

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge’s material findings are supported by substantial record evidence. Applicant was not denied the opportunity to present evidence in his own behalf. He failed to rebut the presumption that the Judge considered all of the evidence. Adverse decision affirmed.

CASE NO: 11-02476.a1

DATE: 06/12/2013

DATE: June 12, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-02476
)	
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 2, 2012, 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 February 27, 2013, after the hearing, 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 on appeal: whether Applicant was denied an opportunity to present evidence; whether certain of the Judge’s findings of fact were in error; and

whether the decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline E, and favorable findings regarding two of the Guideline F allegations, are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following findings pertinent to the issues raised on appeal: In 2002, Applicant co-founded a corporation with another person, who has since left the company. Applicant has always been president and chief executive officer (CEO), and he has served as the facility security officer since 2005. From the inception of the company until 2007, an in-house accountant handled the business's taxes. The accountant was fired due to unsatisfactory performance.¹ After this, Applicant took over responsibility for corporate and payroll taxes.

Applicant has financial difficulties, resulting from his company having lost its small business credit line. As a consequence, the company lost about \$6 million in contracts. Applicant infused about \$800,000 into the company to keep it in business. The SOR lists three tax liens owed to two different states and three credit card debts. The tax liens resulted from a failure to pay withholding taxes on behalf of an employee. Applicant's delinquent debts total around \$274,000. In addition, an audit by state authorities for tax years 2004 to 2009 uncovered additional tax monies due, although these were not alleged in the SOR. Applicant disputed the audit, but he entered into a repayment plan. He provided no evidence of any payments.

The current CEO of the company commended Applicant for his leadership, research and documenting practices, and communication skills.

The Judge's Analysis

The Judge cleared Applicant of the Guideline E allegations. However, he concluded that Applicant's financial circumstances raised security concerns under Guideline F. He mitigated concerns arising from two of the alleged debts, which had been paid. Regarding the remaining debts, the Judge noted record evidence of Applicant's company having lost its line of credit, which was a circumstance outside Applicant's control.² However, he also noted that Applicant's own management of the company's tax responsibilities following the discharge of the accountant contributed to the tax liens. The Judge concluded that Applicant had not demonstrated responsible action in regard to his delinquent debts. He stated that there is no clear evidence that the debts are being resolved or are under control. Though noting Applicant's claims to have been attempting to resolve some of the debts, the Judge found that these claims were not corroborated.

¹"Q: [U]ntil when did you have an accountant that was doing the corporate tax filings? A: Until 2007, when we found some discrepancies with what this individual was doing, and . . . we actually terminated his employment." Tr. at 81.

²Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]"

Discussion

Applicant contends that the Judge erred in finding that he had been CEO of the company since its founding. He cited to the responsibilities exercised by the co-founder which, he believes, contributed significantly to the financial delinquencies at issue in this case. He also argues that the Judge erred in finding that two of the tax liens, owed to the same state, were separate liens and not merely repetitions of the same underlying debt. We examine a Judge's findings to determine if they are supported by substantial evidence, that 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 record." ISCR Case No.11-00970 at 2 (App. Bd. Feb. 28, 2012), quoting Directive ¶ E3.1.32.1.

Applicant testified that he had always been CEO of the company. Tr. at 66. Under the facts of this case, evidence that the co-founder also exercised CEO responsibility does not call into question the challenged finding. Regarding the liens, the record contains evidence that the two liens owed to the same state were filed on two separate dates, two years apart. The liens were for different amounts of money and the evidence shows different filing numbers for each lien. Government Exhibit (GE) 2, Credit Report, at p. 1; GE 3 and 5, [State] Judgement and Lien Filings Reports. Even if the Judge had found that these two liens referenced the same debt, his overall decision would not likely have been different. Applicant has not cited to any error likely to change the outcome of the case. The Judge's material findings of security concern are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 11-06659 at 5 (App. Bd. Oct. 22, 2012).

Applicant contends that he was not permitted to provide evidence of his co-founder's equal authority to obligate the company and the extent to which this person was responsible for at least some of the debts at issue here. However, Applicant testified about the co-founder, in response to questioning by Department Counsel. There is nothing in the record to show that he attempted to present additional evidence about this person. Neither did the Judge say or do anything that could reasonably be interpreted as precluding Applicant from presenting his case or otherwise limiting his opportunity to present evidence. Applicant has not been denied his right to present evidence "to rebut, explain, extenuate, or mitigate facts . . . proven by Department Counsel[.]" Directive ¶ E3.1.15.

Applicant contends that the Judge did not consider all of the evidence, for example evidence concerning the state tax audit, which he believes contained errors. However, the Judge made findings about this audit, noting that Applicant disputed it but that his dispute was denied. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Applicant's argument consists of a disagreement with the Judge's weighing of the evidence. However, this is not enough to show that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 11-03302 at 3 (App. Bd. Apr. 23, 2013).

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board