

KEYWORD: Guideline B; Guideline L; Guideline F

DIGEST: Applicant was given an opportunity to request a hearing and clearly responded that as far as he was concerned the documentary record was sufficient. There was no ambiguity in this response, which placed the Judge on notice that Applicant had no objection to his consideration of the existing transcript. In any event, forum choice is a responsibility of the parties, not of the Judge. Moreover, if Applicant believed that a full and complete understanding of his circumstances required his live testimony, it was his duty to request a hearing. In a DOHA proceeding, it is the applicant's job to present evidence in mitigation of the concerns raised in an SOR. The Judge is an advocate for neither side and bases his Decision on the evidence presented to him by the parties. He has no independent duty to obtain additional evidence. Adverse decision affirmed

CASENO: 12-10335.a2

DATE: 12/29/2017

DATE: December 29, 2017

In Re:)	
)	
-----)	ISCR Case No. 12-10335
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Adam R. Webber, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline L (Outside Activities), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 21, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip S. Howe denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On July 21, 2017, we remanded the case. On September 7, 2017, Administrative Judge Mark Harvey issued a Decision on Remand, denying Applicant’s request for a security clearance. Applicant again appealed pursuant to the Directive.

Applicant raised the following issues on appeal: whether he was denied due process; whether the Judge’s findings contained errors; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guidelines B and L are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: Beginning around 2002, Applicant worked for a company, for which he attempted to market technology to the DoD and other prospective partners.¹ The company stopped functioning in 2007, and by 2010 Applicant and the company were deeply in debt, though by 2015 Applicant had paid off more than \$450,000. Applicant’s debt now totals about \$30,000.

The company employed an accountant, who was responsible for preparing its tax returns as well as Applicant’s. This accountant was fired in 2007. Applicant’s SOR alleges that he failed to file his Federal and state tax returns in a timely fashion for tax years 2008 through 2011. Although he hired a CPA to assist him, Applicant did not provide her all of the relevant information. His returns have subsequently been filed. By the close of the record, Applicant still owes about \$30,000 in Federal, state, and local taxes.

The SOR also alleges a debt of a little over \$11,000 owed to a law firm for representation provided during the course of a lawsuit in which the company was a party. This account is in collection. Applicant states that this debt was owed by the company and not by himself, although

¹Applicant testified that he started the company himself. Tr. at 70.

the creditor contends that Applicant is liable.² This debt appears as Applicant's on a credit report by one of the three reporting agencies.

Applicant attributed his financial problems to several things: that he lacked the financial expertise to run the company; he provided financial support to his parents and in-laws; the death of his son and resulting litigation; his own serious medical problems due to stress; fraud perpetrated by an employee and accountant against the company; a groundless lawsuit filed against the company; and modifications that Applicant made to his residence.

Applicant enjoys a excellent reputation for honesty, reliability, and trustworthiness. He called two witnesses at the hearing, one of whom was generally aware of the nature of Applicant's difficulties.

The Judge's Analysis

Although he resolved most of the SOR debts in Applicant's favor, the Judge entered adverse findings regarding the two discussed above. Though noting that some of the conditions that contributed to Applicant's financial problems were beyond his control, he concluded that others, such as undertaking duties without the appropriate degree of financial expertise, were not. Concerning the debt to the law firm, the Judge stated that Applicant did not provide documents about this matter, including a contract with the law firm or any correspondence with it. He stated that this debt is substantial and remains on Applicant's credit report. The Judge also noted that Applicant had failed to file his tax returns in a timely fashion and to pay his taxes for several years. He acknowledged evidence that Applicant's returns have now been filed, but he concluded that this was not sufficient to mitigate Applicant's lengthy history of tax delinquencies.³

In the whole-person analysis, the Judge cited to the testimony of Applicant's character witnesses that he is reliable, trustworthy, and honest, though too trusting of others. He also noted the progress that Applicant had made in resolving his delinquent debts. However, he found that Applicant had not demonstrated responsible action regarding the debt to the law firm. He also stated that Applicant had known about his obligation to file and pay taxes for several years but did not file until late 2016. He stated that Applicant's having filed his returns shortly after the hearing in his case was not sufficient to mitigate the concerns arising from them.

²“[Q]: Have you written them or otherwise communicated to them that you dispute the debt? [A]: I have called them and I have written a letter. And the response is, you still owe us this.” Tr. at 122.

³The Judge noted evidence that Applicant owed tax for 2012 through 2014, although this was not alleged in the SOR. He stated that he was considering this non-alleged tax debt in on the questions of mitigation, rehabilitation, credibility, and the whole-person concept. Decision at 12, note 7.

Discussion

Applicant contends that the Judge erred by not convening a hearing upon remand. As he notes, after considering his original appeal, we remanded the case for the Judge to consider an additional document. We stated that, if the case were to be “remanded to a different Judge, he or she should inquire of the parties whether a new hearing is required or whether the Judge can rely on the transcript of the original hearing.” ISCR Case No. 12-10335 at 3 (App. Bd. Jul. 21, 2017). On July 31, 2017, the Judge inquired through Department Counsel whether Applicant requested a new hearing. By email dated August 3, 2017, Applicant replied as follows:

We believe that the additional documents and the testimony and evidence adduced [at the original hearing] is sufficient . . . That said . . . if your Honor believes that this case will turn on a subjective assessment of [Applicant’s] credibility, sincerity, honesty, loyalty, or dependability under the whole-person concept, we believe it would be fitting and proper for your Honor to hear live testimony from [Applicant] directly. Hearing Exhibit 5.

Accordingly, the Judge decided the case on the existing record as supplemented by Applicant’s additional documentary evidence.

Applicant now contends that the Judge erred by not convening a hearing. He argues that the Judge’s adverse decision includes an implicit negative credibility determination, which he should not have performed without personally observing Applicant and hearing him testify. He states that an evaluation of his credibility and his live testimony were crucial to a proper resolution of the case and that under the circumstances the Judge decided the case without all of the evidence.

As Department Counsel observes in his Reply Brief, Applicant was given an opportunity to request a hearing and clearly responded that as far as he was concerned the documentary record was sufficient. There was no ambiguity in this response, which placed the Judge on notice that Applicant had no objection to his consideration of the existing transcript. In any event, as Department Counsel argues, forum choice is a responsibility of the parties, not of the Judge. *See* Directive ¶¶ E3.1.4; E3.1.7; E3.1.8. Moreover, if Applicant believed that a full and complete understanding of his circumstances required his live testimony, it was his duty to request a hearing. In a DOHA proceeding, it is the applicant’s job to present evidence in mitigation of the concerns raised in an SOR. Directive ¶ E3.1.15. The Judge is an advocate for neither side and bases his Decision on the evidence presented to him by the parties. He has no independent duty to obtain additional evidence. *See, e.g.*, ISCR Case No. 14-01925 at 3 (App. Bd. Jun. 26, 2015). We conclude that Applicant waived any right he had to a second hearing. Applicant was not denied the due process afforded by the Directive.

To the extent that Applicant is challenging a purported credibility determination, the Judge does not appear to have made one. In fact, he made findings about the favorable character testimony of Applicant’s witnesses, and he addressed that testimony in his analysis. Nowhere in the Decision does he express a view of Applicant’s character or credibility contrary to the opinions of these

witnesses. The mere fact that a Judge has entered an adverse decision does not mean that he found the applicant to be lacking in credibility. It is not inconsistent for a Judge to find an applicant to be honest and believable but, nevertheless, reasonably to conclude that the applicant's presentation is not sufficient to meet his or her burden of persuasion as to mitigation. *See, e.g.*, ISCR Case No. 14-05795 at 2 (App. Bd. Apr. 26, 2016).

Applicant argues that the Judge's findings of fact contain errors. For example, he argues that the Judge erred in finding that he still owes about \$30,000 in taxes. The Judge based this finding upon Applicant's own evidence, a letter from his CPA, which avers a \$37,000 debt to Federal, state, and local tax authorities. Applicant Exhibit Q, dated August 24, 2017. The Judge credited Applicant with a \$7,300 payment for tax year 2011, of which he thought the CPA may have been unaware, reducing the amount accordingly. Decision at 6. Even if the Judge erred in determining the amount of Applicant's tax debt as of the closure of the record upon remand, it did not likely affect the outcome of the case. His analysis relied in large measure not upon the precise amount of such debt but, rather, upon the dilatory nature of Applicant's efforts to address his tax problem.⁴ *See* ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017) for the proposition that timing of debt payments is relevant in evaluating an applicant's case for mitigation.

Applicant challenges the Judge's finding that he is responsible for the debt to the law firm. We note evidence that the firm holds Applicant responsible for the debt (*see* note 2, *supra*) and that it appears as his liability on a credit report. The contents of a credit report are normally sufficient to meet the substantial evidence standard for allegations of indebtedness. *See, e.g.*, ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015). The Judge's finding is a reasonable interpretation of the evidence. In any event, Applicant admitted that he signed the contract with this law firm on behalf of the company. Tr. at 121. Business-related debts can have a bearing upon the judgment and reliability of company officials who incurred them. *See, e.g.*, ISCR Case No. 14-01231 at 4 (App. Bd. Feb. 10, 2015). Therefore, even if the Judge's finding was erroneous, he could still reasonably have found that the totality of circumstances underlying it raised concerns about Applicant's judgment. Accordingly, any error did not likely affect the overall outcome of the case. Applicant has cited to no harmful error in the Judge's findings. The Judge's material findings of security concern are based upon substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 16-00276 at 4 (App. Bd. Oct. 30, 2017).

The balance of Applicant's brief is a challenge to the Judge's weighing of the evidence. Among other things, he argues that the Judge should have extended greater weight to evidence of Applicant's personal circumstances. However, we find no reason to conclude that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08711 at 3 (App. Bd. Aug. 24, 2017). The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. A person who fails repeatedly to fulfill his or her legal obligations, such as

⁴The Judge cited to Applicant's "lengthy history of noncompliance" with tax laws. "There is insufficient evidence about why Applicant was unable to make greater progress sooner in the filing of his tax returns [and] in the payment of his tax debts[.]" Decision at 14.

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. 15-06707 at 3 (App. Bd. Aug. 15, 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 Y. Ra'anan
Michael Y. 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