

KEYWORD: Guideline F

DIGEST: Department Counsel advised the Judge that he had explained to Applicant that he had an “absolute right” to receive 15 days notice of the hearing, and Applicant agreed to waive that right. Upon questioning from the Judge, Applicant agreed that he waived that right and acknowledged that he had sufficient time to prepare for the hearing. Due to Applicant’s waiver of the 15-day notice, the Judge also left the record open for a month. Applicant was adequately informed of his 15-day notice of hearing right, and he knowingly and intelligently waived that right. The record contains no basis for Applicant to have assumed that he was entitled to a favorable outcome or that his waiver for the 15-day notice requirement would have resulted in any particular outcome. He was not denied the due process that the Directive affords. Adverse decision affirmed.

CASENO: 16-03485.a1

DATE: 11/9/2017

DATE: November 9, 2017

In Re:)	
)	
-----)	ISCR Case No. 16-03485
)	
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 January 6, 2017, 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 August 14, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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 due process and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR alleged that Applicant failed to file his Federal and state income tax returns from 2006 through 2012 and that he had four Federal tax liens filed against him totaling about \$59,000. Applicant admitted each of the SOR allegations. He attributed his tax problems to believing mistakenly that payments he received were non-taxable travel expenses instead of his salary. In 2015, he learned from the Internal Revenue Service (IRS) that those payments were taxable. In November 2016, he began working with an IRS agent to resolve his tax problems. In a letter from April 2017, the IRS agent states that he anticipates Applicant's case will be resolved once the returns are received. Prior to receipt of the SOR, Applicant worked with a tax preparer on filing his 2010-2012 income tax returns. After the hearing, Applicant submitted a letter indicating that his 2010-2013 income tax returns have been finalized and have been faxed to the IRS agent. He is now working on his 2006-2009 income tax returns. For 2014-2016, he filed his income tax returns and paid his income taxes. The Judge concluded that none of the mitigating conditions fully applied because Applicant had not yet filed any of the income tax returns in question nor had he begun resolving the four Federal tax liens.

In the appeal brief, Applicant states that he "agreed to waive my right to the 15 days from the date of the notice of appeal." Appeal Brief at 1. From the context of his brief, it is apparent that Applicant is referring to his waiver of the right to have at least 15 days advanced notice of the time and place of the hearing under Directive ¶ E3.1.8. He contends that he waived the 15-day notice requirement based on his assumption that the "word" of the IRS agent would carry enough weight for the Judge to issue a favorable decision. He further states, "Had I known that the word of the IRS agent would not be sufficient for a favorable decision I would have exercised my right to have the 15 days from the notice . . . and my case would have taken place later in the year and [the Judge] would have seen that I am currently in an installment agreement and my taxes all filed." Appeal Brief at 1.

At the beginning of the hearing, Department Counsel advised the Judge that he had explained to Applicant that he had an "absolute right" to receive 15 days notice of the hearing, and Applicant agreed to waive that right. Tr. at 7. Upon questioning from the Judge, Applicant agreed that he waived that right and acknowledged that he had sufficient time to prepare for the hearing. Tr. at 8. Due to Applicant's waiver of the 15-day notice, the Judge also left the record open for a month after the hearing to provide him the opportunity to present additional documentation. Tr. at 9 and 79-84. After reviewing the record, the Board concludes that Applicant was adequately informed of his 15-day notice of hearing right, and he knowingly and intelligently waived that right. *See, e.g.*, ISCR Case No. 06-24213 at 2 (App. Bd. Jun. 10, 2008). The record contains no basis for Applicant to have assumed that he was entitled to a favorable outcome or that his waiver of the 15-day notice requirement would have resulted in any particular outcome. He was not denied the due process that

the Directive affords.

Applicant contends he presented documentation that he filed his 2010-2013 Federal income tax returns. In her findings of fact, the Judge correctly noted that Applicant presented a post-hearing letter in which he stated he finalized those tax returns and faxed them to the IRS agent. He did not submit copies of those tax returns with that letter. The Board has previously noted that it is reasonable for a Judge to expect applicants to present documentation showing resolution of their financial problems. *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008). In the absence of evidence corroborating Applicant's post-hearing statement, the Judge did not error in concluding that Applicant had not yet filed his tax returns for the years in question. Additionally, even if Applicant had established that he filed those tax returns after the hearing, the Judge could still consider the circumstances underlying his tax filing deficiencies for what they may reveal about his worthiness for a security clearance. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug. 17, 2015).

In his appeal brief, Applicant provided information that he did not previously submit to the Judge. Such information constitutes new evidence that the Appeal Board cannot consider. Directive ¶ E3.1.29. The balance of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. For example, he argues that the statements provided by the IRS agent and his tax preparer should be sufficient to resolve the security concerns. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. 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. 15-00650 at 2 (App. Bd. Jun. 27, 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 filing tax returns and 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. 15-08782 at 2 (App. Bd. Apr. 5, 2017). 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, Encl. 2, App A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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 F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board