

KEYWORD: Guideline F

DIGEST: A Judge’s ruling on a request for continuance is reviewed under an abuse of discretion standard. Of particular note, after the Judge denied the continuance request before the hearing, Applicant later indicated that he was prepared to proceed with that hearing. The Judge did not err in denying Applicant’s continuance request. Adverse decision affirmed.

CASENO: 16-00164.a1

DATE: 04/06/2018

DATE: April 6, 2018

In Re:)	
)	
-----)	ISCR Case No. 16-00164
)	
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 October 4, 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 December 12, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Candace Le’i Garcia 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 for 2013 and 2014 as required. Also, it alleged he owed about \$28,000 for a 2009 Federal tax lien as well as about \$33,000 in delinquent Federal taxes for 2005, 2009, and 2010; about \$4,000 in delinquent state taxes for 2012, and about \$53,000 for nine delinquent consumer debts. In responding to the SOR, Applicant admitted each of the allegations except for the state tax debt and a small consumer debt. The Judge stated that the SOR allegations were established by Applicant's admissions and his credit reports. After noting that Applicant failed to present documentation to show he made good-faith efforts to resolve his debts, the Judge found against him on all of the SOR allegations with the exception of one allegation that the Government withdrew.¹

As best we can discern, Applicant is contending that the Judge erred in denying his request for a continuance. The record reveals that Applicant requested a hearing when he responded to the SOR on January 9, 2017. On June 9, 2017, a Notice of Hearing was issued scheduling the hearing for August 1, 2017. On July 11, 2017, the hearing notice was canceled due to Applicant unavailability. After the Judge coordinated with Applicant and Department Counsel, a second Notice of Hearing was issued on July 21, 2017, scheduling the hearing for September 11, 2017. The hearing convened as rescheduled. Before the hearing began, Applicant made a request for a continuance because he left his hearing documents at the location where he had been deployed in the United States. Department Counsel objected to that request. In summarizing their off-the-record discussion, the Judge stated on the record that she determined Applicant had not shown "good cause" under Directive ¶ E3.1.8 to be granted a continuance and decided to leave the record open for two weeks to allow Applicant an opportunity to submit the documents that he would like to present. The Judge also stated Applicant had indicated that he was prepared to proceed with the hearing. Upon being asked whether the Judge's summary of their off-the-record discussion was accurate, Applicant responded, "Yes." Tr. at 5-6. On September 25, 2017 (the date the record of the proceeding was scheduled to close), Applicant sent an email to the Judge and Department Counsel advising them that he was unable to submit all of his documents because he could not locate his belongings due to his work unit's deployment to another state. In response, the Judge granted him an extension until October 25, 2017, for submission of his post-hearing matters and indicated no additional extensions would be granted. On October 25, 2017, Applicant submitted post-hearing matters. Applicant's Exhibit (AE) A. In that submission, he noted he was unable to retrieve some items, but he did not request a further continuance.

A Judge's ruling on a request for continuance is reviewed under an abuse of discretion

¹ The withdrawn allegation involved an account for which Applicant was only an authorized user. Decision at 5.

standard. *See, e.g.*, ISCR Case No. 09-01175 at 3 (App. Bd. May 11, 2010). Of particular note, after the Judge denied the continuance request before the hearing, Applicant later indicated that he was prepared to proceed with that hearing. The Judge did not err in denying Applicant's continuance request. Applicant also contends that "[t]he two weeks [he] was given was not enough time to track down all of the documents requested." Appeal Brief at 1. The abuse of discretion standard is also used to review a Judge's decision whether or not to leave the record open for submission of additional matters.² As noted above, the record reflects that he was given almost a month and a half from the date of the hearing to submit post-hearing matters. The only documents that Applicant identified that he was unable to retrieve belonged to his wife and daughter, and he did not explain why he could not retrieve those documents or what exactly those documents would have established. AE A. Applicant's arguments do not establish harmful error on the part of the Judge. Given the record in this case, the Judge acted reasonably within her discretion in denying Applicant's request for a continuance at the hearing and in granting him almost a month and a half after the hearing to submit additional matters. Applicant has not established a *prima facie* case that he was denied due process under the Directive.

In his appeal brief, Applicant challenges the portion of the Judge's decision that "talks about failure to file tax returns for 2013 and 2014" and points out he submitted copies for those tax returns in his post-hearing submission. Appeal Brief at 1. In her decision, the Judge is not clear whether she concluded that Applicant had filed his Federal and state tax returns for 2013 and 2014. She noted that Applicant used a tax relief company to prepare those tax returns and provided copies of them, which were signed by him and his wife in March 2017.³ However, the Judge also specifically stated that those returns did not reflect that they had been filed. Decision at 4. We note the Federal income tax returns for both years were stamped "COPY," which is a common practice when they are prepared by a professional tax preparer and is indicia they had been filed. In her analysis, the Judge concluded that Applicant "did not demonstrate that he filed his 2013 and 2014 [F]ederal and state income tax returns, as required." Decision at 9. It is clear that Applicant's tax returns were not filed in a timely manner "as required" by law or regulation. Applicant also indicated that he was shocked the Judge used the phrase "fraudulently filing annual Federal, state, or local income returns." This phrase was used only when the Judge quoted disqualifying condition 19(f).⁴ The decision reflects no reason to believe that the Judge concluded Applicant fraudulently filed any tax return. These allegations of error are resolved adversely to Applicant.

Applicant also challenges the Judge's adverse findings against him on three consumer debts that total less than \$2,000. He claims those debts are the responsibility of his wife and children. In her decision, the Judge noted that Applicant requested creditors remove those debts from his credit report. The Judge, however, also noted that Applicant did not provide corroborating evidence of his

² The Appeal Board reviews a Judge's rulings on motions under the abuse of discretion standard. *See, e.g.*, ISCR Case No. 12-04540 at 4 (App. Bd. Mar. 19, 2014).

³ Applicant's 2013 and 2014 Federal income tax returns were signed and dated. His state income tax returns for those years were neither signed nor dated.

⁴ Directive, Encl. 2, App A ¶ 19(f) states, "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required[.]"

efforts to resolve his debts. The Appeal Board has previously noted that it is reasonable for a Judge to expect applicants to present documentation about the resolution of specific debts. *See, e.g.*, ISCR Case No. 15-03363 at 2 (App. Bd. Oct. 19, 2016). Applicant has failed to establish that the Judge erred in her analysis.

The balance of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. However, those arguments are not sufficient 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. 16-00844 at 2 (App. Bd. Jul. 25, 2017).

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board