

KEYWORD: Guideline F

DIGEST: It is not inconsistent for a judge to acknowledge favorable evidence yet conclude that, despite such evidence, an applicant has not mitigated the security concerns. An applicant bears the burden of persuasion. Adverse decision affirmed.

CASENO: 15-03978.a1

DATE: 03/31/2017

DATE: March 31, 2017

In Re:)	
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Applicant for Security Clearance)	ISCR Case No. 15-03978

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 February 12, 2016, 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 4, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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’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

Applicant works for a Defense contractor. He served in the military from 2001 until 2004, when he received a General Discharge Under Honorable Conditions. Divorced and remarried, Applicant has five children and a stepchild.

Applicant’s SOR alleges a Chapter 7 bankruptcy discharge that occurred in 2006, several delinquent debts, and an allegation that he failed to file Federal tax returns for 2012 and 2013. He filed these returns in 2015. He has installment agreements with the IRS for the payment of his tax obligations. Documentation from one installment agreement shows he owes a little over \$17,200 in back taxes, penalties, and interest for 2010 and for 2012 through 2014. He also owes about \$2,000 for 2015. The Judge noted that Applicant’s failure to pay tax was not alleged. He stated that he would consider it on the issues of mitigation, the whole-person analysis, etc. Decision at 3, n.6.

Applicant has received financial counseling. He stated that he is committed to paying his taxes and maintaining financial health. Applicant enjoys a good reputation for job performance, as well as for dependability, trustworthiness, honesty, reliability, and integrity.

The Judge’s Analysis

The Judge resolved the bankruptcy allegations in Applicant’s favor. He also entered favorable findings for Applicant’s delinquent debts, insofar as most had been resolved. However, he entered adverse findings regarding Applicant’s tax problems. He concluded that, despite Applicant’s having finally filed his returns and entered into installment agreements for the payment of amounts owed, Applicant’s problems are not fully under control, citing to the original failure to file and to evidence that Applicant owes back taxes for 2010 and 2012 through 2015.

In the whole person analysis, the Judge considered Applicant’s military service, consistent employment, and favorable character evidence. He concluded, however, that Applicant’s ongoing tax issues raised doubts about his fitness for a clearance.

Discussion

Applicant argues that the Judge's analysis was not consistent. He notes that the Judge made findings about things that were favorable, such as his receipt of financial counseling, his announced intention to pay his taxes, and his belief that he will not owe further taxes for 2016. He argued that the Judge's adverse decision runs contrary to these findings, resulting in a "fragmented" analysis.

However, it is not inconsistent for a Judge to acknowledge favorable evidence yet conclude that, despite such evidence, an applicant has not succeeded in mitigating the concerns arising from his conduct or circumstances. *See, e.g.*, ISCR Case No. 01-24504 at 3-4 (App. Bd. Feb. 11, 2003). In that case, we stated that a Judge's general findings that an applicant was of good character and was trustworthy did not undermine his ultimate conclusion that the applicant was financially irresponsible and had not mitigated her delinquent debts. We stated that, in evaluating the whole-person, a Judge is "required . . . to evaluate both favorable and unfavorable evidence Absent a showing . . . that he did so in a manner that was arbitrary, capricious, or contrary to law, [we] will not disturb the Judge's findings and conclusions on appeal."

By the same token, in the case before us there is no contradiction between the Judge's findings about Applicant's favorable evidence and his conclusion that this evidence was not entitled to such weight as to resolve the concerns arising from Applicant's failure to file his tax returns. An applicant bears the burden of persuasion, and the Judge did not err in considering, on the issue of mitigation, evidence that Applicant continues to owe back taxes for several years. Under the facts of this case, the Judge's weighing of the evidence is supportable. Despite Applicant's argument to the contrary, the Judge complied with the requirements of the Directive, in that he considered the totality of the record evidence in reaching his decision. *See, e.g.*, ISCR Case No. 14-06653 at 3 (App. Bd. Nov. 18, 2016).

Applicant has cited to a Hearing Office case that he believes supports his effort to obtain a clearance. We give this case due consideration as persuasive evidence. However, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 15-04096 at 2 (App. Bd. Nov. 22, 2016). Moreover, there are factual differences between the cited case and Applicant's own. Applicant has not provided a reason to conclude that the Judge's decision was in error.

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 filing tax returns in a timely manner, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. Failure to file tax returns suggests that an applicant has a problem with complying with well-established rules and regulations. *Id.* 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 Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board