

KEYWORD: Guideline F; Guideline E

DIGEST: When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record. The Board believes that Notice requirements are an essential component of the due process provided by the Directive. It is possible that a Judge might have found that Applicant was forthright in his claim that he did not know about the lien when he prepared the EQUIP. However, it is not likely that a Judge would have found the underlying tax lien mitigated. Adverse decision affirmed.

CASENO: 14-05489.a1

DATE: 01/11/2016

DATE: January 11, 2016

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
_____	)	

**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 February 2, 2015, DoD issued a statement of reasons (SOR) 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 decision on the written record. On October 29, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in concluding that he had deliberately falsified his security clearance application (SCA) and 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 is seeking a clearance in connection with his job with a Defense contractor. Married with four children, he has a master’s degree. He served in the military as a commissioned officer from 1965 to 1985. He held a clearance during this time.

Applicant owed Federal income taxes for 2008 and 2009, due to lack of withholding from his income. He discovered this when he prepared his 2009 tax return. However, by that time the Government had scaled back its contracting activity, so Applicant did not have enough funds to make the required payments. He states that he had filed an Offer in Compromise with the IRS in 2011 but that he has not been able to make progress. He also advises that he has not filed his 2013 and 2014 income tax returns due to his ongoing effort to resolve his earlier delinquencies. Applicant submitted a document (Account Quick Report) that appears to be a ledger from his employer showing that he has been making payments of \$1,000 a month to the IRS since April 2014. There is a conflict in the evidence as to whether these are voluntary payments or whether they are a condition required by the Offer in Compromise. The IRS filed a tax lien against Applicant in 2011. The amount of the lien was \$159,000, although Applicant disputes this amount. Although Applicant is willing to settle the debt, the IRS has not yet accepted the terms of his Offer.

When completing his SCA, Applicant answered “no” to two questions. One inquired as to whether he had failed to pay Federal or state taxes within the previous seven years. Another asked if any liens had been filed against him for failure to pay tax. For reasons set forth above, these answers were false. Applicant claimed that he did not know about the lien. However, he knew he owed taxes to the Government, as evidenced by his Offer in Compromise.

**The Judge’s Analysis**

The Judge stated that there is nothing in the record to show that the payments referenced in Applicant's Account Quick Report had been received. She stated that Applicant's having simply waited for the IRS to respond after a number of delays over several years is not sufficient to show a good-faith effort to resolve his tax debt. She concluded that there is insufficient documentary evidence to establish mitigation of the Guideline F concern. Applicant "has not shown that he is or has been reasonably, responsibly or prudently addressing his financial situation." Decision at 6. Regarding Guideline E, the Judge stated that it was possible that Applicant was not aware of the lien. However, she concluded that it was not reasonable to believe that he was unaware that he owed the taxes. Among other things, she noted that he held a clearance during the 20 years he was in the military and, therefore, had significant experience in completing SCAs. She also noted his level of education and that the question at issue is "clear and simple." Decision at 7. She concluded that Applicant had not met his burden of persuasion as to mitigation.

## Discussion

Applicant challenges the Judge's finding that his omissions from the SCA were false.<sup>1</sup> When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015). In the case before us, the record supports the Judge's finding. For example, in his response to the SOR Applicant acknowledged that as of 2009 he was aware that he owed back taxes. This admission, viewed in light of the Judge's findings about Applicant's level of education and the clarity of the question at issue are sufficient to constitute substantial evidence of a deliberate omission in his 2012 SCA. Applicant's appeal brief, to a large extent, repeats assertions that were contained in his reply to the File of Relevant Material. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant challenges the Judge's application of the whole-person factors. We conclude that the Judge's whole person analysis complies with the requirements of Directive, Enclosure 2 ¶ 2(a), in that the Judge considered the totality of Applicant's conduct in reaching her decision. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

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."

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<sup>1</sup>There is a problem with the scope of the SOR compared to scope of the FORM and the Judge's decision. Under Guideline F, the SOR only addresses one debt, the lien for 2011 taxes in the amount of \$159,000. Under Guideline E, the SOR is worded ambiguously such that it might be read to address the entirety of Applicant's e-QIP answers under Section 26 - Financial Record...Taxes or it could, just as easily, be read to address only his negative answer regarding a Tax lien. On the one hand, there is a general approach to construe ambiguities against the drafter (here, the Government). On the other hand, the Board has frequently held that SORs are not held to the same standards as criminal indictments. Under both Guidelines, the FORM and the Judge's decision address a range of tax and disclosure issues beyond the 2011 lien.

The Board believes that Notice requirements are an essential component of the due process provided by the Directive and is reluctant to categorize a failure to provide fair and adequate notice as harmless. In this case, it is possible that a Judge might well have found that Applicant was forthright in his claim that he did not know about the lien on the date he prepared the EQUIP. However, it is not likely that a Judge would have found the underlying tax lien mitigated. Therefore, we decline to remand the case.

**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