

KEYWORD: Guideline E; Guideline F

DIGEST: Two credit reports established by substantial evidence that Applicant had two Federal tax liens totaling over \$100,000 that were filed against him in 2009. Once those tax liens were proven, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the security concerns arising from those tax liens. The Judge's adverse falsification finding is sustainable and is sufficient independently to support the adverse clearance decision in this case. Adverse decision affirmed.

CASENO: 17-01473.a1

DATE: 08/10/2018

DATE: August 10, 2018

In Re:)	
)	
-----)	ISCR Case No. 17-01473
)	
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 June 2, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 erred in his findings of facts and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge’s decision.

The Judge’s Findings of Fact

Applicant served in the military for over 20 years. He has worked as a Federal contractor since 2003. In 2015 and 2016, his adjusted gross income was over \$225,000. In 2009, the IRS filed tax liens totaling over \$100,000 against him that he states are no longer collectable. He did not file his 2012 through 2015 Federal income tax returns. Although he was involved in a court proceeding over deductions that was eventually resolved in his favor, he was aware that he was required to file his tax returns while the tax proceeding was ongoing and made a conscious decision not to file them. He also did not file his 2011 tax return and estimated that he owed approximately \$100,000 in past-due taxes for 2011 through 2016.

In August 2017, Applicant filed the delinquent tax returns and submitted a request for an installment agreement. A month later, the IRS advised they needed to process information before the installment agreement could be established, but he had not heard back from them.

When Applicant was undergoing a background investigation in 2012/2013, he was told his tax issues could negatively impact his security clearance eligibility. Instead of addressing those tax issues at that time, he changed jobs. In April 2015, Applicant submitted a security clearance application (SCA), disclosed that his wages were garnished for underpayment of self-employment taxes, and indicated that the matter was resolved. He testified that he did not disclose his failure to file or pay his Federal taxes on his 2015 SCA because he knew that would be an issue in assessing his security clearance eligibility.

The Judge’s Analysis

Applicant made a conscious decision not to file his 2012-2015 tax returns and only filed them after the SOR was issued. The evidence raised questions about Applicant’s willingness voluntarily to comply with tax filing and paying requirements. None of the financial considerations mitigating conditions apply.

The Judge found for Applicant on the falsification allegation that he failed to disclose his 2009 tax liens on the SCA because he put the Government on notice of his tax issues between 1994

and 2010. However, the Judge found against him on the falsification allegation for failing to disclose on his SCA that he did not file his Federal income tax returns for 2012-2013.¹ “At hearing, Applicant admitted that he deliberately falsified his SCA, but this belated action is insufficient to mitigate the serious security concerns raised by his dishonesty.” Decision at 7. He has shown, through his words and actions, that he is untrustworthy.

Discussion

In the appeal brief, Applicant states the he made the wrong decision when he decided to represent himself at the hearing and appears to argue that he was misled in making that decision. He notes that “[t]he instructions for the hearing indicated it was an informal hearing that would address the findings in the SOR.” Appeal Brief at 4. To the extent that he is arguing that he was misled, we do not find Applicant’s argument persuasive. In communications with Applicant prior to the hearing, the Judge and Department Counsel noted that the hearing was adversarial in nature, the Government would be represented by an attorney, and Applicant had a right to have an attorney or personal representative assist him in the proceeding.² At the hearing, the Judge again asked Applicant whether he was aware of his right to have an attorney or personal representative assist him at the hearing. Applicant responded that he was aware of those rights and was going to represent himself. Tr. at 6. Applicant has failed to point to any specific record evidence that would show he was misled in any manner about the nature of the hearing or his right to be represented at the hearing by counsel or a personal representative. From our review, the record discloses no basis to conclude that Applicant was denied the rights due him under the Directive or that he had not been adequately advised of those rights. *See, e.g.*, ISCR Case No. 10-02170 at 3 (App. Bd. Feb. 6, 2012).

Applicant also contends that the Judge erred in making a number of findings of fact. For example, he claims the Judge erred in finding that he has three children instead of six; that he did

¹ The SOR alleged that Applicant failed to disclose his 2012 through 2015 Federal income tax returns on his 2015 SCA. The Judge, however, noted that Applicant’s 2014 and 2015 Federal income tax returns were not due at the time he submitted that SCA and considered the allegation as only applying to the requirement to disclose his failure to file his 2012 and 2013 Federal income tax returns.

² See, Appeal Exhibit I, which contains the Chief Judge’s Memorandum, Subject: Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings; Department Counsel’s letter (commonly referred to as the “Discovery Letter”), dated August 28, 2017; and email communications between the Judge, Department Counsel, and Applicant. In an email on February 22, 2018, the Judge advised Applicant:

Right to Counsel (or personal representative): You are advised that you have the right to be represented by counsel at your own expense. You also have the right to the assistance of a personal representative. Although our proceedings are setup to allow persons to represent themselves, if they choose to do so, you should be aware that the Government will be represented by an attorney and our proceedings are adversarial in nature.

not meet the obligations of his “creditors” when he states there is only one creditor, *i.e.* the IRS;³ that he claimed his 57-year old daughter as a dependent on his 2015 and 2016 tax returns when it was a “27/28”-year-old dependent; and that he held a security clearance for “several years” rather than he held one for 50 years. These alleged errors, even if established, were harmless because they did not likely affect the outcome in this case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013).

Applicant further contends the Judge erred in concluding that his two alleged tax liens were no longer collectable. In the appeal brief, he stated:

There are no debts remaining. Only debt identified was satisfied mostly by payments in 2011, negotiations, and statute of limitations. Confirmed by IRS on May 9, 2018 that there is no lien due and no debt to be collected. (Conversation with [an identified IRS representative], Collections).⁴

Applicant’s reference to a conversation with an IRS representative that post-dates the Judge’s decision constitutes new evidence. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

Credit reports (Government Exhibits (GE) 2 and 3) established by substantial evidence that Applicant had two Federal tax liens totaling over \$100,000 that were filed against him in 2009.⁵ Once those tax liens were proven, the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the security concerns arising from those tax liens. Directive ¶ E3.1.15. At the hearing, Applicant indicated that the tax liens were resolved and pointed to a Notice of Federal Tax Lien (Applicant’s Exhibit (AE) C) in support of that claim. Tr. at 31. AE C addresses only one of the alleged tax liens. It states the tax lien was for tax years 1996 and 1997, a demand for tax liability was made and remains unpaid, and, unless the lien was refiled, it would be released after a specified date in 2010. AE C does not establish that the tax lien was satisfactorily resolved. At the hearing, the following exchange occurred between the Judge and Applicant:

[Judge]: All right, do you have any documentation showing that you paid the amount that was due for ‘96/’97 taxes?

[Applicant]: Not accurately.

³ The SOR alleged that Applicant had a delinquent medical debt of \$475. The Judge found in favor of Applicant on this debt because, in light of the evidence, it was insignificant from a security risk assessment perspective. Decision at 5, n.9.

⁴ Appeal Brief at 8.

⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1 and ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018).

[Judge]: I'm sorry.

[Applicant]: No, '97 in taxes, the statute of limitations went south a long time ago. They're no longer collectable, if I did owe it.

* * *

[Judge]: All right. So, did you pay that amount?

[Applicant]: I can't -- I actually had more than that owed at one point in time, so that amount was either paid, or forgiven by the IRS.

[Judge]: Okay, because of the statute of limitation passed?

[Applicant]: Yes, sir. It is not a debt any longer.⁶

The Judge's finding that Applicant stated the tax liens were "no longer collectable" was supported by substantial evidence. In addressing the non-collectability of debts, the Appeal Board has stated:

The security significance of long delinquent debts is not diminished merely because the debts have become legally unenforceable owing to the passage of time. Security clearance decisions are not controlled or limited by any statute of limitation, and reliance on the non-collectability of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive. A security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather a security clearance adjudication is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness to make a decision about the applicant's security eligibility. Accordingly, even if a delinquent debt is legally unenforceable . . . , the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.⁷

We find no error in the Judge's conclusion that Applicant failed to mitigate the security concerns arising from the alleged tax liens.

Regarding the Judge's adverse falsification finding, Applicant states that he should have disclosed on his SCA that he did not file his tax returns for 2012 through 2015. However, he claims that he "was not attempting to hide anything" and that he did not make that disclosure because he was fully capable to working with the IRS, but indicated "it is impossible to effectively work with

⁶ Tr. at 31-33. The record does not contain any documentation of Applicant's payments toward the alleged tax liens.

⁷ See, e.g., ISCR Case No. 10-03656 at 3 (App. Bd. Jan. 19, 2011) (internal citations omitted).

the IRS when OPM/DOHA dictates what will be done.” Appeal Brief at 12. He stated an “earlier occurrence” (presumably his 2012/2013 background investigation) demonstrated this concern, which was also “validated by the fact that you [presumably DOHA] have taken over the management of the IRS situation to the detriment of everyone.” Appeal Brief at 12. His concern about OPM or DOHA interfering in his tax matters is untenable and is no justification or excuse for his failure to disclose his tax filing deficiencies on his SCA. The Judge’s adverse falsification finding is sustainable and is sufficient independently to support the adverse clearance decision in this case.

Applicant’s remaining arguments amount to a disagreement with the Judge’s weighing of the evidence. For example, he argues the Judge erred in concluding that he only took action to resolve his tax filing deficiencies after issuance of the SOR and claims that he was attempting to resolve earlier tax issues with the IRS before filing the delinquent tax returns. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party’s disagreement with the Judge’s weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant’s appeal brief fails to establish the Judge committed any harmful error. 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