

KEYWORD: Guideline F

DIGEST: Given evidence that Applicant failed to file his returns for several years due to nothing more than his admitted “procrastination”, the Judge’s conclusion that Applicant had not satisfied the Guideline F mitigating conditions is supportable. Adverse decision affirmed.

CASENO: 12-09719.a1

DATE: 04/06/2016

DATE: April 6, 2016

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In Re:)	
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-----)	ISCR Case No. 12-09719
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

William E. Cassara, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 2015, 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 decision on the written record. On January 12, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Shari Dam 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 Applicant’s circumstances raised concerns under Guideline F; whether the Judge failed properly to apply the whole-person factors; 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 served in the military from 1977 until 1988. After his discharge he began working for his current employer. In his security clearance application (SCA), completed in 2012, Applicant disclosed that he had not filed his Federal or state income tax returns for 2009, 2010, or 2011. He attributed these failures to negligence and to the difficulty in filing them without professional assistance. Applicant eventually filed all of his delinquent returns. He did so after he submitted his SCA, his 2010 and 2011 Federal returns being filed about 2 years from the date of his SCA. He filed his state tax returns in June 2015. In addition, Applicant filed his 2012 and 2013 Federal and state tax returns late. These delinquencies were not addressed in the SOR. The Judge stated that she was not considering them as disqualifying conditions but, rather, for what they might reveal on the issues of mitigation or the whole-person analysis.

Applicant hired a debt solution company to help him with his finances. He received financial counseling and prepared a budget. Applicant has about \$2,700 each month after expenses. He apologized for his negligence in filing his returns.

The Judge’s Analysis

The Judge concluded that Applicant’s tax filing delinquencies raised two concerns under Guideline F: 19(c): “a history of not meeting financial obligations;” and 19(g): “failure to file annual [Federal], state, or local tax returns as required.”¹ In evaluating his case for mitigation, the Judge stated that the recency of Applicant’s tax filings militate against a conclusion that his problems are unlikely to recur. She stated that Applicant presented no evidence that his failures were due to circumstances beyond his control and that, based upon the record before her, there was little evidence that Applicant’s problems were under control. In the whole-person analysis, the Judge stated that Applicant’s failure was “inexplicable.” Decision at 6. She stated that, though Applicant is apologetic, she finds no reason to conclude that he would have filed his returns at all had he not been facing a clearance reinvestigation. She found that there is a significant likelihood that Applicant’s problems will continue.

¹Directive, Enclosure 2 ¶¶ 19(c), (g).

Discussion

Applicant challenges the Judge's conclusion that his circumstances raised security concerns. He argues that he has never been financially overextended or at risk of engaging in illegal acts to generate funds. However, the concern under Guideline F is not simply that an applicant might be tempted to compromise classified information in order to pay his debts. A Judge must also consider the extent to which an applicant's circumstances cast doubt upon his judgment and other characteristics essential to protecting national security information. *See, e.g.*, ISCR Case No. 14-01479 at 2 (App. Bd. Sep. 2, 2015). This obligation is rooted in the language of the Directive, which states that failure to meet financial obligations may indicate unwillingness to abide by rules and regulations, thereby raising questions about an applicant's ability to protect classified information. Directive, Enclosure 2 ¶ 18. We have previously noted that the filing of tax returns is a financial as well as a legal obligation. *See, e.g.*, ISCR Case No. 14-02930 at 3 (App. Bd. Dec. 9, 2015). Moreover, the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). Indeed, as the Judge acknowledged, the Directive explicitly identifies failure to file tax returns as a condition that can disqualify an applicant for a clearance. Under the facts of this case, the Judge did not err in concluding that Applicant's filing delinquencies raised concerns under Guideline F.

Applicant argues that the Judge's consideration of the non-alleged filing delinquencies for 2012 and 2013 served "to obfuscate this issue concerning any national security concerns." Appeal Brief at 5. However, conduct not alleged in the SOR may be considered for purposes other than to raise additional security concerns. These purposes include evaluating an applicant's case for mitigation. *See, e.g.*, ISCR Case No. 14-00151 at 3, note 1 (App. Bd. Sept. 12, 2014). They also include performing a whole-person analysis. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). Evidence that Applicant failed to file returns for 2012 and 2013 is relevant in evaluating whether he has mitigated concerns arising from the earlier delinquencies contained in the SOR. His persistent engagement in conduct even after he had been made aware of its security significance is a matter that bears upon the question of whether he had met his burden of persuasion. The Judge did not err in her treatment of this non-alleged conduct.

Applicant contends that he has met all of the mitigating conditions set forth in the Directive. Among other things, he cites to evidence that all of his tax returns have been filed, that his reason for having been dilatory was negligence rather than intentional failures, and that he is receiving counseling. The Judge made detailed findings about the evidence that Applicant cites in his brief. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record or that she mis-weighed the evidence. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Given evidence that Applicant failed to file his returns for several years due to nothing more than his admitted "procrastination" (Item 6, Clearance Interview Summary, at p. 6), the Judge's conclusion that Applicant had not satisfied the Guideline F mitigating conditions is supportable.

Applicant challenges the Judge’s whole-person analysis. Among other things, he cites to Directive ¶ 6.4, which permits officials to suspend an applicant’s clearance pending final adjudication whenever “there is a reasonable basis for concluding that [the] applicant’s continued access to classified information poses an imminent threat to the national interest[.]” He argues that his circumstances do not rise to that level. However, DOHA proceedings to adjudicate an applicant’s final eligibility for a clearance are conducted under the Guidelines and procedures set forth in Enclosures 2 and 3 of the Directive. ¶ 6.4 is limited in scope and 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. *See, e.g.*, ISCR Case No. 14-05238 at 2 (App. Bd. Jan. 13, 2016).

Applicant challenges the Judge’s use of the word “inexplicable” in describing his conduct. However, under the facts of this case, the Judge did not err in concluding that Applicant’s claims of neglect were insufficient to explain or excuse a dereliction that extended over a course of several years. Neglect is a failure to exercise reasonable care, and an applicant who neglects to file his tax returns might fail to take appropriate care in regard to other legal obligations, such as those governing the protection of classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). We find no reason to conclude that the Judge contravened the requirements of Directive ¶ 6.3 in her whole-person analysis, insofar as she considered Applicant’s security-significant conduct in light of the totality of the record evidence. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information 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: William S. Fields
William S. Fields
Administrative Judge

Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board