

KEYWORD: Guideline F

DIGEST: Applicant has not identified any harmful error in the Judge's decision. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Adverse decision affirmed.

CASENO: 15-08043.a1

DATE: 08/03/2018

DATE: August 3, 2018

In Re:)
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 Applicant for Security Clearance)
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ISCR Case No. 15-08043

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Richard Frizzell, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 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 February 28, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuider 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 he 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 Judge’s Findings of Fact and Analysis

The SOR, as amended, lists six allegations. The Judge found in favor of Applicant on three allegations and against him on three allegations. The Judge’s unfavorable findings involve Applicant having a delinquent Federal tax debt of about \$4,400 and him failing to file his Federal and state income tax returns for 2015 and 2016.

In discussing tax filing deficiencies for which a favorable finding was entered, the Judge noted that Applicant’s wife took care of the family tax returns, and she thought it was not necessary to file those returns in a timely manner. Other factors contributing to the delays involved serious family medical issues, Applicant’s underemployment, his incorrect belief that a local tax volunteer filed his tax returns, and his wife’s periods of unemployment and, at other times, her exhaustion from working 12-hour shifts.

Applicant’s Federal tax debt of about \$4,400 arose from tax years 2009, 2010, and 2014. In 2015, the IRS informed Applicant that a tax refund was withheld to pay the delinquent taxes and he still owed \$367. At the date of the hearing, Applicant had not filed his 2015 and 2016 Federal and state tax returns. He initially blamed those tax filing deficiencies on problems at work, but later conceded such problems were not the cause. He filed the delinquent tax returns in September 2017 and noted he was “getting some refunds in these tax returns.” Decision at 4. He also noted that, in the future, he planned to file his tax returns separately from his wife to ensure they are timely filed.

The Judge concluded that Applicant did not establish that he acted responsibly under the circumstances and that his tax filing deficiencies showed poor judgment. The Judge also stated:

The main problem here is Applicant’s failure to timely file his state and federal tax returns for tax years 2012 through 2016. For some of these years, he was entitled to a refund, or the taxes due were low. For the first three years, he relied on his spouse to file their tax returns. For 2015 and 2016, he filed the tax returns after his hearing. He did not provide documentation showing the specific amount of federal taxes due. His failure to file his tax returns timely several years ago is

somewhat excused due to his underemployment, lack of education, financial inexperience, misplaced trust in a tax volunteer, and illnesses in his family. There is insufficient assurance his financial problems are resolved, under control, and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.¹

In his whole-person analysis, the Judge also noted that Applicant did not provide documentation showing the current status of his Federal tax debt.

Discussion

In his appeal brief, Applicant states that he submitted documentary evidence to the Judge that did not make it into the record. At the hearing, the Judge left the record open to September 29, 2017, for Applicant to submit additional matters. Tr. at 63-65. On September 23, 2017, Applicant's Personal Representative sent an email to Department Counsel indicating that Applicant's Federal income tax returns for 2015 and 2016 and state income tax returns for 2011, 2012, 2013, 2015 and 2016 were filed and Applicant was "getting some refunds in these tax returns." Applicant's Exhibit (AE) J. On September 25, 2017, Department Counsel forwarded that email to the Judge and included a comment, "Recognizing that our case law places a heavy emphasis on the provision of documentary proof to corroborate oral statements or testimony, the Government defers to you as to whether you would like to see documentary proof that the returns have been filed." *Id.* On AE J, there is a handwritten note pointing to Department Counsel's above comment that states, "Sent hard copy docs on 9/13/17[.]" There is no indication who wrote that handwritten note. In the decision, the Judge noted that Applicant provided nine post-hearing exhibits (AE B through J), which were admitted into the record without objection. As quoted above, the Judge also noted in the decision that, while Applicant filed his 2015 and 2016 tax returns, "[h]e did not provide documentation showing the specific amount of Federal taxes due."

In the appeal brief, Applicant stated that he mailed to the Judge "copies of transmittals" on the day of Department Counsel's email (*i.e.*, September 25, 2017) and attached copies of the documents he sent. Those documents include IRS Form 8879, IRS *e-file* Signature Authorization, for 2015 and 2016, both dated September 7, 2017, which reflect Applicant's gross income, total tax, Federal income tax withheld, and refund or amount owed for each year.² Those documents reflect he qualified for refunds of \$1,292 for 2015 and \$1,236 for 2016. The documents also includes two IRS letters dated September 22, 2017, reflecting that \$462 and \$499 was diverted to his state taxing authority for debts he owed. From our review of the record, we conclude that the failure of some

¹ Decision at 8.

² The Appeal Board is generally precluded from considering new evidence on appeal. Directive ¶ E3.1.29. However, in the past we have considered new evidence insofar as it bears upon questions of due process or jurisdiction. *See, e.g.*, ISCR Case No.14-00812 at 2 (App. Bd. Jul. 8, 2015).

of Applicant's post-hearing exhibits to make it into the record was at most harmless error. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013)(An error is harmless if it did not likely affect the outcome of the case). First, we noted the Judge found that Applicant filed his 2015 and 2016 Federal income tax returns based on the Personal Representative's email. Second, while it is plausible that Applicant's delinquent tax debt has been resolved, the documents that did not make it into the record do not explicitly state that debt is resolved. Third, the SOR notified Applicant in May 2016 that his tax filing deficiencies created security concerns, yet, he did not file his 2015 and 2016 Federal income tax return until weeks after his security clearance hearing in August 2017. Fourth, the Judge noted in the decision that the main concern was Applicant's failure to file his tax returns for a number of years in a timely manner. Fifth, the Judge concluded there was "insufficient assurance" that Applicant's financial problems will not recur in the future. Decision at 8. In light of the above, the failure of some of Applicant's post-hearing exhibits to make it into the record did not affect the outcome of the case and, therefore, did not result in a denial of due process.

The balance of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence, which is not sufficient to show that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

Applicant has not identified any harmful error in the Judge's decision. 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

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