

KEYWORD: Guideline F

DIGEST: In holding the record open, the Judge did not explicitly mention the state tax issues. However, he told Applicant that he could submit evidence about a short sale of real property, various debts that a law firm was addressing on his behalf, extracts from his military records, and “[a]nything you’d . . . want me to consider, you can submit that as well. . . . I look at all the aspects that are submitted on the SOR, all the issues that are discussed in the SOR.” A Judge has no authority to advise an applicant on the quantum of evidence that would mitigate the concerns in his case. There is no reason to conclude that the Judge did so or that he limited Applicant’s post-hearing documents to certain specified subjects. To the contrary, his guidance was quite broad and could reasonably be understood to mean evidence regarding any or all of the SOR allegations. Adverse decision affirmed.

CASENO: 14-05762.a1

DATE: 12/15/2016

DATE: December 15, 2016

In Re:)	
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Applicant for Security Clearance)	ISCR Case No. 14-05762

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 19, 2015, 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 September 29, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul 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 Applicant was denied an opportunity to submit relevant and material evidence; whether the Judge’s whole-person analysis was erroneous; 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

The Judge made the following findings pertinent to the issues raised upon appeal: Applicant failed to file and pay his Federal income taxes in a timely manner for tax years 2008 through 2011. He filed his returns for 2008 through 2010 in 2011. He filed his 2011 return after it was due. In August 2015, he finished paying off his debt to the IRS. He also failed to file and pay his state income taxes for 2009 through 2010. When asked if he had filed his state return for 2011, he replied, “I think so.” Decision at 3. The Judge found that Applicant had not presented evidence to show that he had actually filed his state return, either in his Answer to the SOR or in his post-hearing submissions.

Applicant attributed his tax problems to his ex-wife. He was traveling, due to his job, and had to take his mother back to her homeland, where she died. Applicant relied on his wife to take care of their taxes and was unaware of the fact that she was not doing so. Applicant conceded, however, that he knew the importance of filing his tax returns but did not begin resolving his debts to the IRS until 27 months after they had become due.

Applicant received numerous awards while in the military. His monthly income is over \$8,500 and his expenses are a little over \$2,840. He submitted four letters of recommendation from persons who have known him in a professional capacity.

The Judge’s Analysis

The Judge cleared Applicant of allegations about such things as a charged-off mortgage, a credit card account, etc. However, he entered adverse findings regarding Applicant’s tax delinquencies. He stated that Applicant’s failure to file his Federal and state tax returns for many years remained a concern. He noted that Applicant had provided no evidence about the status of his

state tax debt. The Judge stated that Applicant's tax delinquencies left him with questions and doubts about his eligibility for a clearance.

Discussion

Applicant points out that he represented himself at the hearing. He notes that the Judge left the record open after the hearing for the presentation of additional evidence but did not mention Applicant's state tax debt as something he might want to address. He argues that he could have presented information about his state taxes had he understood that he could do so. He also asserts that Department Counsel conceded in argument that Applicant had paid his state taxes.

Applicant is correct that, in announcing his decision to hold the record open, the Judge did not explicitly mention the state tax issues. However, he told Applicant that he could submit evidence about a short sale of real property, various debts that a law firm was addressing on his behalf, extracts from his military records, and "[a]nything you'd . . . want me to consider, you can submit that as well. . . . I look at all the aspects that are submitted on the SOR, all the issues that are discussed in the SOR." Tr. at 73-74. Of course, a Judge has no authority to advise an applicant on the quantum of evidence that would mitigate the concerns in his case. *See, e.g.*, ISCR Case No. 14-02806 at 3, n.1 (App. Bd. Sep. 9, 2015). There is no reason to conclude that the Judge did so or that he limited Applicant's post-hearing documents to certain specified subjects. To the contrary, his guidance was quite broad and could reasonably be understood to mean evidence regarding any or all of the SOR allegations. We find no reason to conclude that Applicant was denied an opportunity to present evidence in his behalf. We have considered Department Counsel's closing argument. It is not clear that he meant to argue that Applicant had paid his state taxes in addition to his Federal ones. In any event, arguments by counsel are not evidence. *See, e.g.*, ISCR Case No. 12-09829 at 4 (App. Bd. Nov. 25, 2016).

Applicant challenges the Judge's whole-person analysis, arguing that it was contradictory. He notes that the Judge found that he had paid his Federal taxes but entered adverse formal findings on that allegation nonetheless. Of course, a Judge is not bound to clear an applicant based solely on evidence that debts have been paid. Even if an applicant has actually paid his debts, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015). In this case, the Judge noted evidence that Applicant had been aware of his tax debts for over two years before he undertook to do anything about them. The timing of debt payments is relevant in evaluating an applicant's case for mitigation. *See, e.g.*, ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015). We conclude that the Judge's whole person analysis complied with the requirements of Directive ¶ 6.3, in that he considered the totality of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 15-00424 at 2-3 (App. Bd. Apr. 20, 2016).

Applicant cites to a Hearing Office case that, he contends, supports his effort to get a clearance. We give this case due considerations as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). Applicant's citation to various pieces of favorable

evidence, such as his character references and his evidence about his wife's conduct, is not enough to rebut the presumption that the Judge considered all of the evidence in the record. Nor has he shown that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 14-05795 at 2, 3 (App. Bd. Apr. 26, 2016)

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. A person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and regulations, voluntary compliance with which is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge

Member, Appeal Board