



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

KEYWORD: Guideline F

DIGEST: Individuals are required to file and pay their Federal taxes on time. Under the adjudicative guidelines, an applicant cannot abdicate that responsibility by merely claiming someone else was performing those functions for him or her. Whether an applicant acted responsibly by having his or her spouse or a third-party perform those functions depends upon the circumstances of the case. As a general proposition, an applicant’s failure to exercise reasonable oversight of his or her tax obligations is a sufficient basis to prompt skepticism about his or her judgment or attentiveness in matters of importance. In cases of this nature, the key issue is often when did Applicant know or reasonably should have known his or her spouse or the third-party was failing to perform the required functions. Adverse decision is affirmed.

CASENO: 19-01541.a1

DATE: 12/21/2021

Date: December 21, 2021

In the matter of:)	
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-----)	ISCR Case No. 19-01541
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

William Savarino, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 28, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 10, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant had a past-due mortgage loan with a balance of over \$271,000, that he failed to file, as required, his Federal income tax returns for 2013 and 2015-2018, and that he was indebted to the Federal Government for about \$181,000 in delinquent taxes for 2013 and 2016. The Judge found in favor of Applicant on the mortgage allegation and against him on the tax-related allegations. The Judge’s favorable finding was not raised as an issue on appeal.

Applicant raised the following issues on appeal: whether the Judge erred in her analysis of the tax-related allegations and whether the Judge was biased against Applicant. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant is in his sixties, is married, and has adult children. He has worked for a Federal contractor since 2005 and also works part-time in a self-employed status. His wife serves as an officer for two companies. Between 2005 and 2011, they experienced family health issues that impacted their finances. Due to those issues, they began having difficulties making mortgage payments in 2008. In 2013, they applied for mortgage relief to have their payments reduced, but it was not as helpful as they expected. Through an attorney, they unsuccessfully attempted to renegotiate their mortgage loan.

Applicant and his wife hired another attorney who negotiated a “cash for keys” resolution in which they received \$4,500 in cash, while the mortgage company received the property and agreed to waive the deficient mortgage balance of over \$272,000. Applicant admitted to the best of his recollection that he lived in the house for approximately three years without paying the mortgage or homeowner’s fees until the transaction was finalized in 2019. Applicant reported this issue to his facility security officer at that time. He now rents a home.

As a successful businessperson with experience in financial matters, Applicant’s wife was responsible for filing their Federal income tax returns. In an affidavit, Applicant wife stated that she filed their tax returns in paper form without issue from 2001 to 2012. In 2013, she began using an electronic program to prepare and file their returns. She claimed she prepared and filed their tax return for 2013-2018. She noted Applicant would inquire “how it was going and if I needed anything.” Decision at 3, quoting from Applicant’s Exhibit (AE) A. On the other hand, “[h]e testified that he never inquired about whether their tax returns were timely filed.” Decision at 3.

At some point the IRS informed them that information in its possession indicated they owed taxes for 2013. She also later found out the IRS had not received their 2015-2018 tax returns.

When Applicant completed his security clearance application (SCA) in June 2017, he disclosed that he failed to pay his income taxes for 2013, was disputing the amount the IRS claimed he owed, and hired an accountant to determine the amount owed. According to his tax transcript for 2013, the IRS received his tax return in December 2014. He originally received a tax refund for 2013. In April 2016, the IRS issued him a notice for an additional assessment. In May 2016, he was assessed an amount of about \$29,900 for unreported income as well as interest and penalties, and he appointed the accountant as his representative. The IRS sent him another notice in July 2017 and again in November 2018.

In March 2019, Applicant established an installment agreement to pay the past-due taxes. He failed to make payments under that agreement between March and June 2020. Applicant testified he stopped making payment on the advice of his accountant because delinquent tax returns were ready to be filed and they would automatically trigger a stoppage. Another plan would then have to be negotiated with the IRS to address the newly calculated amount owed.

In June 2020, the IRS received Applicant's Federal income tax returns for 2015-2018. He owes a tax liability, including interests and penalties, of approximately \$55,000 for 2015, \$22,900 for 2016, \$7,900 for 2017, and \$8,300 for 2018. He also had a tax liability of \$8,400 for 2019. He has paid his 2018 and 2019 tax liability. As of June 2021, he owed a total Federal tax liability of about \$115,200.

In January 2021, Applicant hired another accountant who is a tax expert. This accountant testified that the IRS notices would have been sent to his last known address, which may have been the "cash for keys" property. In May and June 2021, Applicant made payments, while his accountant began negotiating another payment plan. Shortly after the hearing, Applicant provided confirmation of a new installment plan in which he would make monthly payments of about \$1,750 for 72 months. Due to the amount owed, a tax lien would be filed once the payment plan commenced.

Applicant testified that his wife never told him they owed taxes for 2013 and 2015-2017. "Applicant's wife's affidavit did not explain why, if she timely filed the federal tax returns as she stated, she and Applicant failed to pay the taxes when due as required." Decision at 6. "Based on all of the evidence, I did not find Applicant's wife's vague and incomplete explanations credible. Regardless of whether Applicant was aware of the extent of their tax problems, he is equally responsible for ensuring his tax returns are filed on time and the taxes paid." *Id.* at 9. He experienced conditions beyond his control, but did not act responsibly. "It is not believable that he never inquired whether they were to receive a refund or owe taxes each year considering they were going through serious financial issues regarding their ability to pay their mortgage. The fact that he says he was unaware of what was happening does not absolve him of this legal duties." *Id.* Various mitigating conditions apply or partially apply but Applicant failed to mitigate the security concerns arising from his alleged financial problems.

Discussion

In his appeal brief, Applicant contends the Judge erred by “imputing [to him] *per se* accountability for [his wife’s] shortcomings” in failing to file and pay their taxes. Appeal Brief at 2. He argues that “he reasonably entrusted [her] for over a decade or more to prepare and timely file the family’s tax returns,” but she failed to ensure their tax returns were filed as required for 2013 and 2015 and 2018. *Id.* He asserts that he was unaware of the tax deficiencies until he hired the first accountant who obtained his IRS tax transcripts and reported the problems. *Id.* at 6. He characterizes the Judge’s conclusion that Applicant was “equally responsible for ensuring his tax returns are filed on time and taxes are paid” as a “bright line rule, which is not supported by the Guidelines, renders the Guideline F mitigating conditions and the Whole Person considerations that, among other things, requires analysis of [Applicant’s] personal culpability in his wife’s failures, meaningless.” *Id.* at 9. We do not find Applicant’s arguments persuasive.

In responding to the SOR in November 2019, Applicant admitted in part and denied in part the three tax-related allegations. For the tax-filing allegation, he stated he was “now aware” that his “taxes for some years were not filed.” For the delinquent tax allegations, he admitted he owed past-due taxes for 2013 and 2016 but was uncertain of the actual amounts owed for those years. His IRS tax transcripts for the years at issue establish he did not file his tax returns or pay his taxes as required. Government Exhibit (GE) 4 and Applicant Exhibit (AE) K. The record contains sufficient evidence, as the Judge concluded, to establish Disqualifying Conditions 19(a), *inability to satisfy debts*, 19(c), *a history of not meeting financial obligations*, and 19(f), *failure to file . . . annual Federal . . . income tax returns or failure to pay annual Federal . . . income tax as required.*” Decision at 8, quoting from Directive, Encl. 2, App. A ¶¶ 19(a), 19(c), and 19(f).

Once the facts in an SOR allegation are proved, an applicant is then responsible for presenting witnesses and other evidence to rebut, extenuate, or mitigate those facts and has the ultimate burden to persuasion in obtaining a favorable clearance decision. Directive ¶ E3.1.15. In this case, the Judge’s conclusions do not establish, as Applicant contends, that he was “*per se* accountability for [his wife’s] shortcomings” but instead are just a determination that he failed to meet his burdens of production and persuasion to mitigate the security concerns arising from his proven tax problems.

Individuals are required to file and pay their Federal taxes on time. Under the adjudicative guidelines, an applicant cannot abdicate that responsibility by merely claiming someone else was performing those functions for him or her. Whether an applicant acted responsibly by having his or her spouse or a third-party perform those functions depends upon the circumstances of the case. As a general proposition, an applicant’s failure to exercise reasonable oversight of his or her tax obligations is a sufficient basis to prompt skepticism about his or her judgment or attentiveness in matters of importance. In cases of this nature, the key issue is often when did Applicant know or reasonably should have known his or her spouse or the third-party was failing to perform the required functions. *See, e.g.*, ISCR Case No. 13-00789 at 3-4 (App. Bd. Mar. 28, 2014) and ISCR Case No. 18-02914 at 3-4 (App. Bd. Jan. 8, 2020).

In this case, Applicant disclosed in his SCA of June 2017 that he owed approximately \$25,000 in delinquent taxes for 2013, he had not filed or paid his taxes for 2016, and he hired an accountant to help him with his tax issues. GE 1 at 36-37. These disclosures establish that

Applicant was well aware he had tax problems at that time and was on notice such problems created potential security concerns. At that point, Applicant should have taken responsible steps not only to resolve those problems but also to ensure he was in compliance with his future tax requirements. He failed to do so. The evidence establishes that, after submission of his SCA, he did not file his tax returns for 2015-2018 until June 2020¹ and he continued to incur tax delinquencies for 2017 and 2018. Additionally, he did not establish the first IRS payment plan until March 2019, did not make consistent payments under that plan, did not make any payments under a second IRS payment plan that was in existence from September to December 2020, and did not establish the third IRS payment plan until after the hearing. AE K and T. These facts neither support his claim that he was not responsible for his recurring tax deficiencies nor support his claim that he acted responsibly in addressing those deficiencies.

Applicant argues that his most recent IRS payment plan merits the application of Mitigating Condition 20(g), *the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements*. Directive, Encl. 2, App. A ¶ 20(g). The Judge concluded that, even though Mitigating Condition 20(g) applied, Applicant had not mitigated the Guideline F security concerns, noting he still owes a substantial tax debt and has not yet established a financial track record of compliance. Applicant has failed to establish that conclusion was arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3.

Applicant also argues the Judge demonstrated a “lack objectivity towards [him] and his wife” and had an “inflexible position” about whether he or his wife were telling the truth. Appeal Brief at 11 and 12. He further contends the Judge concluded that either he or his wife was lying before hearing all the evidence. *Id.* at 13. The Appeal Board is required to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. A party challenging a credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005). Furthermore, it would be error for a Judge to accept uncritically a witness’s testimony or an individual’s affidavit without considering whether that information is plausible and consistent with other evidence. *See, e.g.*, ISCR Case No. 14-01894 at 6 (App. Bd. Aug. 18, 2015). Based on our review of the record, we find no basis for concluding the Judge prejudged the evidence and no reason to disturb the Judge’s credibility determinations. To the extent Applicant is claiming the Judge lacked impartiality, we do not find that argument convincing. Applicant has not directed our attention to anything in the record that would likely persuade a reasonable person that the Judge had an inflexible predisposition or lacked impartiality. In short, he has failed to meet the heavy burden on him to rebut the presumption that a Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020).

Applicant has failed 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 the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with 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 national security.”

¹ The only Federal tax return that Applicant and his wife filed close to its due date between 2013 and 2018 was in 2014 when they were qualified for a refund of about \$6,700.

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