

KEYWORD: Guideline E; Guideline F

DIGEST: Applicant has raised some due process issues. He notes that the Judge applied adjudicative guidelines that were effective as of June 8, 2017, after the date of his SOR. He argues that the Judge should have applied the guidelines in effect on the date of his SOR. However, as Department Counsel states in his Reply Brief, the DoD has implemented Security Executive Agent Directive 4, mandating that all adjudications will utilize the new guidelines. This requirement applies without regard to the date of an SOR. Applicant received notice of this along with copies of the appropriate guidelines. Applicant also contends that DOHA unduly delayed convening his hearing until after his 2017 taxes were due, thereby prompting the Judge to inquire into their status to his detriment. However, it was Applicant himself who broached his 2016 and 2017 tax filings. In any event, we find no reason to believe that if these subsequent tax years had not been considered the Judge would have arrived at a different decision. There is no reason to conclude that the timing of the hearing prejudiced Applicant's ability to present his case for mitigation. Accordingly, we have no authority to comment on the manner in which officials have processed Applicant's case. Applicant was not denied due process. Adverse decision affirmed.

CASENO: 17-01193.a1

DATE: 01/22/2019

DATE: January 22, 2019

In Re: _____)
-----) ISCR Case No. 17-01193
)
Applicant for Security Clearance)
_____)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Allison R. Weber, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 19, 2017, 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 October 25, 2018, 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 Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge denied him due process; whether the Judge raised concerns not included in the SOR; whether the Judge placed improper limitations on Applicant's evidence; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline E are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following pertinent findings of fact: Applicant has a history of significant delinquent debt, including back taxes owed the Federal Government. While they were married, Applicant's now ex-wife had many personal problems, for which Applicant paid for counseling and medical treatment. He hired a lawyer to assist him in a dispute with child protective services, occasioned by his wife's difficulties. Applicant was not able to pay all of his bills, and he was discharged in bankruptcy in 2008.

He claimed to have a payment plan with the IRS, which was interrupted after his credit union closed his account. He stated that he could not set up another payment plan but documented that he has been making payments to the IRS since mid-2018. He did not provide documentation from the IRS showing how much he previously paid and how much he still owes. He filed his 2017 Federal and state income tax returns, but he did not show that he paid the Federal tax obligation owed for that year. Applicant stated that his financial problems stabilized after his bankruptcy discharge. However, in 2016, Applicant's ex-wife was evicted from her home and moved in with their daughter. Applicant provided his wife and daughter with financial support, as he did for his two other children. He did so at the expense of paying his own debts.

The Judge found that some of the debts alleged in the SOR were duplicates of others or were not substantiated. He also found that some of the SOR debts had been resolved but that a number had not been, including those to the IRS. Applicant has received financial counseling and is making

payments on a plan proposed by “a noted financial advisor.” Decision at 3. In addition, he is working additional jobs, maintains a budget, and is setting aside funds for emergency situations.

The Judge’s Analysis

The Judge concluded that Applicant’s financial problems raised three disqualifying conditions: inability to satisfy debts, a history of not meeting financial obligations, and failure to file or fraudulently filing tax returns or failure to pay income tax as required.¹ The Judge noted circumstances outside Applicant’s control that affected his financial problems, such as his family’s medical expenses and unexpected car repairs. However, he also concluded that Applicant had not provided sufficient corroborating evidence to show that he had acted responsibly in resolving his debts. Though noting his debt resolution plan, the Judge stated that it constituted nothing more than a promise to resolve debts in the future rather than a track record of debt payment. He also stated that, “[f]or whatever reason, Applicant has left me in the dark about his taxes,” noting a paucity of corroborating evidence concerning the amounts paid, the amount yet owed, etc. Decision at 7. The Judge concluded that Applicant’s financial problems are recent and ongoing and continue to cast doubt upon his reliability, trustworthiness, and good judgment.

Discussion

Applicant has raised some due process issues. He notes that the Judge applied adjudicative guidelines that were effective as of June 8, 2017, after the date of his SOR. He argues that the Judge should have applied the guidelines in effect on the date of his SOR. However, as Department Counsel states in his Reply Brief, the DoD has implemented Security Executive Agent Directive 4, mandating that all adjudications will utilize the new guidelines. This requirement applies without regard to the date of an SOR. *See* ISCR Case No. 15-02728 at 4 (App. Bd. Feb. 9, 2018).² Applicant received notice of this, both from the Department Counsel and from the Chief Hearing Office Judge, along with copies of the appropriate guidelines. Applicant also contends that DOHA unduly delayed convening his hearing until after his 2017 taxes were due, thereby prompting the Judge to inquire into their status to his detriment. However, it was Applicant himself who broached his 2016 and 2017 tax filings. Tr. at 58. In any event, we find no reason to believe that if these

¹Directive, Encl. 2, App. A ¶¶ 19 (a, c, and f).

² *See also* Security Executive Agent Directive 4 at heading “(Effective: 08 JUNE 2017)”; ‘B. PURPOSE: This Security Executive Agent (SecEA) Directive establishes the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The Guidelines reflected herein supercede all previously issued national security adjudicative criteria or guidelines. . . . E. POLICY: 1. The National Security Adjudicative Guidelines in Appendix A shall be used by all authorized adjudicative agencies when rendering a determination for initial or continued eligibility for access to classified information or initial or continued eligibility to hold a sensitive position. . . . [and] F. EFFECTIVE DATE: This Directive becomes effective 180 days after the date of signature.” [It was signed on 10 December 2016.]

subsequent tax years had not been considered the Judge would have arrived at a different decision.³ There is no reason to conclude that the timing of the hearing prejudiced Applicant’s ability to present his case for mitigation. Accordingly, we have no authority to comment on the manner in which officials have processed Applicant’s case. *See, e.g.*, ISCR Case No. 11-12730 at 2 (App. Bd. Sep. 4, 2013). Applicant was not denied due process.

Applicant contends that the Judge improperly considered matters that were not alleged in the SOR, specifically information about his 2016 and 2017 income tax returns. Again, it was Applicant who introduced the subject of his subsequent returns. Moreover, it was not improper for the Judge to have considered this matter, insofar as non-alleged conduct can be relevant on issues of mitigation, rehabilitation, the whole-person analysis, etc. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). Our review of the Decision and of the record as a whole persuades us that the Judge considered this evidence in its proper context.

Applicant contends that the Judge improperly limited the evidence that he wished to submit. He argues that, by commenting upon a paucity of documentary corroboration, the Judge discounted his hearing testimony, thereby imposing an evidentiary standard not found within the Directive. However, it is reasonable to expect an applicant to present corroborating documentation of his efforts at debt resolution. *See, e.g.*, ISCR Case No. 15-07062 at 2 (App. Bd. Nov. 21, 2017). In a DOHA proceeding, the applicant bears the burden of persuasion that he or she should have access to classified information, and corroborating evidence can go a long way toward enabling an applicant to meet that burden. We note that the Judge admitted all documents that Applicant proffered, and we find nowhere in the transcript that the Judge curtailed his testimony. Indeed, he kept the record open for four months after the hearing, over Department Counsel’s objection. Tr. pp. 84-86, 91. Applicant appears to be arguing that the Judge should have extended more weight to his testimony that was apparently the case, which is not the same thing as demonstrating the Judge prevented him from submitting evidence itself. The Judge did not limit Applicant’s ability to present his case in mitigation.

Applicant contends that the Judge’s decision was arbitrary, capricious, or contrary to law. In making this argument, he asserts that the Judge erred in concluding that his circumstances raised security concerns under Guideline F. In addition to his claim that the Judge relied upon the wrong set of guidelines, which we have already rejected, he contends that his financial problems were unfortunate but did not raise security concerns in the absence of any “aggravating factors.” Appeal Brief at 12. There is no support for Applicant’s argument about aggravating factors. The Directive imposes no such requirement. To the contrary, the Directive provides that delinquent debts themselves can raise concerns about an applicant’s willingness to abide by rules and regulations, thereby giving rise to questions about his or her ability to protect classified information. Directive, Encl. 2, App. A ¶ 18.; ISCR Case No. 15-01737 at 3 (App. Bd. Feb. 14, 2017). Indeed, the

³Applicant’s argument is predicated, in part, on the premise that failure to pay taxes would not have been included in Statements of Reasons under the old guidelines. This premise is mistaken. For two examples of cases under those guidelines in which failure to pay taxes was a security issue (without a failure to file component) *see* ISCR Case 09-07064 (App. Bd. Nov. 18, 2011) and ISCR Case No. 14-05489 (App. Bd. Jan. 11, 2016).

Directive presumes that there is a nexus between admitted or proved conduct or circumstances under any of the guidelines and an applicant's eligibility for access to classified information. *See, e.g.*, ISCR Case No. 17-02595 at 3 (App. Bd. Jul. 31, 2018). Applicant's history of delinquent debt and in particular his debt to the IRS are sufficient to raise security concerns, thereby shifting the burden of production to Applicant. The balance of Applicant's brief is, in effect, a challenge to the Judge's weighing of the evidence. However, an ability to argue for a different interpretation of the record is not 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. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

In support of his arguments, Applicant refers to the "imminent threat to the national interest" standard set forth in Directive ¶ 6.4,⁴ which applies to the suspension of a previously adjudicated security clearance pending a final clearance decision. Applicant's reliance on ¶ 6.4 is misplaced. First, his security clearance was not suspended under ¶ 6.4. Second, the "imminent threat to the national security" standard is for use by the appropriate DoD official in reviewing a proposed security clearance suspension and not for use by Judges in adjudicating security clearance eligibility. Third, the Judge's decision in this case is an integral part of and, depending on the circumstances, could constitute the final clearance decision.⁵ *See*, Directive ¶ E3.1.36. *See also*, ISCR Case No. 14-05238 at 2 (App. Bd. Jan. 13, 2016) for the proposition that ¶ 6.4 is limited in scope and that as a general matter the Government does not have to prove a "'clear and present danger' to national security" before it can deny an applicant a clearance.

The Judge examined the relevant evidence 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, 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."

⁴ In his argument Applicant refers to ¶ 6.4 and uses the phrase "imminent threat to national security" instead of "imminent threat to the national interest" as set forth in that provision. Appeal Brief at 13.

⁵ Because Applicant appealed the Judge's decision, our decision constitutes the final clearance decision.

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