

KEYWORD: Guideline F

DIGEST: Applicant's argument that the law is complex and therefore capable of being misunderstood is not a reason to excuse a multi-year failure to have complied with Federal and state tax laws, especially in light of his 2012 realization that his late filings could imperil his clearance. Adverse decision affirmed.

CASENO: 18-00635.a1

DATE: 04/05/2019

DATE: April 5, 2019

In Re:

Applicant for Security Clearance

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) ISCR Case No. 18-00635
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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 March 27, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 9, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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 erred in concluding that his financial circumstances raised security concerns and 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 filed his Federal and state income tax returns late for tax years 2008 through 2016. Though he admitted that he had done so, he relied on a rule whereby Federal taxpayers will not be subjected to a penalty if they file within three years, provided that they are owed a refund. Applicant previously admitted late tax filings. In his 2012 security clearance application (SCA), he stated that he owed taxes for 2008, 2009, and 2010, attributing his late filings to “unorganized business accounting.” Decision at 2. Later in 2012, he told an investigator that he was concerned about the impact of his filing delinquencies on his security clearance, that he had hired a tax consultant, and that he expected to have his returns filed by mid-year. At the hearing, he admitted that he had not hired someone to help him with his taxes.

In responding to DOHA interrogatories in 2014, Applicant provided tax transcripts that showed that he filed his 2008, 2009, and 2010 Federal and state returns in 2012, his 2011 state return in 2013, and his 2011 Federal return in 2014. In his 2017 SCA, Applicant disclosed that he had failed to file his tax returns in a timely fashion for 2010 through 2015. His subsequent interrogatory answers included documentation that showed he had filed late for 2016 as well. He explained these late filings as having been the result of not completely understanding the impact of delinquent taxes on his clearance eligibility. He vowed that he was working with a tax preparation company to assist him in complying with his tax obligations and signed a statement of intent never again to file his returns late. Applicant is financially secure. In 2018, he completed an on-line credit counseling course, budget analysis, and financial plan. He has monthly income of about \$10,000 and expenses of about \$9,800. Colleagues described Applicant as skilled, honest, truthful, and forthright.

The Judge’s Analysis

The Judge concluded that Applicant’s tax problems established two Guideline F disqualifying conditions: 19(c), “a history of not meeting financial obligations,” and 19(f), “failure to file . . . annual Federal, state, or local income tax returns . . . as required.”¹ In evaluating Applicant’s case for mitigation, the Judge stated that, even if Applicant honestly believed that he

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

had three years in which to file his returns, he had previously acknowledged that late filing could have an impact on his clearance. The Judge stated that Applicant's conduct raised questions about his judgment and reliability.

Discussion

Applicant contends that his tax issues do not raise security concerns. He states that he does not have a history of financial problems and that he has not failed to file his returns as required. On this latter point, he reiterates his belief that he had three years in which to file his returns without penalty, insofar as he was entitled to refunds. Noting that Federal law elsewhere sets April 15 as the date for filing taxes, he contends that the law is confusing and that he acted through honest misunderstanding. He notes that he had previously been granted a clearance despite having disclosed late tax filings.

We have addressed the "three-year rule" before. In ISCR Case No. 12-11357 at 4 (App. Bd. Jun. 17, 2016), we noted that the cited rule requires that a Federal taxpayer file within three years in order to receive a refund. This rule does not provide that taxpayers owed a refund can legitimately file after the April 15 deadline without first obtaining an extension. "The fact that the IRS may waive a late filing penalty does not constitute proof that tax returns were not filed late The three-year statute of limitation is not a grant of a filing extension, but only a limitation on claiming a refund." *See also* ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015). Applicant's argument that the law is complex and therefore capable of being misunderstood is not a reason to excuse a multi-year failure to have complied with Federal and state tax laws, especially in light of his 2012 realization that his late filings could imperil his clearance.² The Directive presumes that there is a nexus, or rational connection, between admitted or proved conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 17-02595 at 3 (App. Bd. Jul. 31, 2018). Applicant's arguments on appeal are not enough to rebut the presumption of nexus. The Judge did not err in concluding that Applicant's late tax filings raised the disqualifying conditions cited above.

The balance of Applicant's brief constitutes, in effect, a challenge to the Judge's weighing of the evidence. Among other things, Applicant cites to his having been granted a clearance in 2012 despite admissions of late filings. Prior decisions to grant or retain a clearance do not undermine the legal sufficiency of the Judge's subsequent adverse decision. The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 16-03047 at 4 (App. Bd. May 29, 2018). This is especially true when, as here, Applicant continued to file his returns late after having been placed on notice that doing so could imperil his access to classified information. Applicant's arguments are not enough 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).

²In any event, the rule that Applicant has cited applies by definition only to his Federal returns for years in which he was entitled to a refund. It would not apply to his admittedly late 2008 Federal return or to his late state returns for the years in question.

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.”

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