

KEYWORD: Guideline F; Guideline E

DIGEST: In evaluating an applicant's *mens rea* we consider omissions or false statements in light of the record evidence as a whole. Adverse decision affirmed.

CASENO: 13-01328.a1

DATE: 09/17/2014

DATE: September 17, 2014

In Re:)
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 -----) ISCR Case No. 13-01328
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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 28, 2014, 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 hearing. On July 16, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean 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 certain of the Judge's findings of fact were supported by substantial evidence 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 an employee of a Defense contractor, having worked in that position since 2012. He worked for other Defense contractors for ten years before his current employment.

Applicant contends that, in 2004, a co-worker told him that taxpayers do not have to file their federal tax returns until three years after the end of the tax year. He was 27 years old when he received this advice. He did not file federal tax returns for tax years 2004 through 2006 until 2008. His debt for back taxes is about \$60,000. He has worked out a payment plan with the IRS, and Applicant estimates his tax debt at around \$49,000. He also has state income tax debts for tax years 2008 through 2010. He has also established a payment plan with the state. He acknowledges that his tax debts were due to his immaturity and his failure to check the tax advice he had received.

Applicant was terminated by a prior Defense contractor in 2007 for failure to pay his company travel credit card. He used the card to make business and personal purchases. He was undergoing a divorce, and his pay was being garnished for payment of expenses incurred during the marriage. He did not make timely payments under his card after having been reimbursed for his business expenses by his employers.

Applicant's security clearance application (SCA) inquired if, within the previous seven years, he had failed to file a tax return. He answered "no," which was false, in light of the findings summarized above. Applicant stated that he did not understand the question. He believed that he did not owe taxes because he was current with his repayment plan. He disclosed his tax debt during his clearance interview.

Applicant has a good reputation for efficiency, attention to detail, frugality with the taxpayers' money, and honesty. His references described him as professional and unselfish, with "impeccable character and integrity." Decision at 5.

The Judge's Analysis

The Judge characterized Applicant's testimony as evasive in regard to his belief that he did not have to file tax returns for three years. He stated that Applicant's claim to have been relying on advice from someone else in delaying filing was not credible. He stated that Applicant's reliance on "clearly erroneous advice" and his failure to verify it reflected poorly on his judgment and

reliability. He stated that, although Applicant knew he owed Federal taxes since 2008, he did not negotiate a repayment plan until 2011. He stated that Applicant had presented insufficient evidence to mitigate the Guideline F concerns arising from his failure to file tax returns and his failure to pay the debt owed on his company credit card.

Regarding the Guideline E allegation of falsification of Applicant's SCA, the Judge noted that the question at issue is "clear and straightforward," *Id.* at 10. He stated that, when he completed the SCA, Applicant was well aware of his failure to file both state and Federal tax returns. The Judge found that Applicant's omission was deliberate.

Discussion

Applicant challenges the Judge's finding that he deliberately omitted his tax derelictions from his SCA. We examine a Judge's findings 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. In evaluating an applicant's *mens rea*, we consider his omissions or false statements in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-03415 at 3 (App. Bd. Jul. 25, 2014). In this case, the Judge's reliance on Applicant's knowledge that he had not filed tax returns and the lack of ambiguity in the question support his finding of deliberate omission. We find no error in the challenged finding. Applicant has cited to no harmful error in the Judge's material findings of security concern.¹

Applicant cites to evidence that he had submitted in his own behalf, such as his good job performance and the favorable opinions of his character references. Applicant's argument is not enough to rebut the presumption that the Judge considered all of the evidence in the record. Neither is it sufficient to establish that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014). Moreover, we conclude that the Judge's whole-person analysis complies with the requirements of the Directive, in that he evaluated Applicant's conduct as a totality. *See, e.g.*, ISCR Case No. 12-02859 at 4 (App. Bd. May 16, 2014).

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*

¹In his formal findings, the Judge found against Applicant regarding (1) his failure to file state and federal tax returns, (2) his having been fired for not paying his company credit card, and (3) his deliberate omission from the SCA. He cleared Applicant of all allegations regarding his tax debts themselves. SOR ¶¶ 1(a) and (c) each contained two sentences. The first sentence under each paragraph alleged failure to file tax returns and the second sentence of each alleged a tax indebtedness. The Judge explicitly found in Applicant's favor for the second sentences of both allegations. That is, he entered two formal findings for each of these two allegations, clearing him for the tax debts themselves. He also cleared Applicant of seven other allegations that pertained to tax debts solely. Applicant's brief contains extensive citations to his evidence of tax debt repayment, challenging a factual finding that he had not begun to repay his taxes until 2011. Even if this factual finding is in error, it is more relevant to the allegations for which the Judge entered favorable formal findings. To the extent that the challenged finding is relevant to Applicant's failure to file his returns, any error is harmless.

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

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