

KEYWORD: Guideline f

DIGEST: Applicant failed to file tax returns for years 2009-2012. There is no reason to conclude Applicant was denied an opportunity to present mitigating evidence. Adverse decision affirmed.

CASENO: 14-02226.a1

DATE: 07/21/2015

DATE: July 21, 2015

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In Re:)	
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-----)	ISCR Case No. 14-02226
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Alex Kaminski, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 10, 2014, 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 April 6, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 Applicant’s circumstances raised security concerns; whether Applicant was denied due process; 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 works for a Defense contractor. A graduate of a military academy, Applicant served on active duty, retiring as a Lieutenant Colonel. He received a top secret clearance with access to sensitive compartmented information (SCI), although his SCI access was administratively terminated for reasons not specified in the record. Applicant and his wife divorced in 2000, but they have continued to cohabit for five nights a week since the divorce.¹

Applicant failed to file his income tax returns for tax years 2009 through 2012. He attributed this failure to (1) an erroneous belief that he did not need to file if he owed no money; (2) the demands of a high-pressure job; (3) his providing care to his chronically ill ex-wife; (4) an inadequate leave balance; and (5) the difficulty of obtaining all of the documents he needed to complete his returns. Applicant eventually filed his returns, those for 2011 and 2012 after he had received the SOR. The Judge noted that Applicant’s security clearance application (SCA) included an acknowledgment that he needed to file his returns, but he failed to do so for over two years. He also noted that Applicant’s circumstances did not prevent him from filing tax returns on behalf of his ex-wife.

Applicant currently has a monthly income deficit of \$387.40. His assets are valued at over \$840,000. Although he claims he pays off the balances on his credit cards each month, his monthly budget shows that he has over \$10,000 in consumer debt. “It is unclear which story is accurate.” Decision at 6.

Applicant enjoys an excellent reputation for the quality of his work performance. He is considered meticulous in his approach to his job, and he has received numerous awards.

The Judge’s Analysis

¹Applicant testified that his wife suffers from a debilitating illness, and he provides care for her that she could not otherwise obtain. Tr. at 74-75.

In concluding that Applicant had not mitigated the concerns arising from his tax delinquencies, the Judge stated that these problems were not caused by circumstances outside Applicant's control. He stated that, despite numerous opportunities to file his returns and his promises to do so, Applicant repeatedly failed in meeting this responsibility. The Judge characterized Applicant's conduct as "repeated procrastination and delay." *Id.* at 10. He stated that the record contains no evidence that Applicant has received financial counseling.

In the whole-person analysis, the Judge cited to evidence of Applicant's military service, his excellent job performance, his church activities, and his devotion to his ex-wife. He found that Applicant's financial accounts appear to be in order. He characterized Applicant as a meticulous worker with impeccable judgment who had many opportunities to file his returns yet failed to do so. The Judge concluded that Applicant's past conduct provides little reason for confidence that he will comply with his tax obligations in the future.

Discussion

Due Process

Applicant contends that he was denied an opportunity to address some of the evidence in the record. He states that, at the end of the hearing, the Judge asked him to provide a financial statement, along with other documents. Tr. at 81. He notes that his financial statement listed consumer debts of over \$10,000, which the Judge cited as inconsistent with Applicant's claim that he pays off his credit cards each month. He argues that, had he had the opportunity to do so, he could have explained the nature of his consumer debts.

In making this argument, Applicant includes matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. We have evaluated this argument in light of the record as a whole. The Judge held the record open for about a month after the hearing. Applicant provided several exhibits during that time which were admitted into evidence. There is nothing in the record to show that Applicant had requested an opportunity to comment that was denied by the Judge. In addition, Applicant does not explain, nor is it otherwise clear from the record, why he believes that he could not have provided an explanation for the consumer debt at the time he submitted his financial statement to the Judge. As was made clear to Applicant prior to the hearing, it was his responsibility to mitigate the concerns arising from his delinquent tax returns. Directive ¶ E3.1.15. In any event, information from Applicant's financial statement does not appear to have been a significant factor in the Judge's analysis, and, to the extent that he mentioned Applicant's current finances, the Judge described them as being in order. Therefore, even if there were an error here, it would be harmless. There is no reason to believe that Applicant was denied a fair opportunity to present evidence in mitigation.

Security Concerns

Applicant contends that his circumstances do not raise security concerns. He notes that he does not actually owe money to the IRS and that he has no unexplained affluence, gambling habit, or a need to generate funds through illegal acts.

However, the concern under Guideline F is not simply that an applicant may owe money and be tempted to compromise classified information in order to generate funds to pay his creditors. The Guideline also requires a Judge to examine an applicant's financial condition for what it may reveal about his judgment, self-control, and willingness to abide by rules and regulations. *See, e.g.*, ISCR Case No. 14-00434 at 3 (App. Bd. Jan. 20, 2015). The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's worthiness for a clearance. *See, e.g.*, ISCR Case No. 12-10404 at 5 (App. Bd. Mar. 13, 2015). Moreover, the Directive explicitly states that failure to file tax returns is a condition that could raise security concerns in and of itself. Directive, Enclosure 2 ¶ 19(g). In the case before us, Applicant's repeated failure to have filed his returns is sufficient to raise a concern that he may be lacking in the judgment expected of persons who have access to national security information. We resolve this issue adversely to Applicant.

Whole Person Analysis

Applicant challenges the Judge's whole-person analysis. Specifically, he argues that the Judge did not properly apply the factors set forth in Directive, Enclosure 2 ¶ 2(a).

A whole person analysis involves more than the consideration of these factors. It also requires that a Judge evaluate an applicant's security significant conduct in light of the record as a whole. *See, e.g.*, ISCR Case No. 14-01567 at 2 (App. Bd. Apr. 10, 2015). A review of the Judge's decision shows that he complied with this requirement. In presenting this argument, Applicant cites to some Hearing Office cases in which the Judges granted clearances to applicants who had failed to file their returns. We give these cases due consideration as persuasive authority. However, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-10178 at 3 (App. Bd. Aug. 29, 2013).

In the case before us, Applicant's admissions and record evidence show that he repeatedly failed to file his Federal income tax returns. Moreover, a reasonable person could conclude that the explanations that Applicant provided for this failure were not sufficient to excuse, or even explain, the malfeasance, given Applicant's level of education, his acknowledgment in his SCA that he needed to file his returns, and his apparent assiduous care in filing returns for his wife. Insofar as each case must be decided on its own merits, Applicant's citation to other decisions is not sufficient to show that the Judge erred. *See* Directive, Enclosure 2 ¶ 2(b).

Other Issues

Applicant argues that the Judge failed properly to apply the mitigating conditions. However, after considering this argument in light of the record as a whole, we conclude that Applicant is merely presenting an alternative interpretation of the evidence, which is not sufficient 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. 14-00173 at 3 (App. Bd. Aug. 8, 2014). Moreover, Applicant’s citation to various pieces of evidence is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-00723 at 3 (App. Bd. Feb. 4, 2014).

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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board