

KEYWORD: Guideline F

DIGEST: A variance between the SOR allegations and the Judge findings and conclusions is material only if subjects the Applicant to unfair surprise regarding the government's evidence or the security concerns at issue. Adverse decision affirmed.

CASENO: 12-01266.a1

DATE: 04/04/2014

DATE: April 4, 2014

In Re:)
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-----) ISCR Case No. 12-01266
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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 August 20, 2013, 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 January 23, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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 variance between the evidence and the Judge’s formal finding regarding one of the allegations was an error 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 works on Defense contracts at a university. She has held a security clearance since late 2000.

Applicant failed to file income tax returns for tax years 2005 through 2007, evidenced by a Federal tax lien. Applicant also had a judgment entered against her for unpaid state taxes. Between May 2007 and December 2012, the IRS had sent Applicant and her husband numerous inquiries about their failure to file. They filed their Federal and state tax returns for 2005 through 2007 in March 2013. Applicant and her husband had received an extension for the filing of their 2004 return until August 2005. However, they did not file the return until April 2006. They have filed their returns for 2008 and each succeeding year in a timely fashion.

Applicant and her husband had used an accountant to prepare and file their returns through 2004. However, after that accountant died, Applicant “procrastinated” in finding a new one. She testified that she did not believe that failing to file would be a problem because she always received a refund.

In 2009, she decided to prepare her own returns, using computer software. She utilized a Federal tax advocate to help her prepare her overdue returns as well as to assist in determining the amount of taxes due and in arranging for payment. The IRS transcript for 2005 shows a balance of \$12,564 for that year, a zero balance for 2006, and a credit for 2007. Applicant believes that she owes \$3,000 in state taxes, but the amount of her federal tax debt has yet to be determined. She has not made any payments of her Federal or state taxes for the years in question except for involuntary seizures of her refunds, and she does not have a structured payment plan for any delinquent taxes due. In December 2013, the IRS advised Applicant that a claimed refund for tax year 2005 had been disallowed because she had submitted her claim after the expiration of the statute of limitations.

Applicant has a monthly net income \$8,827, expenses of \$3,595, and debt payments of \$4,160. Applicant’s claimed net remainder of \$4,667 should read \$1,072. Applicant’s home is worth \$650,000 with \$55,000 left on the mortgage. She has a mobile home worth \$45,000 and \$75,000 worth of stocks and bonds.

Applicant enjoys a good reputation for the quality of her work performance. Her colleagues consider her to be dependable, honest, and responsible.

The Judge's Analysis

The Judge concluded that Applicant's failure to have filed her taxes for the three years in question established pertinent disqualifying conditions under Guideline F and that her having filed her 2004 returns in April 2006 was also a matter of concern. He concluded that Applicant had failed to meet her burden of persuasion as to mitigation. He stated that her tax debts are numerous and unresolved; that they cannot be attributed to causes outside her control; and that she has not demonstrated a good-faith effort to resolve her debts. The Judge did credit Applicant for receiving counseling from the Federal tax advocate, for having eventually filed her returns, and for having disputed the amounts due. However, he concluded that this favorable evidence did not outweigh evidence of Applicant's many years of procrastination. In the whole-person analysis, the Judge stated that Applicant's long history of failing to file tax returns raises questions about her reliability and judgment. He stated that the trigger for ending her years of procrastination appears to have been her submission of a security clearance application.

Discussion

SOR ¶ 1(c) alleged that Applicant's returns for 2004 through 2007 had been filed in 2013. The Judge entered an adverse formal finding for this allegation. Applicant contends that this formal finding was an error, insofar as the evidence shows that she filed her 2004 return in 2006.

An SOR serves to put an applicant on notice as to the security concerns arising from the investigation of his or her clearance application. It enables the applicant to present his or her case for mitigation. Variances between an SOR allegation and a Judge's findings of fact and conclusions occur from time to time. They are material only in those cases in which the extent of the variance is so great that the SOR allegation fails to serve as reasonable notice to the applicant of the concerns against him, thereby subjecting him to unfair surprise when confronted with the Government's evidence. *See, e.g.*, ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003); *United States v. Barker*, 100 F. 34 at 39 (3d Cir. 1900). A non-material variance, one within the general scope of the pleadings, does not in and of itself raise a reasonable concern that the applicant was subjected to unfair surprise and, accordingly, denied an opportunity to present his case in mitigation. Moreover, a non-material variance does not preclude an adverse formal finding by the Judge. In this case, there is no reason to believe that Applicant's rights were impaired. The discrepancy involved only one of four alleged late tax return filings. After examining the record as a whole, we conclude that Applicant received fair notice of the issues raised, had a reasonable opportunity to litigate those issues, and was not subjected to unfair surprise by the evidence actually adduced at the hearing. The variance between the Judge's formal finding for this allegation and his findings of fact and conclusions is non-material and, under the facts of this case, does not constitute an error.

Applicant challenges some of the Judge's findings of fact. For example, she states that the Judge erred in finding that the monthly remainder listed on her financial statement was \$1,072 and

that she no longer owes anything to the IRS, challenging the statement in the analysis that her tax problems are unresolved. We examine a Judge's findings of fact to see if they 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." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 12-12172 at 3 (App. Bd. Jan. 9, 2014).

Applicant appears to be correct regarding the amount of her monthly remainder. The amount of \$4,160 does not, as the Judge found, represent her debt payments but her total monthly payments, including debts and expenses. Subtracting her total expenditures from her net income leaves \$4,667.05, as reflected on Applicant's financial statement. However, even if the Judge had not made this challenged finding, there is little likelihood that he would have decided the case differently. His analysis was not dependent upon the amount of Applicant's monthly remainder. Therefore, this error is harmless. *See, e.g.*, ISCR Case No. 10-09281 at 4 (App. Bd. Mar. 5, 2012).

Regarding the extent to which Applicant's tax problems have been resolved, she herself admitted that she owes the state about \$3,000 (Tr. at 47), and her own Exhibit G, an IRS Account Transcript, shows that, as of November 2013, she owed \$12,564.94 in back taxes for tax year 2005. Exhibit G also states that this does not represent a payoff amount, leaving open the possibility that further interest and/or penalty accruals could increase it. Applicant claims that she no longer owes anything to the IRS, as evidenced by her Exhibit P, a letter from the IRS denying her claim for a refund. However, this document merely states that Applicant had filed her claim too late. It does not assert that she no longer owes anything to the IRS. Even if that turns out to be the case, it would not undermine a conclusion that, as of the close of the record, her disputes with the IRS and the state tax authorities had yet to reach a final resolution. The Judge's material findings of security concern are based upon substantial record evidence or constitute reasonable inferences drawn from the evidence. Applicant has cited to no harmful error likely to change the outcome of the case.

Applicant cites to evidence favorable to her, for example, that she has been current on her taxes since 2007. The Judge made findings about this matter. He addressed much of Applicant's favorable evidence in his analysis. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-11803 at 2 (App. Bd. Dec. 17, 2012).

Applicant challenges the Judge's treatment of the mitigating conditions. For example, she contends that the Judge erred in relying on evidence of her prior procrastination in filing her taxes. She contends that her past several years of timely filing show that she will not procrastinate. This amounts to a disagreement with the Judge's weighing of the evidence. Given the record as a whole, and taking into account Applicant's testimony that her tax delinquencies began with her failure to hire a new accountant after the death of her previous one or otherwise to file her taxes herself, an explanation entitled to minimal probative value under the facts of this case, we cannot say that the Judge's weighing of the evidence in mitigation was erroneous.

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: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board