

KEYWORD: Guideline F

DIGEST: In a DOHA proceeding, the applicant bears the burden of presenting evidence in mitigation. A Judge’s finding that an applicant has not presented sufficient evidence in mitigation is not, in and of itself, a finding that the applicant has been deceptive or that he or she lacks credibility. Adverse decision affirmed.

CASENO: 17-03363.a1

DATE: 11/29/2018

DATE: November 29, 2018

In Re:)	
)	
-----)	ISCR Case No. 17-03363
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Iana D. Benjamin, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 26, 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 hearing. On September 25, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 his current employer, a Federal contractor, since 2003. He worked for other contractors before taking this job. Applicant has held a clearance since 1996. Divorced, he has two children, ages 36 and 17. Applicant failed to file his Federal and state income tax returns from 2000 through 2006. He stated that during this time he was going through a difficult divorce and that taxes were “the last thing on his mind.” Decision at 3. Applicant stated that he had hired an accountant to file his returns for him, and he claimed that this had in fact been done. He did not provide documentary corroboration of these contentions.

Applicant failed to pay his taxes as required, both the IRS and his state securing liens against him. He presented evidence that the IRS had released its liens, although he never attempted to set up payment plans or pay any of his tax debts, either to the Federal Government or to his state. Applicant admitted that he had no answer when queried about his reasons for not having made payments. Applicant hired a company to assist him in resolving his tax problems. With the assistance of this company, the IRS placed Applicant in a “non-collectible” status. *Id.*

Applicant’s take-home pay is about \$1,200 every two weeks, and he has about \$2,000 in savings and about \$50,000 in a retirement account. He pays a little over \$420 each month in support of his minor child, and an additional \$300 in view of her serious illness. This child has had four operations between 2012 and 2015.

The Judge’s Analysis

The Judge resolved some of Applicant’s SOR allegations in his favor. However, he entered adverse findings regarding Applicant’s tax problems. Though noting Applicant’s marital difficulties during the time in question, the Judge concluded that Applicant had failed to demonstrate responsible action in regard to his tax obligations. He stated that Applicant had failed to provide convincing evidence that he had filed his returns and that Applicant had made no effort to pay his delinquent tax debts. Despite the release of his Federal liens, the evidence shows that he still owes over \$26,000 to the IRS. The Judge stated that Applicant’s repeated failure to file his Federal and state tax returns impugns his judgment and reliability.

In the whole-person analysis, the Judge cited to evidence that Applicant has worked for Federal contractors and has held a clearance since the mid-1990s. As a consequence, Applicant was aware that he was required to maintain financial responsibility in order to keep access to classified information. The Judge concluded that Applicant's tax delinquencies show that he has a problem complying with well-established Government rules and that he has not established a track record of financial responsibility.

Discussion

Applicant contends that the Judge did not take into account evidence that demonstrates his trustworthiness, including his many years of service to the Federal government as a contractor employee, his steps to prevent recurrence of his security-significant conduct, and "other factual circumstances referenced in [his] testimony." Appeal Brief at 11-12. Examining the Decision in light of the record as a whole, we conclude that the Judge addressed Applicant's having hired a tax firm to assist him in resolving his problems, his family difficulties, and his testimony about having filed his returns. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record, nor are they 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. 17-02145 at 3 (App. Bd. Sep. 10, 2018).

Applicant states that he disclosed his tax problems, that he had not intentionally hidden any information from adjudicative authorities, and that his failure to have submitted sufficient corroborative evidence was not the result of an intent to mask the true state of his finances. He also contends that he "should not be punished for not presenting enough evidence." Appeal Brief at 11. The SOR did not allege, nor did the Judge find, that Applicant had deliberately failed to admit to his financial delinquencies. The Judge merely concluded that Applicant had not provided enough evidence to mitigate the concerns arising from his tax problems. In a DOHA proceeding, the applicant bears the burden of presenting evidence in mitigation. Directive ¶ E3.1.15. A Judge's finding that an applicant has not presented sufficient evidence in mitigation is not, in and of itself, a finding that the applicant has been deceptive or that he or she lacks credibility. *See, e.g.*, ISCR Case No. 16-01390 at 3 (App. Bd. Sep. 15, 2017) for the proposition that it is not inconsistent for a Judge to conclude that an applicant is credible but nevertheless has failed to meet his or her burden of persuasion. In the case before us, the Judge found that Applicant's evidence did not establish that he had paid his tax debts or even corroborate that he had filed his returns as he claimed. This was not a credibility determination but merely a comment on the state of the evidence. We resolve this issue adversely to Applicant.

Applicant has cited a Hearing Office case in support of his appeal. We have given this case due consideration as persuasive authority. However, each case must be decided on its own merits. Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 17-02145 at 3.

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 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