error identified above is harmless. *See* ISCR Case No. 01-23362 (App. Bd. Jun. 5, 2006).

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board