

KEYWORD: Guideline F

DIGEST: Besides not alleging that Applicant failed to file his Federal income taxes for 2008-2012, the SOR also did not allege that he owed Federal and state taxes and that he owed the large student loan, i.e., presumably the one for over \$80,000. When the weight of the decision is based on non-alleged issues, a question arises as to whether an applicant has been denied due process because he or she was not given adequate notice and an opportunity to respond. Adverse decision remanded.

CASENO: 17-02952.a1

DATE: 08/03/2018

DATE: August 3, 2018

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In Re:)	
-----)	ISCR Case No. 17-02952
)	
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 3, 2017, 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 decision on the written record. On April 23, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 in his 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 remand the Judge’s unfavorable clearance decision.

The Judge’s Findings of Fact

The SOR set forth three allegations. It alleged that Applicant did not file his Federal and state tax returns for 2013 through 2016 and had a delinquent student loan for about \$13,200. He filed his 2013-2015 Federal and state tax returns in October 2017 and his 2016 Federal and state tax returns in May 2017.¹ He provided an undated payment plan for the delinquent student loan in which he was scheduled to make monthly payments of \$5 from October 2017 to June 2018. No documentation was provided of payments under that plan.

A number of non-alleged financial issues were discussed in the decision. In 2015, Applicant’s wages were garnished for delinquent state taxes from 2013. He intended to make a payment plan for delinquent Federal taxes of an unspecified amount. He owes a university collection agency about \$5,900 and a student loan agency about \$82,700. This latter loan became delinquent in 2010. In late 2017, the IRS responded to Applicant’s request to establish a payment plan that would address his delinquent Federal taxes for 2008 through 2016. Under that plan he would make monthly payments of \$130, starting in early 2018. In a footnote, the Judge cited to ISCR Case No. 08-09232 at 3 (App. Bd. Sep. 9, 2010), indicating that he considered evidence of non-alleged financial issues in assessing Applicant’s case in mitigation and in evaluating the overall record in the whole person concept.

The Judge’s Analysis

“Based on Applicant’s failure to file his federal and state 2013 through 2015 tax returns until October 2017, and, except for the garnishment to satisfy his 2013 state taxes, the lack of evidence indicating that he paid federal and state taxes from 2008 through 2016, I infer that he did not file federal returns from 2008 through 2012. Applicant still owes over \$85,000 for the delinquent student loans.” Decision at 6.

¹ The Judge noted that Applicant initially filed his 2015 tax returns in May 2017, but refiled them in October 2017 because his tax preparer did not inform him where to sign the returns.

“There is no evidence that Applicant filed the unalleged federal and state tax returns for 2008 through 2012. He provided no evidence of paying his federal or state taxes for 2008 through 2016.” Decision at 7. In his whole-person analysis, the Judge also mentions that Applicant did not disclose his tax or student loan issues in his 2016 security clearance application (SCA) and, when later questioned by an investigator, he could not give a reason for the omission.

Discussion

In his appeal brief, Applicant raises a due process concern. Specifically, he states:

I provided copies of my 2013 through 2016 tax returns in my notarized SOR. The SOR did not question or request information on my 2008 through 2012 tax returns. . . . It is erroneous to state the tax returns have not been file[d] when the tax returns were never questioned or copies requested.

We conclude Applicant’s argument has merit. The Judge erred in concluding that Applicant did not file his Federal tax returns from 2008 to 2012. In the decision, the Judge notes that he inferred Applicant did not file his Federal tax returns for those years based on his failure to file Federal and state tax returns for 2013-2015 in a timely manner and the lack of evidence indicating he paid Federal and state taxes for 2008 through 2012. The only evidence regarding Applicant’s Federal tax issues for 2008-2012 is an IRS installment agreement that indicates he owes an unspecified amount of taxes for each of those years.² The fact that an individual owes the IRS back taxes for a particular year does not establish the individual failed to file his or her Federal income taxes for that year. Moreover, proof that an individual failed to file tax returns in a timely manner for certain years does not establish he or she failed to file such returns for earlier years. The Judge’s conclusion that Applicant failed to file his Federal income taxes for 2008-2012 is not based on substantial evidence, *i.e.*, “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).

We note that the Judge mentioned three times in the decision that Applicant failed to file his Federal income tax returns for 2008-2012. While the Judge stated that he would only consider non-alleged issues for limited purposes, a major portion of the decision is devoted to non-alleged issues. For example, on the first page of the decision, the Judge summarized the case as follow:

Applicant filed four federal and state tax returns for tax years 2013 through 2016, but has more returns from 2008 through 2012 that have not been filed. He has delinquent federal and state taxes that he owes. He also owes a large student loan debt that became delinquent over seven years ago. His evidence in mitigation is insufficient to overcome the lingering security concerns arising from the guideline for financial considerations. Eligibility for security clearance access is denied.

² The reference section of the IRS installment agreement not only lists the years involved, but also states: “Forms: 1040,” which possibly could mean those forms were filed for the years in question.

Besides not alleging that Applicant failed to file his Federal income taxes for 2008-2012, the SOR also did not allege that he owed Federal and state taxes and that he owed the large student loan, *i.e.*, presumably the one for over \$80,000.³ When the weight of the decision is based on non-alleged issues, a question arises as to whether an applicant has been denied due process because he or she was not given adequate notice and an opportunity to respond. *See, e.g.*, ISCR Case No. 12-11375 at 5-6 (App. Bd. Jun. 17, 2016). Such a question exists in this case. In this regard, the Board has held that an SOR should be easily amended. *See, e.g.*, ISCR Case No. 04-08547 at 4 (App. Bd. Aug. 30, 2007). As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of the relevant issues. *Id.*

Accordingly, we remand this case for a new Decision in accordance with the Directive. The Judge may reopen the record to amend the SOR provided that the parties have fair notice and a reasonable opportunity to respond. If the record is reopened, Applicant should be entitled to another opportunity to elect a hearing.

³ The SOR also did not allege that Applicant falsified his SCA. However, the Judge discussed Applicant's SCA omission in his findings of fact and analysis. Furthermore, the Judge concluded that Applicant did not provide evidence of paying his state taxes for 2008 through 2016; however, there was no evidence presented that he was delinquent for state taxes between 2008 through 2012.

Order

The Decision is **REMANDED**.

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