

KEYWORD: Guideline D; Guideline J

DIGEST: Applicant contends that Judge erred in finding that he was convicted of the sexual abuse offense. He states that he was never convicted of that offense because he received a suspended imposition of sentence and successfully completed his probation. A court record supports Applicant’s claim that he received a suspended imposition of sentence. Even if the Judge may have erred in finding that Applicant was “convicted” of that offense, such an error was harmless. Adverse decision affirmed.

CASENO: 16-02769.a1

DATE: 05/14/2018

DATE: May 14, 2018

In Re:)	
)	
-----)	ISCR Case No. 16-00792
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Eric Leckie, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 14, 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 January 29, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy 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 the Judge cited to evidence that had not been admitted into the record 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

Appellant experienced financial problems for several years, attributable to care that he provided to his seriously ill mother-in-law and to his wife’s unemployment. The Judge resolved allegations of delinquent debt in his favor. However, the SOR also alleged that Applicant failed to file Federal income tax returns for 2010 through 2013 and state income tax returns for 2005, 2006, and 2010 through 2013, for which he entered adverse findings. In addition to the allegations listed in the SOR, the Judge found that Applicant had not filed his 2007 through 2009 Federal or state returns on time.¹

Applicant claimed that he had filed all of his past-due returns by 2015.² However, he did not corroborate his testimony that his state would not accept late returns for 2005 and 2006. Applicant made no excuses for his late filings. He testified that he was prompted to resolve his tax problems as a result of his background interview.

Applicant enjoys a good reputation for integrity, character, and duty performance. He has been recognized for his professional expertise. Applicant’s annual salary is now about \$88,000 and his wife earns about \$42,000. They keep a budget and he demonstrated that he normally has several hundred dollars left at the end of each month.

The Judge’s Analysis

The Judge characterized Applicant’s tax problems as extensive. He stated that Applicant filed returns for 2007 through 2009 around the time that he completed an earlier security clearance application. He concluded that Applicant’s desire for a clearance probably spurred him to act. He went on to observe that Applicant then failed to file additional returns, again filing them during the

¹The Judge stated that he was considering the non-alleged conduct for such issues as mitigation, rehabilitation, the whole person factors, and credibility.

²The Judge found that Applicant filed his 2015 Federal and state returns in mid-2016.

pendency of his current investigation. The Judge concluded that Applicant's failures were unreasonable. He stated that Applicant did not become dedicated to filing his returns until his clearance was in jeopardy, which suggests that he may be lacking in judgment. The Judge reiterated that he was considering Applicant's non-alleged delinquencies for what they showed about Applicant's case for mitigation. He found that Applicant's belated corrective actions were not enough to mitigate concerns arising from his multiple failures to file his returns on time.

Discussion

Applicant contends that the Judge considered evidence not in the record. He states that the Government's exhibit list refers to an SCA dated June 2014. However, the transcript states, on the contents page, that Government Exhibit (GE) 1 is an SCA dated 2011. He also notes that the Government's exhibit list includes a summary of his clearance interview but that the Government did not offer the summary into evidence. Nevertheless, he argues that the Judge relied on the interview in his findings of fact.

Regarding the SCA, Government Exhibit (GE) 1 is an SCA signed by Applicant in June 2014. Both the exhibit list and a memorandum from Department Counsel to Applicant, dated January 31, 2017, advised that the Government would submit at the hearing an SCA dated June 2014. *See* Hearing Exhibit (HE) I. Therefore, Applicant was advised in advance of the hearing that the Government would submit an SCA from 2014, and the record contains an exhibit that corresponds to this notice. The Judge cited to GE 1 in his Findings and to no other. The reference in the Analysis to an earlier SCA is supported by GE 1 at 27. We conclude that the reference to a 2011 SCA was a typo in the transcript. There is no reason to believe that the Judge considered another SCA not in the record.³

In addition, the record shows that Department Counsel notified Applicant that he would offer a summary of Applicant's clearance interview. HE I. However, Department Counsel did not present this exhibit at the hearing, and it is not included in the record. In and of itself, this is not an error. The Judge did find that Applicant began addressing his more recent tax problems after his interview. However, this was based upon Applicant's testimony at the hearing during direct examination.⁴ The record does not support a conclusion that the Judge considered the interview summary itself.

Applicant also argues that the interview summary contains information that would have been beneficial to him. If so, he could have submitted it himself. It is an applicant's job to present evidence in mitigation of the concerns raised by an SOR. Directive ¶ E3.1.15. He notes that the Government's exhibit list states that the interview occurred in 2015. He argues that he had informed

³In any event, Applicant did not object to GE 1, whether on the ground of inadequate notice or any other reason. Therefore, any objection he may otherwise have had about the admissibility of GE 1 has been waived.

⁴"... I told my investigator, at the time... when they started doing my clearance, I explained to her everything, and then I started filing in 2014, to make sure I went back and started filing all my taxes, and got them straight." Tr. at 41.

his interviewer in 2015 about corrective efforts that he had taken a year before. Accordingly, he contends that, contrary to the Judge's finding, he had begun addressing his problems prior to his interview and not because of it. We conclude that the Judge's finding is a reasonable interpretation of Applicant's testimony. Even if it were not, the evidence shows that Applicant began addressing his more recent filing delinquencies around the time of his current adjudication. This is consistent with the Judge's conclusion that Applicant undertook to file his returns only when his clearance was possibly at risk. Therefore, even if there were some errors in the Judge's findings, they did not likely affect the outcome of the case.

Applicant argues that the Judge erred by relying on non-alleged misconduct. However, conduct not alleged or otherwise fairly embraced by the SOR may be relevant for other purposes: making a credibility determination; evaluating the applicant's case for extenuation or mitigation; evaluating the extent to which the applicant has demonstrated rehabilitation; and in performing a whole-person analysis. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). Our reading of the Decision shows that the Judge addressed the non-alleged conduct in its proper context.

The balance of Applicant's brief is a challenge to the Judge's weighing of the evidence. A disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, 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.*, 15-07062 at 2 (App. Bd. Nov. 21, 2017). The filing of tax returns is both a financial and a legal obligation. An applicant's failure to have done so is sufficient to raise a concern that he may be unwilling to follow other rules and regulations, such as those governing the handling of classified information. *See, e.g.*, ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015). Given the extent of Applicant's tax delinquencies and his failure to provide a reasonable explanation for his conduct, we find no reason to conclude that the Judge mis-weighed the evidence.

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 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