

KEYWORD: Guideline F, Guidelie E

DIGEST: The challenged finding and conclusions regarding falsification are sustainable. Applicant has not demonstrated that the Judge's decision to close the record 26 days after the hearing was arbitrary or capricious. Adverse decision affirmed.

CASENO: 14-03641.a1

DATE: 04/17/2015

DATE: April 17, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-03641
)	
)	
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 August 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) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 20, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 50 years old. She failed to file her federal and state income tax returns for 2010, 2011, 2012, and 2013. Applicant's difficulties began in late 2010, when her husband's corporation was folding and their accountant retired. She stated that there is "no suitable explanation" for not filing the returns, but that "it fell through the cracks." Applicant believed that since her husband was not working, the filing of taxes was less urgent. Applicant found another accountant in 2013. The delay was the result of other accountants not wanting to become involved with tax issues. Applicant filed the tax returns for the years in question on August 15, 2014. She received a refund for the years 2010 and 2011. For the years 2012 and 2013, Applicant owes the IRS \$9,354. Applicant claims she is in the process of setting up a payment plan. Regarding state income tax returns, Applicant claims she is due refunds, but has received conflicting information from the state.

When Applicant completed her 2012 security clearance application, she failed to include information concerning the failure to file taxes for tax years 2010 and 2011. Applicant stated it was an error, but the e-QIP is not particularly user friendly. When the government investigator pointed out the discrepancy during her 2012 interview, she verified that she marked the wrong block. She stated at the hearing that she knew she had to get the taxes done when she completed the security clearance application.

A contractor program security officer considers Applicant an extremely valuable member of the team, and states that no one has ever questioned her integrity or candor. Her current supervisor finds her to be reliable and trustworthy. A colleague who has worked with Applicant since 2004 entrusts her with a high level of responsibility in the department.

The Judge reached the following conclusions: Regarding Guideline E, Applicant is a seasoned employee who has held a security clearance and is familiar with them. Her explanation that she checked the wrong box and that the application is not "user friendly" as a reason for not disclosing her failure to file taxes is not plausible. At the hearing she stated she knew she had to get the taxes done when she was completing the security clearance application. The explanations do not allow a conclusion that Applicant is reliable, trustworthy, or has met her burden to mitigate the personal security concerns. This creates doubts about her eligibility for a security clearance. Doubts

must be resolved in favor of the Government. Applicant has not mitigated the personal conduct concerns under Guideline E.

Regarding Guideline F, Applicant admitted that she did not timely file her federal and state tax returns for 2010 through 2013 until 2014. With such issues raised, it is left to Applicant to overcome the case against her and mitigate security concerns. The nature, frequency, and relative recency of Applicant's financial difficulties make it difficult to conclude that it occurred long ago. Applicant and her husband suffered financial setbacks and lost their accountant. However, she did not act responsibly under the circumstances. Applicant has not provided sufficient information concerning the payment plan with the IRS. The fact that she failed to file her tax returns for four years in a row created grave concerns about her reliability. Applicant has been on notice for some time about her failure to file. Her recent filing of her tax returns does not mitigate the concerns.

Applicant bases her appeal on an assertion that the Judge engaged in an improper weighing of the evidence. She argues that the entirety of her professional career overshadows the single incident of her failing to file tax returns and pay taxes. She states that she recognizes the severity of her lack of action regarding her taxes, but asserts that she adequately explained this anomaly in her life. She argues that she had no reason to deliberately falsify her security clearance application. Applicant fails to establish error on the part of the Judge.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence.

In this case, the Judge made sustainable findings that Applicant had a significant history of not satisfying her obligation to file tax returns, and failing to pay taxes in a timely manner. The record supports the Judge's findings that Applicant still owes significant amounts in back taxes and that there is insufficient evidence to support a conclusion that she has worked out a solid plan for repayment of taxes with the IRS. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. *See, e.g.*, ISCR Case No. 05-07747 at 2 (App. Bd. Jul. 3, 2007). A review of the Judge's decision reveals that, regarding Guideline F, the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in her analysis. However, the Judge offered a narrative explanation as to why the disqualifying conduct under Guideline F was not fully mitigated. Applicant has not demonstrated that the Judge erred when she weighed the mitigating evidence against the seriousness of the disqualifying conduct.

Applicant challenges the Judge's conclusion that she knowingly falsified her security clearance application when she failed to indicate on that application her neglect in filing income tax returns. After a review of the evidence, the Board concludes that the Judge's findings and conclusions on the issue of falsification are sustainable.

Applicant makes reference to the fact that the Judge explicitly refused to keep the record open past February 5, 2015, thus depriving Applicant of the opportunity to submit an important document. The Board construes this statement as an assertion that the Judge denied Applicant procedural due process. Applicant fails to establish error. The granting of continuances is reviewed by the Board for an abuse of discretion on the part of the Judge. *See, e.g.*, ISCR Case No. 01-03683 at 4 (App. Bd. Aug. 9, 2002). There is no right to a continuance, and a party challenging the denial of a continuance has the burden of showing the Judge's denial was arbitrary or capricious. *See, e.g.*, ISCR Case No. 02-16061 at 3 (App. Bd. Feb. 17, 2005). The decision to keep the record open for a period beyond the conclusion of the hearing is analogous to the granting of a continuance. In this case, Applicant asked for a period of 30 days post-hearing in which to submit documents. The Judge agreed to 26 days, without further objection from Applicant. The Judge indicated at that time that she would entertain no additional extensions beyond that time. Given the length of the time extension granted by the Judge, the Board concludes that Applicant fails to establish arbitrary or capricious conduct on the part of the Judge.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice 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 the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge 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