

KEYWORD: Guideline F; Guideline E

DIGEST: As security clearance decision is not a determination of an applicant's loyalty.
Adverse decision affirmed.

CASENO: 14-06093.a1

DATE: 12/04/2015

DATE: December 4, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-06093
)	
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 January 28, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 14, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy 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 conduct raised security concerns 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 position he has held since January 2000. He has completed some college courses. Applicant served in the U.S. military from 1981 to 1984 and in the Reserves from 1986 to 1988. He has been divorced three times.

In his security clearance application, Applicant disclosed that he had not filed his Federal income tax returns since 2009 because he did not have access to his personal records following a divorce and because he lost some records to water damage. He also testified that he delayed filing because he was concerned that state authorities would seize his refunds to pay for past-due child support obligations. At the hearing he testified that he had filed for tax years 2011 through 2014 but failed to provide corroborating evidence. He testified that he did not file his returns for 2009 or 2010 because his tax preparer told him that he could not go back that far.

Applicant submitted copies of the first two pages of his returns for 2012 through 2014. He stated that he was providing a copy of the 2011 return but in fact did not. The copies of the returns that he provided were neither signed nor dated. There is no evidence that the IRS received the returns or that Applicant paid any taxes owed.

Applicant’s tax delinquencies were cross-alleged under Guideline E. In addition, the SOR alleged other Personal Conduct concerns of a criminal nature. Some were misdemeanor offenses, such a bounced check, operating a vehicle off an established road, and an assault. The SOR also alleged some traffic offenses. However, other offenses were felonies, for example, aggravated battery and cruelty toward a child (spanking with a belt, leaving severe bruises). On another occasion, Applicant was charged with battery and resisting arrest, arising from an incident in which neighbors stated that Applicant had made a pass at a woman at a party and had thrown a table at someone. The charges were dropped after Applicant wrote a letter of apology to his neighbors and performed 30 hours of community service.

Applicant submitted letters of reference from supervisors, co-workers, and friends attesting to his reliability, honesty, dedication, integrity, and good character. While in the military he was twice commended for outstanding performance of duty. He also received the Good Conduct Medal.

He has worked for Defense contractors for 30 years, and his 2015 performance evaluation rated him in the highest category.

The Judge's Analysis

Although concluding that Applicant had most likely filed his tax returns for 2012 through 2014, the Judge stated that, on the whole, Applicant had not acted responsibly regarding his tax obligations. He found Applicant's explanation for his conduct to be unpersuasive and concluded that the conduct cast doubt on his reliability, trustworthiness, and good judgment. Regarding the Guideline E concerns, the Judge stated that some of the offenses were serious. Although others, viewed in isolation, were of minimal significance, the Judge concluded that the record as a whole showed a pattern of unreliable behavior. In the whole-person analysis, the Judge noted Applicant's military service and his many years of working for Defense contractors. Nevertheless, the Judge concluded that the record left him with unresolved doubts about Applicant's fitness for a clearance.

Discussion

Applicant argues that "[t]here is no evidence to show that the [Applicant] did not file his past tax returns and that this was not a mistake that will recur in the future." He also argues that "[t]here is no evidence to show that the [Applicant] does not have an undying loyalty to the United States and that he or his past conduct is a threat to National Security." Applicant contends that, as a consequence, "the 'conditions that could raise a security concern'" under both Guidelines are not applicable. Appeal Brief at 4-5.

We note that a security clearance determination is not a determination as to an applicant's loyalty. Directive, Enclosure 1, SECTION 7. *See* ISCR Case No. 12-08412 at 2 (App. Bd. Sep. 11, 2015). Neither does the Government have to show that an applicant has compromised national security before it can render an adverse clearance decision. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). To the contrary, the Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's eligibility for a security clearance. *See, e.g.*, ISCR Case No. 14-04648 at 3, *supra*. In this case, Applicant's failure without reasonable excuse to file his taxes in a timely manner and his various criminal and traffic offenses, viewed as a totality, support the Judge's conclusion that his conduct raised concerns under both Guidelines. Applicant's argument is not enough to rebut the presumption of nexus.

Applicant cites to his good character evidence, his duty performance, and his military service. He also cites to his claims that he had filed all of his tax returns, noting that the Judge found that Applicant had most likely filed his returns for 2012 through 2014. He argues that this finding shows that the Judge found Applicant's testimony credible. Applicant's argument is not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-08412 at 2, *supra*. Moreover, although the Judge found that Applicant had probably

filed some of his tax returns,¹ he concluded that Applicant's stated reasons for his delinquencies were not persuasive. We give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. Applicant's arguments are not sufficient to undermine the Judge's evaluation of Applicant's credibility. Neither are they 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. 14-05251 at 3-4 (App. Bd. Oct. 5, 2015).

Applicant cites to two Hearing Office cases that he contends support his effort to obtain a favorable decision. Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-02632 at 3 (App. Bd. Aug. 28, 2015). These cases provide no reason to conclude that the Judge's decision was erroneous.

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

¹To the extent that Applicant is challenging the Judge's finding that he had probably filed his returns for 2012 through 2014 but had not demonstrated that he had filed for the previous years, we conclude that the Judge's findings are sustainable under the standard for factual sufficiency set forth in Directive ¶ E3.1.32.1.

James E. Moody
Administrative Judge
Member, Appeal Board