

KEYWORD: Guideline F

DIGEST: Applicant claims there is no nexus between his tax filing deficiencies and how he performs his security clearance responsibilities. The Directive, however, presumes there is a nexus or rational connection between proven circumstances under any of its guidelines and an applicant's security eligibility. Direct or objective evidence of nexus is not required. Moreover, Guideline F recognizes that applicants who do not act responsibly in the handling of their finances, such as filing tax returns when due, may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. Adverse decision is affirmed.

CASE NO: 19-01431.a1

DATE: 03/31/2020

DATE: March 31, 2020

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In Re: )	
)	
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)	
)	
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 July 19, 2019, 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 January 16, 2020, 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 his findings of facts, whether the Judge was biased against him, and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the Judge’s decision.

The SOR alleges that Applicant failed to file, as required, his Federal and state income tax returns for 2010 through 2017; he was indebted to the IRS for about \$430 for 2017; and he was indebted to his state for a total of about \$1,780 for six years between 2011 and 2018. In responding to the SOR, he admitted the tax filing deficiencies and denied the tax indebtedness. The Judge found in favor of Applicant on the tax indebtedness and against him on the tax filing deficiencies. The Judge’s favorable findings were not raised as an issue on appeal.

### **The Judge’s Pertinent Findings of Fact**

Applicant, who is in his 60s, works for a defense contractor. He is married with children. He has held a security clearance since the early 1980s.

In 2009, Applicant called the IRS to inquire into the repercussions for not filing his 2008 income tax return by October 15, 2009, the deadline for the six-month automatic tax filing extension. “Applicant testified that the representative told him that there would be no penalty if he was entitled to a refund, but that his refund would be forfeited if he did not file his return within three years of the original due date.” Decision at 2. In previous years, Applicant always received refunds. After his conversation with the IRS representative, he “adopted a three-year deadline for filing late federal and state returns” and requested six-month Federal tax filing extensions. Decision at 3. He never requested an extension beyond the automatic extensions. He could not remember when he started requesting extensions for filing his state tax returns. “He admitted at the hearing that his attitude toward his obligations to timely file tax returns was ‘lackadaisical.’” *Id.*, citing Tr. at 16.

Applicant filed his Federal and state tax returns as follows: 2010 in August 2013, 2011 in June 2014, 2012 in April 2016, 2013 in April and May 2017, 2014 in April 2018, 2015 and 2016 in March 2019, and 2017 and 2018 in April 2019. When he filed those tax returns, he owed Federal or state taxes for a number of the years. Except for his tax deficiencies, he has had no other financial problems. A supervisor and coworkers submitted reference letters vouching for his honesty, trustworthiness, and integrity.

## **The Judge's Pertinent Analysis**

Mitigating Condition 20(g), *i.e.*, *the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements*, was established, but that does not end the inquiry. “[Applicant] did not abandon his three-year rule until he was interviewed by a security investigator in July 2018 and realized that his security clearance was in jeopardy. His belated action in an effort to protect his security clearance ‘does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nations secrets.’” Decision at 6, quoting from ISCR Case No. 14-05794 at 7 (App. Bd. Jul. 7, 2016). “[Applicant] admitted that his failure to timely file his returns was due to procrastination and a lackadaisical attitude about his tax obligations. He may be a conscientious employee and a careful manager of his personal finances, but he has offered no excuse other than procrastination for failing to carry out his basic duty as a citizen to timely file his tax returns.” *Id.*

## **Discussion**

### Findings of Fact

Applicant challenges a number of the Judge's findings of fact. We examine a Judge's challenged 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 same record.” Directive ¶ E3.1.32.1. *See, e.g.*, ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018). None of Applicant's challenges to the Judge's findings merit relief. We note that some of his challenges to the findings essentially amount to disagreements with the Judge's weighing of the evidence, which is discussed separately below.

Applicant challenges, for example, the Judge's finding that Applicant was “lackadaisical” in meeting his tax filing obligations. He argues that his admission to being lackadaisical was taken out of context. During his opening statement, Applicant stated, “The primary point that I hope to demonstrate in his hearing is that my past, admittedly lackadaisical attitude toward my tax filing obligations, in no way reflect on my ability, trustworthiness, and reliability to protect classified information.” Tr. at 16-17. He contends the Judge only restated his admission about being lackadaisical without explaining the mitigating context in which it was offered. He also indicated that he made a similar statement during his closing argument and cites to the Chief Judge's Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings for the proposition that an opening statement is not evidence. We do not find these arguments persuasive. The Judge's finding at issue is not misleading, but rather is a reasonable reiteration or interpretation of the record evidence. In his SOR Response, Applicant referenced his “past lackadaisical attitude toward timely tax filing” and described his conduct as “procrastination.” SOR Response at 2 and 6. During cross-examination, he further acknowledged his statement to an investigator that his tax filing delinquencies were due to procrastination was as accurate summary of the interview. Tr. at 53. *See also* Government Exhibit 2, Applicant's response to interrogatories

that includes his background interview. The Judge’s finding that Applicant was lackadaisical in filing his tax returns is supported by substantial evidence.

Applicant also challenges the Judge’s finding that he never requested an additional extension beyond the automatic six-month extension. He argues this finding was an unfair characterization of his statements because it erroneously implies he had the option to request another extension that he neglected to execute. We do not find this finding misleading. In this regard, it merits noting that a Judge's decision is not measured against a standard of perfection, and there is no requirement that a Judge discuss each and every piece of evidence in his or her decision. *See, e.g.*, ISCR Case No. 12-01500 at 3 (App. Bd. Aug. 25, 2015). Within the parameters that a Judge must base his or her findings of fact on substantial evidence, comply with the requirements of Executive Order 10865 and the Directive, and draw conclusions that are not arbitrary, capricious, or contrary to law, he or she has broad latitude and discretion in how to write a decision. Directive ¶ E3.1.32. In this case, the Judge’s decision as written is sustainable.

Applicant further challenges the Judge’s finding that he has two children living at home when he testified he and his wife live alone and challenges the finding that his wife receives a pension. Applicant acknowledges that these errors have no direct bearing on the case. We agree. These errors are harmless because they do not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). Applicant also asserts these errors are indicative of a trend. He argues, for example, the former error “creates concern regarding the thoroughness and familiarity of [the Judge’s] review of the record, and an ensuing concern that other evidence in the record was not fairly reviewed and considered prior to arriving at the unfavorable decision.” Appeal Brief at 1. We do not find this argument persuasive. Applicant’s arguments in his appeal brief fail to rebut the presumption that the Judge considered all the evidence in the record. *See, e.g.*, ISCR Case No. 19-00520 at 2 (App. Bd. Feb. 7, 2020). Notably, Applicant admitted the significant facts pertaining to his tax filing deficiencies in his SOR Response and his testimony. From our review of the record, the Judge’s material findings or conclusions of a security concern are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 18-02581 at 3 (Jan. 14, 2020).

### Nexus

Applicant claims there is no nexus between his tax filing deficiencies and how he performs his security clearance responsibilities. The Directive, however, presumes there is a nexus or rational connection between proven circumstances under any of its guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 19-00520 at 2. Moreover, Guideline F recognizes that applicants who do not act responsibly in the handling of their finances, such as filing tax returns when due, may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See, e.g.*, ISCR Case No. 16-04112 at 3-4 (App. Bd. May 28, 2019). This assignment of error lacks merit.

### Weighing of the Evidence

Applicant makes various arguments challenging the Judge's weighing of the evidence. In doing so, he asserts the Judge did not properly consider key evidence. For example, he argues that he is not a security risk, that his tax filing deficiencies were an anomaly based on a lack of understanding of the security clearance implications, that the Judge erred in finding that he did not consider the impact of his tax filing deficiencies until he underwent a background interview, and that the Judge's findings and conclusions understate the mitigating evidence, including his character references. Such arguments do not demonstrate harmful error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. 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. 15-08684 at 2 (App. Bd. Nov. 22, 2017). We find no error in the Judge's analysis of the mitigating evidence or in his whole-person assessment.

### Bias

Applicant contends the "numerous instances of factual error, unfair and unfavorable mischaracterizations, and errors with regard to consideration of the mitigating conditions as well as of the whole person assessment, which in whole lead to an unfair, partial, unfounded conclusion regarding my trustworthiness to hold a security clearance." Appeal Brief at 1. He also contends that Judge's "error of omission in considering very favorable evidence continues a trend raising a concern for the fairness and impartiality of the decision." *Id.* at 5. We do not find these arguments persuasive. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 15-03162 at 3 (App. Bd. Jul. 25, 2017). Applicant has failed to identify any errors or evidence, either individually or cumulatively, that would persuade a reasonable, disinterested person to question the fairness and impartiality of the Judge. This issue is resolved adversely to Applicant.

### Conclusion

Applicant's appeal brief fails to establish the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. A person who fails repeatedly to fulfill his or her legal obligations, such as complying with tax return filing requirements, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 15-08782 at 3 (App. Bd. Apr. 5, 2017). "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