

KEYWORD: Guideline F

DIGEST: Applicant has not made a *prima facie* showing that she sought to submit additional mitigating evidence but was prevented from doing so by DOHA personnel. She cited to no harmful error in the Judge’s findings. She also failed to either rebut the presumption that the Judge considered all of the evidence in the record or show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 15-02728.a1

DATE: 02/09/2018

DATE: February 9, 2018

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 15-02728
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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 October 21, 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 decision on the written record. On October 25, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 she was denied due process, whether the Judge's whole-person analysis was in error; 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 divorced in 2010 and has since remarried. She has two children from her previous marriage. She has worked for her present employer since 1999. Applicant's SOR lists two bankruptcy filings and numerous delinquent debts, including taxes owed to the IRS and to her state taxation authority. Her bankruptcy petition, discussed below, included over \$29,000 due to the IRS for tax years including 2010 and 2012. The evidence also showed that Applicant had failed to pay her Federal taxes for 2013 through 2015, although this was not alleged in the SOR. The Judge stated that she was considering these non-alleged tax delinquencies on the issues of credibility, application of the mitigating conditions, and the whole-person analysis. Applicant attributed her financial problems to her previous husband having lost his job and to their divorce.

Applicant filed for Chapter 13 bankruptcy protection in early 2012. The petition was dismissed due to errors in the filing process. She filed again later that year, but the case was dismissed in early 2015 upon motion of the Trustee in Bankruptcy. The motion stated in pertinent part:

[F]or material default in the plan as the Debtor has failed to make all plan payments as required by the plan. Debtor is an above median income Debtor and thru March 2015 should have paid \$109,804 to the plan. The Debtor, [as] of March 9, 2015, has only paid \$97,088 and is therefore short of plan payments in the amount of \$12,716. Decision at 3.

The court granted the Trustee's motion and dismissed the petition. At the time of dismissal, the case had been pending for over 30 months and the amount of unsecured claims discharged without payment was zero. The only debts paid through the bankruptcy process were secured debts for two vehicles and three secured debts owed to Applicant's mortgage company. In her response to the SOR, Applicant stated that after having made about \$100,000 in payments under the bankruptcy plan, she felt that she no longer needed to rely on the trustee to make payments. She stated that the Bankruptcy Judge concluded that she should concentrate on making past due mortgage payments and the auto payments and that her tax debts were to be addressed at the end of the plan.

Applicant stated that she had paid her taxes for 2010 and had submitted a payment plan for the balance. She is working with an attorney in order to resolve her tax liabilities. Her credit report states that her mortgage account is being paid as agreed. Applicant stated that some of her debts were charged off or in collection. The Judge found no evidence that Applicant had contacted the creditors who held the collection accounts or that she had made payments. Her SOR lists numerous medical debts that Applicant contends she is researching in order to identify the proper creditor.

The Judge's Analysis

The Judge stated that Applicant's husband's job loss and their subsequent divorce were circumstances outside Applicant's control. She also stated that Applicant's having filed for Chapter 13 bankruptcy protection was a responsible act. On the other hand, she noted Applicant's failure to have made payments under the bankruptcy plan and her failure to demonstrate that she was paying her creditors. The Judge stated that reliance on the fact that debts have fallen off a credit report or on the statute of limitations are not sufficient to mitigate security concerns arising from them. Regarding Applicant's tax problems, the Judge observed that she did not explain why she failed to pay taxes for 2013 through 2015. She provided no information about her income, expenses, or budget. In the whole-person analysis, the Judge reiterated her findings about the bankruptcy dismissal and stated that Applicant has relied on such things as the statute of limitations or the unfounded belief that debts sold to collection agencies relieve her of responsibility for them.

Discussion

Applicant contends that she was denied an opportunity to present additional evidence.¹ She states, "Applicant offered to provide up to date information at least twice because she was denied an extension by Department Counsel[.]" Appeal Brief at 4. The Judge cited to Applicant's Response to the File of Relevant Material (FORM) to the effect that she would like to offer additional information in mitigation. Decision at 7. Applicant's FORM response stated that, "if requested," she would be "more than happy to provide additional information from my creditors[.]" Applicant Exhibit A, Memorandum dated December 13, 2016, at 4.

Applicant's argument includes information from outside the record, which we generally cannot consider. Directive ¶ E3.1.29. However, we will consider new evidence insofar as it bears upon threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015). An applicant who claims that he or she attempted to provide additional evidence, or expressed a desire to do so that was denied, must make a *prima facie* showing of his or her claims. *See, e.g.*, ISCR Case No. 16-01237 at 2 (App. Bd. Dec. 5, 2017). In this case, Applicant has not corroborated her claim to have sought to provide additional evidence or for her claim that Department Counsel prevented her from doing so. Neither has she submitted anything that she could have presented to the Judge during the pendency of the record. She has attached some documents to her brief, but these post-date the Decision itself and would therefore not have been available before the close of the record.² We conclude that Applicant has not made a *prima facie* showing that she sought to submit additional mitigating evidence but was prevented from doing so by DOHA personnel. Applicant was not denied the due process afforded by the Directive.

Applicant challenges some of the Judge's findings, particularly the Judge's treatment of her bankruptcy petition and its dismissal in 2015. She argues that the Judge painted her in an unfair light and that the record shows that she is serious about resolving her delinquent debts. She has

¹Applicant raises this in the context of complaining that she was not considered as a candidate for having her clearance suspended. It is not clear how she believes she would have benefitted from such an action.

²One of these documents is a letter from Applicant's attorney addressing the circumstances underlying the dismissal of Applicant's bankruptcy petition. This letter does not contradict the Judge's findings of fact on this matter.

challenged other findings, for example that she had worked for her current employer since 1999.³ We have considered Applicant's arguments in light of the record as a whole. The Judge's material findings of security concern are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence. Applicant has cited to no harmful error in the Judge's findings. *See, e.g.*, ISCR Case No. 14-04724 at 3 (App. Bd. Aug. 18, 2017).

Applicant cites to evidence that she submitted in her own behalf, such as her ex-husband's job loss, their divorce, her having reported her bankruptcy to her employer, etc. She also states that she has never had a security infraction. Applicant's argument consists, in large measure of a disagreement with the Judge's weighing of the evidence. She has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has she shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017). Contrary to Applicant's argument, the Judge appears to have satisfied the requirements of Directive ¶ 6.3, in that she considered the totality of the evidence in reaching her decision. *See, e.g.*, ISCR Case No. 16-00578 at 2-3 (App. Bd. Sep. 26, 2017). Applicant's significant delinquent debt, her failure to make payments under the bankruptcy plan, and her unexplained tax delinquencies support the Judge's adverse decision.

Applicant contends that the Judge erred in her application of the disqualifying conditions. Among other things, she notes that at the time of her SOR, failure to pay taxes, as opposed to failure to have filed, was not explicitly cited under Guideline F as a security concern. However, the Judge properly applied the current Guidelines in her decision. *See* Security Executive Agent Directive 4, effective date June 8, 2017. One of the disqualifying conditions includes "failure to pay annual Federal, state, or local income tax as required." Directive, Encl. 2, App. A ¶ 19(f). Even under the previous Guidelines, however, failure to pay income tax could raise a security concern. *See, e.g.*, ISCR Case No. 14-06781 (App. Bd. Dec. 16, 2016), in which the applicant's security concerns included failure to pay Federal income tax obligations. We have considered Applicant's argument in its entirety and conclude that the Judge did not err in her application of the disqualifying conditions.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. 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

³This challenged finding is consistent with information that Applicant provided in her security clearance application. Item 2 at 10.

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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board