

KEYWORD: Guideline F

DIGEST: Although the Judge acted hastily in dismissing the possibility that Applicant has been making payments on her IRS debts, there is an adequate basis for the Judge's ultimate adverse decision. Adverse decision affirmed.

CASENO: 11-14784.a1

DATE: 01/17/2014

DATE: January 17, 2014

In Re:)
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-----) ISCR Case No. 11-14784
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)
Applicant for Security Clearance)
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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 April 19, 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 October 18, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 issues on appeal: (1) whether certain findings of fact and conclusions made by the Judge are supported by record evidence; and (2) 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 43 years old. The SOR alleges that she is indebted to the IRS for taxes and penalties on her 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 personal income tax returns. The SOR also alleges that Applicant failed to timely file income tax returns for the years 2002 to 2011 inclusive, and that she has eight federal liens against her totaling approximately \$94,000. The SOR also alleges a state tax judgment in the amount of \$3,513, several private collection accounts totaling \$125, and a homeowner's association judgment for \$871. Applicant admits that she did not file her tax returns in a timely fashion and stated that she had no excuse for not doing so. She did not request extensions. She does not dispute that she owes the IRS taxes, but does dispute the amount the IRS claims she owes for each year. Applicant asserts she owes about \$25,000 to the IRS.

Applicant has now filed the tax returns for the years 2002 through 2012. In 2002 she entered into an installment agreement but there is no evidence of payments. The agreement ended in 2005. Although Applicant has not been able to pay all of her taxes each year, she claims she has made some payments. Tax transcripts for years 2002 through 2011 reflect credits to her account, but it is not clear why the credits were issued. Three offers in compromise were denied by the IRS.

Applicant's husband was unemployed from April 2010 until September 2012. His job loss impacted her ability to continue to pay her taxes. In February 2013, Applicant talked with a tax service, seeking their assistance to work with the IRS to contest the tax assessments and negotiate an installment agreement. She is required to pay the service \$4,800. She has paid \$2,800. The service will not work on a client's behalf until 65% of the fee is paid. Applicant's plan is to obtain a loan from her 401(k) account to pay the delinquent taxes. She wants to know exactly what she owes the IRS before she agrees to a plan. The state tax judgment (\$3,513) and the homeowner's association judgment (\$871) are still unpaid. She recently contacted the state collection agency and will attempt to negotiate a payment plan.

The Judge concluded: Applicant disputes the amount of tax owed the IRS and she has attempted to determine the actual amounts she owes. However, she has not paid consistently during the years of the delinquencies. She has been on notice since 2005. She has earned a significant salary during those years, despite the unemployment of her husband. She did not seek the advice of a tax attorney to help determine what she owed the IRS. Applicant did not produce any documentary evidence to show that she has actually paid any additional taxes to the IRS not

automatically withheld from her salary. She has smaller debts that she has not paid. She disputes the amount owed on these debts, but did not substantiate the basis of the dispute. She has obtained the services of a company to help negotiate with the IRS, but has not paid enough of their fee so that they may begin to work on her behalf. She stated she would like to pay her delinquent obligations but has failed to demonstrate any payments on those obligations. It is not clear that she will resolve the issue in the near future. Applicant has not met her burden in this case to mitigate the financial considerations concern.

Applicant argues that the Judge erred regarding several related findings of fact centering on the issue of whether Applicant adequately documented her claims that she consistently made payments to the IRS toward her ongoing tax delinquencies. Applicant asserts that she submitted tax transcripts from the IRS that unmistakably identify that she made payments for each tax year “that there was a debt.”¹ The Judge found that the “credit to your account” entry on the tax transcripts did not contain enough information on why they were issued and were not sufficient to establish payments on the part of Applicant. Applicant has not established harmful error on the part of the Judge.

This case involves a significant discrepancy between what the numerous tax documents and credit reports show Applicant owes the IRS (in excess of \$90,000) and what Applicant admits she owes (approximately \$25,000). The tax transcripts do list credits to Applicant’s account for most of the years in question, and these do provide some corroboration for Applicant’s testimony that she has been making payments. After a review of the record and the Judge’s decision, the Board concludes that the Judge erred by too hastily dismissing the possibility that Applicant has been making payments on her IRS debts.² However, the record supports the Judge’s conclusion that Applicant’s failure to resolve the dispute over what she owes the IRS indicates an ongoing delinquent status unlikely to be resolved in the near future.³ The Judge’s adverse decision is also based on Applicant’s failure to resolve a state tax lien and a substantial homeowner’s association debt—the amounts of which she also disputes, but provides no basis for the dispute. In the context of the Judge’s overall decision, any error by the Judge on the finding that Applicant has not been making consistent payments on her delinquent taxes is harmless. Other important components of

¹The record contains ten IRS tax transcripts for the years 2002 through 2011, each of which gives a detailed summary of the status of Applicant’s tax debt for that particular year. While Applicant states on appeal that she supplied these documents, this is unclear from the record. The tax transcripts were entered into the record as Government Exhibits 5 through 14. There is no indication that Applicant supplied the documents. They do not appear to have accompanied her answer to the SOR, nor were they included as attachments to her response to interrogatories (Government Exhibit 2).

²The Judge discounts the likelihood that the “credit to your account” amounts on the tax transcripts covering multiple years resulted from Applicant’s payments by speculating that they could be an offset due to a refund for certain years or a readjustment of the tax assessment. Given Applicant’s longstanding history of tax delinquencies, the possibility of an offset due to a tax refund is extremely unlikely, and there is no evidence that the IRS adjusted its assessment of Applicant’s tax liabilities.

³Even when the “credit to your account” figures are factored in, the total amount of the tax delinquencies, as evidenced by the tax transcripts greatly exceeds the \$25,000 amount that Applicant admits she owes.

the Judge's decision are her conclusions that Applicant's delinquent tax debt has been ongoing since 2003, that she did not file timely tax returns for tax years 2002 to 2010, that she did not ask for extensions and she has no excuse for not filing timely, that she earned a significant salary during the delinquent years, despite the unemployment of her husband, and the fact that Applicant has failed to resolve the dispute over the amount of taxes owed through diligent employment of professional help.⁴ These conclusions are reasonably based on record evidence, and provide an adequate basis for the Judge's decision.

Applicant argues that her case has been mitigated, based on the fact that she has not ignored her debt to the IRS, that she is a dedicated employee, and that she has been placed on a payment plan to rectify her problems with the IRS. The last assertion contains a matter not included in the case record. The Board may not consider new evidence on appeal. 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).

A review of the Judge's decision reveals that, regarding Guideline F, the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in her analysis. The Judge offered a narrative explanation as to why the disqualifying conduct under Guideline F was not fully mitigated. Applicant has not demonstrated that the Judge erred when she weighed the mitigating evidence mitigating against the seriousness of the disqualifying conduct.

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

⁴Throughout the hearing, Applicant repeatedly insisted that the IRS figures for her tax delinquencies were incorrect. She offered no evidence in support of her claim, other than references to her tax returns, which she completed herself, and which she asserted were correct.

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