

KEYWORD: Guideline F

DIGEST: The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. Adverse decision affirmed.

CASE NO: 15-02326.a1

DATE: 10/14/2016

DATE: October 14, 2016

In Re:))	
-----))	ISCR Case No. 15-02326
))	
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Thomas C. Houck, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 11, 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 hearing. On July 12, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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

Applicant, who is 54 years old, has worked for her current employer since 1990. She served in the U.S. Marine Corps from 1982 to 1990 and was honorably discharged. She was married from 1984 to 1994 and has three children.

Applicant admitted that she failed to file her Federal income tax returns for 2005 through 2010 in a timely manner. Her explanations for not filing the tax returns on time was that she always received a refund; that she was a single mother with three children; that she would request an extension; that there was a big strike at work in 2005; and that her children always came first. She also explained that she incurred educational and other expenses involving her children and that her mother injured herself in 2009. She took off about a month from work to help her mother who then lived with Applicant for about ten months before returning home.

In her Answer to the SOR, Applicant acknowledged that she procrastinated in filing her tax returns. She knew she was required to file her tax return each year, but did not see it was a "major emergency." She stated, "I figured if I did not owe them, you know, they don't really care." Decision at 3. She filed the delinquent returns in 2012. Her Federal income tax returns reflected that she was due a refund of about \$2,700 for 2005; she owed about \$1,180 for 2006; she was due a refund of about \$2,430 for 2007; she owed about \$1,780 for 2008; she was due a refund of about \$2,430 for 2009; she owed about \$1,260 for 2010; and she was due a refund of about \$3,050 for 2011. She admitted she regularly received letters from the Internal Revenue Service (IRS) requesting that she file her delinquent Federal income tax returns. Her 2011 Federal income tax return was filed in August 2012, and the Judge concluded that tax return was not filed late.

In her Answer to the SOR, Applicant stated that she filed her 2009 and 2010 state income tax returns in 2012, did not owe any taxes, and was due refunds. She provided documentation supporting those statements. She attributed the delays in filing her state income tax returns to the same reasons for failing to file her Federal income tax returns in a timely manner. She explained: "I procrastinated obtaining my refunds because of what I then considered to be higher priority demands on my severely limited time." Decision at 3.

Applicant denied a charged-off home equity loan for about \$34,670. She acknowledged that she defaulted on that loan. She received a letter from the creditor advising it could not bring legal action on the debt because the statute of limitations had expired. She was advised by an attorney not to contact the creditor, and she indicated that she does not intent to pay the debt. She resolved a debt for about \$4,300 after the creditor filed a lawsuit against her. After receiving the SOR, she attempted to contact the creditor of a debt for about \$200, but there was no answer. The debt is now with a collection agency. For a medical debt of about \$80, she stated the medical provider did not have a record of the debt. The medical debt is with a collection agency, and it is unknown if she contacted the collection agency.

Applicant is no longer living paycheck to paycheck. She is contributing to a retirement account and making "catch-up" payments. She is current on her mortgage. She stated that, since

2012, she filed her Federal tax returns on time. Between 2006 and 2010, she took a pleasure cruise and a trip to Europe with some of her children. Two character witnesses testified favorably for her.

The Judge's Analysis

The Judge concluded that Applicant intentionally failed to file her 2005-2010 Federal income tax returns and her 2009 and 2010 state income tax returns in a timely manner. She has delinquent debts that began in at least 2009. It was not conceivable that she was unable to complete and file her tax returns due to her personal obligations. Recognizing that Applicant filed her delinquent tax return before issuance of the SOR, the Judge was unable to conclude that the conditions that resulted in Applicant's financial problems were not beyond her control and that she acted responsibly. The Judge found in favor of Applicant on the debt she settled after being threatened with a lawsuit and found against her on the remaining SOR allegations.

Discussion

In her appeal brief, Applicant argues that the largest debt is legally unenforceable due to the running of the statute of limitations and, for practical purposes, is resolved. Comparing this debt to those discharged in a bankruptcy, she contends this debt should not form the basis of the primary Guideline F concern that an applicant will engage in illegal acts to generate funds. She then argues that her financial situation has improved and mitigated the security concerns. Next, Applicant contends that her failure to file income tax returns in a timely manner should have been alleged under Guideline E (Personal Conduct) of the Directive and that she came to the hearing prepared to mitigate financial concerns and not personal conduct concerns. For reasons discussed below, these arguments lack merit.

Applicant's argument concerning the unenforceability of the largest debt due to the running of the statute of limitations fails to demonstrate the Judge erred. First, security clearance decisions are not controlled or limited by statutes of limitations. Second, absent an explicit act of Congress to the contrary, the Federal Government is not bound by state law in carrying out its functions and responsibilities. Applicant does not cite to any Federal statute that requires the Federal Government to be bound by state law in making security clearance decisions. Third, a security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Accordingly, even if a delinquent debt is legally unenforceable under state law, has been discharged in a bankruptcy, or is paid, the Federal Government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See, e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). In this case, the Judge's consideration of the unenforceable debt in making her security clearance eligibility determination was not arbitrary, capricious, or contrary to law.

The Guideline F security concern is as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.¹

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. *See, e.g.*, ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). Contrary to Applicant's contention, Guideline F, with its disqualifying condition² directly on point, is an appropriate avenue for alleging security concerns that arise from an individual's failure to file Federal, state, or local income tax returns in a timely manner. It is well settled that conduct may have independent weight under multiple guidelines (*see, e.g.*, ISCR Case No. 04-09251 at 3 (Mar. 27, 2007)). The fact that Government did not allege that conduct under all possible applicable guidelines did not relieve Applicant of the responsibility of mitigating the conduct within the scope of the guideline alleged. In the present case, the SOR adequately placed Applicant on notice that her alleged failure to file her Federal and state income tax returns in timely manner was a concern that would be addressed at the hearing. We find no basis for concluding that Applicant's due process rights were violated by the Government alleging her tax return filing delinquencies under Guideline F.

Applicant also contends that the Judge findings about her failure to pay taxes was not supported by the evidence. The Judge found that Applicant did not owe any state taxes for 2009 and 2010, and found that she either owed taxes or was due refunds on her Federal income tax returns for each year between 2005 and 2011. Those findings were based on state and Federal income tax returns that Applicant offered into evidence. After reviewing the record, the Board concludes that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

A recurring theme in Applicant's appeal brief is her argument for an alternative weighing of the evidence. For example, she argues that her delay in filing tax returns was not the result of her unwillingness to follow rules and regulations. She contends that her family responsibilities as a single mother and caregiver as well as her belief that she was due tax refunds mitigated her tax return filing delinquencies. The Appeal Board's scope of review is to determine whether or not the Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept

¹ Directive, Enclosure 2 ¶ 18.

² Directive, Enclosure 2 ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same[.]"

as adequate to support a conclusion in light of all the contrary evidence; whether the Judge adhered to the procedures of the Directive, and whether the Judge's ruling and conclusions are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32. 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). Moreover, we conclude that the Judge's whole-person analysis complies with the requirements of Directive ¶ 6.3, in that the Judge considered the totality of the evidence in reaching her decision. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

Throughout her appeal, Applicant cites to Hearing Office decisions that she argues support her request for a favorable determination. The Board gives due consideration to these cases. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office judges nor on the Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). Her arguments based on the Hearing Office decisions are not persuasive.

The Judge examined the relevant evidence 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board