

KEYWORD: Guideline F

DIGEST: The Appeal Board cannot consider new evidence on appeal. An ability to argue for an alterative interpretation of the evidence is not sufficient to show that the Judge erred. Hearing Office decision are not binding on other Hearing Office Judges or on the Appeal Board. Adverse decision affirmed.

CASE NO: 11-11455.a1

DATE: 02/04/2014

DATE: February 4, 2014

In Re:)	
)	
-----)	ISCR Case No. 11-11455
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 9, 2013, 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 November 14, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 46 years old. He is part owner of a Subchapter S corporation, along with at least two other owners. One of the owners had a friend who acted as bookkeeper and prepared the corporate tax returns, as well as the owner's individual tax returns. The bookkeeper did not prepare the tax returns for several years. In about 2010, the corporate and Applicant's individual tax returns for several years were prepared and filed. Applicant stated that the bookkeeper incorrectly subscribed all of the corporation's income to him, instead of dividing it among the owners. A witness verified Applicant's description of the tax problems caused by his corporation and his corporations's bookkeeper. Applicant stated that he did not note the discrepancy because he was heavily involved in a child custody battle. The IRS determined that Applicant owed taxes for several years. In July 2011, the IRS filed a \$42,256 tax lien against Applicant.

From 2010 to 2012, Applicant went through a contentious and costly child custody battle that cost him about \$45,000. This expense added to his financial problems and prevented him from addressing his delinquent taxes. Applicant testified that he paid the IRS about \$4,000 for his tax debt. He admitted that he had not made any payments since about 2011. Applicant contracted with a tax consulting company in February 2013 to represent him before the IRS. He also has an accountant who is preparing documents for the tax consulting company. The company agreed to review his tax records and negotiate with the IRS. The company may prepare amended tax returns that will lower his tax liability to about \$21,000. Applicant stated that the tax company is close to arriving at an agreement with the IRS. He indicated that he will pay whatever amount is agreed upon.

Applicant filed his 2011 federal income tax return in about September 2013. He states that there is no amount owing for 2011. He expects to file his 2012 federal income tax return within a few days. He expects to owe the IRS about \$5,000. Applicant's state tax situation is dubious. He has not filed state income tax returns in the state where he spends the most time because he considers his permanent residence to be in another state. He admits that he likely owes state income taxes. He states that he will address any delinquent state taxes after he resolves his federal taxes.¹

The Judge concluded: Applicant relied on his corporation's bookkeeper to prepare his tax returns and the bookkeeper did not fulfill his responsibilities in a timely manner. However, the responsibility to file his tax returns and pay his taxes ultimately rests on Applicant. His tax debt was not caused by conditions that were beyond his control. Applicant has known since at least 2010 that he had tax problems, and that they were of interest to DoD. There is insufficient evidence to determine that Applicant's financial problems will be resolved within a reasonable period. He did

¹Three other debts were listed in the SOR in addition to Applicant's delinquent federal income tax debt. The Judge found that these debts were either paid by Applicant or successfully disputed. The Judge made favorable formal findings regarding these debts.

not act responsibly under the circumstances and he did not make a good-faith effort to resolve all his financial problems. His financial issues are recent and ongoing, and it cannot be determined that they are unlikely to recur. Financial concerns remain despite the presence of some mitigation. Applicant's significant unresolved tax problems are inconsistent with the holding of a security clearance.

Applicant asserts that he has established a case for mitigation of the government's security concerns. He states that his debts were caused by third parties and were out of his control, that the debts are lone incidents in a multiple decade career, are infrequent, and are in no way indicative of behavior likely to recur. He states that a payment plan is now in place, that an agreement with the IRS has been reached, and he has begun his payment plan. Applicant's arguments do not establish error on the part of the Judge.

Applicant's statements regarding the tax payment plan, agreement with the IRS, and the commencement of payments under the plan are assertions of fact that fall outside the case record. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence.

In this case, the Judge made sustainable findings that Applicant had a significant history of not filing returns and not paying his income taxes in a timely fashion. He emphasized that Applicant's case consisted largely of his intentions to pay off his taxes in the future and noted that such intentions were not a substitute for a track record of debt repayment. The Judge's conclusion that Applicant's tax difficulties were ultimately not matters beyond his control is sustainable on this record. The Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in his analysis, partially applying some of them. The Judge found in favor of Applicant as to three of the Guideline F allegations. However, the Judge offered a reasonable explanation as to why the disqualifying conduct under Guideline F as evidenced by tax delinquencies was not fully mitigated. Applicant has not demonstrated that the Judge erred when he weighed matters in mitigation against the seriousness of that disqualifying conduct. Applicant has cited to a Hearing Office case that, he contends, supports his effort to secure a reversal of the Judge's decision. We give this case due consideration. However, hearing office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-10178 at 3 (App. Bd. Aug. 29, 2013). The cited case is not sufficient to show that the Judge erred in denying Applicant a clearance.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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