

KEYWORD: Guideline F

DIGEST: Applicant’s appeal brief argues that the Judge failed properly to weigh the evidence, including circumstances beyond her control that affected her financial condition and the steps she has taken to resolve her problems. She also notes that the last time she failed to file her tax documents on time was several years ago and that she has filed in a timely manner since then. However, we have noted that unresolved debts are ongoing and therefore recent, for purposes of security clearance determinations. Similar reasoning applies in cases of late tax filings. Applicant knew of these problems for about two years before taking action to resolve them. In a DOHA proceeding, the applicant is charged with presenting evidence in mitigation of the concerns raised in his or her SOR and bears the ultimate burden of persuasion. Directive ¶ E3.1.15. The Judge’s conclusion that she did not provide evidence explaining her dilatory filings is consistent with the record that was before him. Adverse decision affirmed.

CASE NO: 19-01643.a1

DATE: 03/17/2021

DATE: March 17, 2021

)	
In Re:)	
-----)	ISCR Case No. 19-01643
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Joseph D. Jordan, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 4, 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 December 10, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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 and Analysis

Applicant has an associate’s, bachelor’s, and master’s degree. Married, she has four children, three of whom live with her. She has served in the military, and during a deployment to the Middle East was subjected to hostile fire. She has held a security clearance for over 20 years.

Applicant’s SOR alleged that she had failed to file in a timely manner her Federal income tax returns for 2011 through 2017; State A returns for 2011 through 2016; and State B returns for 2017. In addition, the SOR alleged delinquent tax obligations and nine other delinquent debts. The Judge found in Applicant’s favor on all allegations except her failure to have filed Federal returns and the returns due to State A.

Applicant attributed her financial problems to several events that were beyond her control. For example, two of her children were hospitalized for mental health problems; her husband experienced unemployment and underemployment and also had mental health difficulties requiring both inpatient and outpatient treatment; Applicant and her husband were separated for several years; Applicant had disruptions in income due to changes in employment; and another family, as well as her mother, moved in with her due to necessity. Applicant attributed her tax filing delinquencies to her husband’s mental health problems, insofar as tax return preparation was his responsibility and he failed to follow through. At the hearing, the Judge advised Applicant that her tax filing issues were the key factor in her case. He requested that she provide evidence concerning when she was notified of her filing deficiencies and what she did about them. Decision at 8. She did not provide any evidence beyond a statement from her husband that did not admit responsibility for Applicant’s problems.

Applicant did not file her delinquent returns until after she had completed her security clearance application and had undergone her clearance interview. Her mitigation evidence failed to show that she acted promptly in resolving her tax filing delinquencies. These delinquencies suggest that Applicant may be lacking in judgment, trustworthiness, or the ability to follow rules and regulations.

Discussion

Applicant's appeal brief argues that the Judge failed properly to weigh the evidence, including circumstances beyond her control that affected her financial condition and the steps she has taken to resolve her problems. She also notes that the last time she failed to file her tax documents on time was several years ago and that she has filed in a timely manner since then. However, we have noted that unresolved debts are ongoing and therefore recent, for purposes of security clearance determinations. *See, e.g.*, ISCR Case No. 17-03146 at 2 (App. Bd. Jul. 31, 2018). Similar reasoning applies in cases of late tax filings. Applicant knew of these problems for about two years before taking action to resolve them. In a DOHA proceeding, the applicant is charged with presenting evidence in mitigation of the concerns raised in his or her SOR and bears the ultimate burden of persuasion. Directive ¶ E3.1.15. The Judge's conclusion that she did not provide evidence explaining her dilatory filings is consistent with the record that was before him. A disagreement with the Judge's weighing of the evidence or an ability to argue for an alternative interpretation of the record is not sufficient to show that a Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020). Applicant's arguments are not enough to show that the Judge erred in his analysis.

Applicant cites to several Hearing Office cases in support of her effort to obtain a favorable result. However, each case must be decided on its own merits. Inevitable factual variances among decisions involving different applicants substantially diminishes their relevance. *See, e.g.*, ISCR Case No. 19-03344 at 3-4 (App. Bd. Dec. 21, 2020). The cited cases provide no basis to disturb the Judge's analysis.

The record supports a conclusion 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,'" both for the mitigating conditions and the whole-person factors. *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)). A person who fails to fulfill his or her legal obligations, such as filing tax returns when due, 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. ISCR Case No. 17-01256 at 3 (App. Bd. Aug. 3, 2018). The Judge's adverse 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 Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

See Dissenting Opinion

James F. Duffy
Administrative Judge
Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES F. DUFFY

The Judge's decision should be remanded due to analytical errors, such as his failure to address key mitigating factors, *i.e.*, the related concepts of recency¹ and reform & rehabilitation.² In her appeal brief, Applicant raises these issues by highlighting that her last failure to file income taxes properly was for tax year 2015, which was more than four years prior to the issuance of the SOR. Appeal Brief at 7.

In analyzing Applicant's tax filing deficiencies, the Judge focused on the amount of time she took to file the delinquent returns. While the timing of corrective action was an important factor for the Judge to consider, it was not the only factor that warranted consideration in this case. Directive ¶ 6.3 provides that "[e]ach clearance decision must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent

¹ Directive ¶¶ 6.3.2 provides the "recency of the conduct" must be evaluated appropriately. *See also* Directive, Encl. 2, App. A ¶ 2(d)(3).

² The concept of the "recency" is addressed in Mitigating Condition 20(a), *i.e.* "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]" Reform and rehabilitation are more general concepts implicit in various mitigating conditions. *See* Directive, Encl. 2, App. A ¶¶ 20(a)-20(g). *See also* Directive ¶ 6.3.5, which provides each clearance decision must be based on, as appropriate, the "[a]bsence or presence of rehabilitation[;]" *Id.* at Encl. 2, App. A ¶ 2(d), which lists the whole-person factors of "(6) the presence or absence of rehabilitation and other behavior changes;" and "(9) the likelihood of continuation or recurrence [of the conduct at issue];" and *Id.* at Encl. 2, App. A ¶ 2(f)(5), which sets forth the adjudication factor whether the applicant "has demonstrated positive changes in behavior[.]"

criteria and adjudication policy in enclosure 2[.]” *See also* ISCR Case No. 03-04172 at 5 (App. Bd. Jun. 7, 2005)(“A Judge must apply pertinent provisions of the Adjudicative Guidelines.”). The pertinent mitigating conditions or factors to be applied, of course, depend on the facts of the case.

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. This silence does not relieve a Judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 02-11810 at 4 (App. Bd. June 5, 2003). The Board has consistently stated the length of time needed to demonstrate reform and rehabilitation must be based on a reasoned analysis of the facts and circumstances of the case. The Board has also repeatedly held that if the record evidence shows that a significant period of time has passed without evidence of recurrence of the alleged security-significant conduct, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *See, e.g.*, ISCR Case No. 02-08032 at 7 (App. Bd. May 14, 2004); ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004); and ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006).

In this decision, the Judge found against Applicant on two allegations. These asserted she failed, as required, to file her Federal income tax returns for 2011 through 2017 and her state income tax returns for 2011 through 2016. The evidence shows the number of years that Applicant failed to file her tax returns properly was less than alleged. The Judge found that Applicant filed her 2012 Federal tax return about two months late and filed her Federal tax returns for 2014 and 2016 through 2018 on time.³ Decision at 4 and 7. In admitting the state tax filing allegation, Applicant explained that, when she contacted state tax authorities, they informed her all of her state tax returns had been filed with the exception of tax years 2013 and 2015. SOR Response at 3. In the decision, the Judge concluded that “[s]he [eventually] filed all required tax returns” (Decision at 12), which given when the record closed would have apparently included her 2019 Federal and state income tax returns.⁴ In this regard, the Judge made no adverse findings or conclusions concerning Applicant’s filing of her Federal or state income tax returns for the last four completed tax years (2016-2019).

³ In responding to interrogatories, Applicant reported that she filed her Federal and state income tax returns for 2014, 2016, and 2017 about a month or two late. Government Exhibit (GE) 2 at 22 and 27. Such minor tax filing delays are generally not a matter of security significance. *See, e.g.*, ISCR Case No. 17-03024 at 2, n.1 (App. Bd. Sep. 6, 2019)(minor tax filing delays do not raise security concerns). In her interrogatories, Applicant also provided IRS tax transcripts that reflect she filed her 2014, 2016, and 2017 Federal income tax returns on time. 2 at 39, 45, and 47. The incongruity between Applicant’s interrogatory responses and the IRS tax transcripts about the filing dates apparently occurred because she was confusing the _____ and the “processing date” on the tax transcripts. Her misreporting of those filing dates by about a month or so in responding to the interrogatories appears to be the only evidence in the record supporting that portion of the SOR allegations asserting she failed to file, as required, her Federal and state income tax returns for 2014, 2016, and 2017. Consequently, portions of the SOR allegations were apparently based upon Applicant’s innocent mistakes in responding to the interrogatories.

⁴ The hearing was held on October 30, 2020, and record closed on November 13, 2020. Decision at 2. At the hearing, Applicant testified that all of her Federal taxes were filed (Tr. at 29. *See also* SOR Response at 9) and that she was up-to-date on her Federal and state taxes (Tr. at 71). No record evidence shows otherwise.

It also merits noting that Applicant's case is distinguishable from Appeal Board decisions that the Judge cites regarding the issue of the timing of corrective action. For example, the Judge's decision contains the following quote from ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017):

The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, Applicant's filing of his Federal income tax returns for 2009-2014 after submitting his SCA [security clearance application], undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit. [Emphasis added. Decision at 13-14.]

The facts in Applicant's case, however, are different from that case. Applicant's last established tax filing deficiency occurred more than a full tax year before the initiation of the adjudicative process that started when she submitted her latest security clearance application in August 2017. In other words, Applicant began correcting the alleged behavior by filing her 2016 tax returns on time before she was placed on notice her security clearance was in jeopardy. Contrary to the SOR allegations, she also filed her 2017 tax returns in a timely manner. No evidence reflects that Applicant initiated corrective action due to external pressure or coercion. Instead, such action appears to have been taken in good-faith. In analyzing Applicant's case, the Judge did not address this meaningful distinction from the above quoted Appeal Board decision.

The Judge also cites ISCR Case No. 14-05794 at 7 (App. Bd. Jul. 7, 2016) and ISCR Case No. 15-03481 at 3 (App. Bd. Sep. 27, 2016) regarding the timing of corrective action. For the reasons stated in the previous paragraph, those decisions are likewise distinguishable from Applicant's case.⁵ In the decision, the Judge concluded "the primary problem here relates to the timing of Applicant's filing of her federal and state income tax returns." Decision at 16. In short, the Judge's primary reason for denying Applicant's security clearance appears to be based in large part on Appeal Board decisions that are distinguishable from Applicant's case without any explanation for why those decisions should apply in her case. By quoting and citing those decisions without distinguishing them from Applicant's case, the Judge's decision inaccurately creates the impression that Applicant's corrective action was initiated after her security clearance was placed in jeopardy.

Delays in taking corrective action are not *per se* disqualifying but are merely a factor to consider with other pertinent adjudicative factors. Applicant's delays in taking corrective action should have been considered together with the length of time that passed since her last tax filing

⁵ Additionally, the Judge cites ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015) and ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014), but those cases are distinguishable from Applicant's because they involve the filing of tax returns after the IRS instituted tax liens and garnishment actions.

delinquency and all other relevant evidence to determine whether the alleged behavior was behind her.⁶

Given that four completed tax years elapsed since Applicant's last tax filing delinquency, the Judge erred in failing to address whether that significant period warranted a finding of reform and rehabilitation. The Judge also erred in an apparent misapplication of Appeal Board precedent on a

key issue. These errors leave sufficient doubt as to whether they had an impact on the outcome of the case. The decision should have been remanded for the Judge to correct these errors.

Signed: James F. Duffy

James F. Duffy

Administrative Judge

Member, Appeal Board

⁶ The Judge's other favorable findings—such as Applicant's husband was the one who filed their taxes online without the need for her signature; that she and her husband were separated from 2010 to 2016; that she did not learn of the tax filing deficiencies until 2016 or 2017, possibly July or August 2017; that she filed her delinquent Federal tax returns before she responded to the DOHA interrogatories and the SOR; and that she encountered difficulties obtaining documentation regarding her state taxes from a former employer because that company had been sold—also should have been factored into the mitigation analysis.