

KEYWORD: Guideline F

DIGEST: The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. Adverse decision affirmed.

CASENO: 14-03528.a1

DATE: 07/22/2015

DATE: July 22, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-03528
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 2, 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 30, 2015, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer I. Goldstein denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 58 years old. He failed to file both federal and state income tax returns for the years 2006 through 2012. As a result, he became indebted to the federal government in the amount of \$6,600. The delinquency accumulated between 2007 to at least 2010. Applicant has since satisfied his income tax arrearages. His failure to file income tax returns was a result of two conditions: his brother's 2003 cancer diagnosis and a ruptured disk in Applicant's back. Applicant actively assisted and cared for his brother during his cancer treatment. The treatment ended in approximately 2003. Applicant's back injury occurred in late 2005. In 2006, he started a rehabilitation regimen that included Ibuprofen for the pain. Applicant stated that the medication did not affect his judgment or thinking. He stated that he was overwhelmed by the circumstances of his brother and his back problems and made a bad mistake in judgment by not filing income tax returns.

Applicant testified that he filed all of his delinquent federal and state income tax returns for tax years 2006 through 2012 in October 2014, after he received the SOR in this case. He presented tracking information showing he submitted something to both the IRS and the state taxing authority at that time. However, the contents are not identified on the tracking information, nor did he submit copies of the returns themselves or other proof that the returns have been filed. Despite his claims to have filed all delinquent federal and state returns, he has not produced sufficient documentation to support his claims. Additionally, the evidence shows that Applicant filed his 2013 federal income tax return on December 1, 2014 after being granted a filing extension only until October 15, 2014. Applicant signed a statement of intent indicating that he would never fail to file his federal and state income tax returns again. Applicant has a reputation for honesty, integrity, hard work, and high personal and professional standards.

The Judge reached the following conclusions: Despite resolving his tax delinquency, Applicant failed to produce sufficient evidence to document that he filed federal and state tax returns, as required by law. He has a history of not meeting his legal financial obligations. The evidence is sufficient to raise disqualifying considerations, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns. None of the Guideline F mitigating conditions provide full mitigation for Applicant's failure to file his income taxes. While his brother's 2003 illness and his own 2006 back injury may initially have played a role in his failure to file tax returns in 2006 or 2007, he failed to adequately explain how they affected his ability to file in subsequent years. Further, even if he filed those delinquent taxes, he did so after receiving the SOR and learning his position was in jeopardy. Moreover, he filed his 2013 federal income taxes late. These facts significantly undermine his signed statement promising to file his income taxes in a timely manner in the future. While he filed his 2014 income tax returns in a timely manner, he has not

established a proven track record in this respect. He did not meet his burden to mitigate the security concerns arising from financial considerations.

Applicant argues that he has filed his 2006 through 2012 tax returns, that there was ample evidence in the record establishing this fact, and that the Judge failed to take this evidence into account when rendering her decision. He also asserts that the evidence of his circumstances with his brother and his own health, coupled with evidence of his high credit score, his reputation for honesty and trustworthiness, and his ten years of holding a security clearance without incident, mandate a conclusion that the government's concerns have been mitigated. Applicant fails to establish error on the part of the Judge.

The Judge found that Applicant had not established his burden of proving he had filed income taxes from 2006 to 2012. That finding is sustainable. A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant does not rebut that presumption here. The Judge specifically mentions the evidence Applicant cites in support of his argument that the tax return filings were established. She gave a detailed description of why she did not consider the evidence adequate to support Applicant's assertion. Additionally, the Judge concluded that, even if Applicant had filed the returns in question, he wouldn't have done so until after his receipt of the SOR, and he filed his 2013 federal tax return late. The Judge concluded that these facts significantly undercut the weight to be accorded Applicant's stated intent to file his future returns on time. This conclusion is reasonably supported by the record.

Applicant lists favorable evidence in the record in support of his general assertion that the case was mitigated. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of the case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. Applicant has not demonstrated that the Judge erred when she weighed the mitigating evidence against the seriousness of the disqualifying conduct.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes 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.'"

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)). “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). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge 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