

KEYWORD: Guideline F

DIGEST: At the hearing, Applicant testified that he had not paid his taxes as a 1099 employee because “he did not understand that he would have to pay his taxes on his income.” He also testified that he kept the funds that he should have paid in taxes in order to address other expenses. Adverse decision affirmed.

CASENO: 15-08908.a1

DATE: 03/26/2018

DATE: March 26, 2018

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In Re:)	
)	
-----)	ISCR Case No. 15-08908
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Stephanie J. Maloney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 3, 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 November 24, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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 has worked for a Defense contractor since mid-2015. He has a college degree, financed with student loans which have a balance of over \$104,000. Applicant and his wife operated a business, which lost its primary contract. Applicant was unemployed until 2008, when he found work with a company as a 1099 contractor. After Applicant’s business closed, his spouse worked as an employee of their state, but she eventually lost this job. As a consequence of these circumstances, Applicant and his wife experienced financial problems.

Applicant disclosed in his security clearance application (SCA) that he owed Federal and state income taxes for 2014. During his clearance interview, Applicant stated that he had not paid his Federal or state income taxes for 2008, 2010, 2011, and 2013. Applicant attributed his tax delinquencies to his spouse’s unemployment and to prioritizing living expenses over tax obligations. At the hearing, Applicant testified that he had not paid his taxes as a 1099 employee because “he did not understand that he would have to pay his taxes on his income.” Decision at 5. He also testified that he kept the funds that he should have paid in taxes in order to address other expenses.

In resolving his tax problems, Applicant gave priority to his state tax delinquencies because he found the IRS to be more accommodating. He entered into an installment agreement with the state tax authority to address tax liens and, as of August 2017, was in good standing with his state.

He hired a tax resolution firm to assist him in dealing with the IRS. Applicant entered into an installment agreement, which began in October 2016. He missed a couple of payments, which Applicant stated was with the concurrence of the IRS because their tax refunds were applied to their back taxes. In August 2017, Applicant and his wife entered into a new installment agreement to resolve their \$51,700 tax debt.

Applicant obtained a hardship deferment for his student loans, and, in August 2017, he entered into a payment schedule which, if he makes all of his payments, will discharge his student loan debt by 2028.

The Judge’s Analysis

The Judge cited to Applicant's business having lost its primary customer and to his wife's unemployment, which were circumstances outside their control. She concluded that Applicant showed responsible action in regards to a mortgage debt alleged in the SOR. She also resolved Applicant's state tax problems in his favor. However, she entered adverse findings regarding his debt to the IRS. She cited to evidence that he still owes over \$51,000 and concluded that he had not made enough payments on his installment plan to establish clear indications that his Federal tax issues are likely to be resolved or are under control. She stated that it will take Applicant years to resolve this debt.

The Judge noted that Applicant and his spouse have an adjusted gross income of nearly \$104,000, yet they had only \$200 in bank deposits. Applicant had to borrow from his 401(k) in order to meet expenses, suggesting that he has a cash flow problem. She stated that Applicant has committed to monthly payments on his student loans but noted that he had a history of late mortgage payments, which tended to impugn his financial judgment.

In the whole-person analysis, the Judge cited to Applicant having failed to pay his taxes for six years, which raises concerns about his judgment, reliability, and trustworthiness. She stated that, even when tax concerns have been corrected, a Judge may still consider an applicant's prior behavior in evaluating his case for a clearance. Noting that on his SCA Applicant had disclosed only one year's tax delinquency, she stated that he had either been lacking in candor or had not been aware of the full extent of his tax problems. She stated that his efforts to resolve his Federal tax problems are too recent to establish a track record of debt payment.

Discussion

Applicant contends that the Judge's mitigation analysis was flawed. He argues that the circumstances surrounding his Federal debts are not measurably different from those of the state that the Judge resolved in his favor. He takes issue with the Judge's comment to the effect that it may take years for him to resolve his Federal debt. He also challenges the Judge's conclusion that his effort to resolve his Federal tax debt is too recent to be of mitigating value.

Given the size of Applicant's Federal tax debt relative to that owed to his state, however, we find no reason to disturb the Judge's adverse holding. Moreover, her findings that Applicant prioritized his state taxes over his Federal obligations and that, by August 2017, he was in good standing with his state provide a reason to distinguish her treatment of the two categories of tax delinquency. We note the Judge's observation that Applicant may take a long time to resolve his Federal debt. While such a circumstance in and of itself may be of little security significance, her adverse decision relied on other, more telling, matters. These include that Applicant simply did not pay any taxes on his income for the years in question, which in and of itself impugns his judgment. Moreover, the Judge noted that Applicant had sometimes failed to make his mortgage payments and that, despite an annual income of over \$100,000, he had to borrow from his retirement fund in order to meet his expenses. Evidence that the Judge reasonably characterized as showing cash-flow problems raises a concern that Applicant may have difficulty maintaining steady payments over a

long course of time, which, in turn, provides a reason to question the extent to which he has established a track record of tax debt resolution.

Applicant contends that the Judge erred by considering his student loans, which were not alleged in the SOR. He argues that he was not placed on notice that this debt would be of concern. However, a Judge may consider conduct not alleged in the SOR for a variety of reasons, such as evaluating an applicant's case for mitigation or rehabilitation, as well as the applicant's credibility and the whole-person factors. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). In the case before us, the Judge discussed Applicant's student loans as part of her analysis of the mitigating conditions. She did not address them as a separate security concern, nor did she extend undue weight to them. We note Applicant's argument that the Judge's credibility determination was in error. We give deference to a Judge's credibility determination and find no reason to disturb the one in this case. *See* Directive ¶ E3.1.32.1.

We have considered the balance of Applicant's arguments and conclude that they amount to a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-07062 at 2 (App. Bd. Nov. 21, 2017). Applicant's contentions on appeal are not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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 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