

KEYWORD: Guideline F

DIGEST: An SOR is an example of notice pleading. So long as it places an applicant on notice of the matters to be addressed in the hearing, it satisfies the requirements of the Directive. The Directive presumes a nexus between admitted or proved conduct under any of the Guidelines and an applicant’s eligibility for a clearance. A decision to amend the SOR is discretionary with the Judge. Even if an applicant has paid his debts, a Judge may still consider the underlying circumstances. Adverse decision affirmed.

CASE NO: 15-00216

DATE: 10/24/2016

DATE: October 24, 2016

In Re:)	
)	
-----)	ISCR Case No. 15-00216
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Mark R. Thomas, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 27, 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 June 21, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 denied Applicant 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 has been a Federal contractor since 2007. He served in the military from 1979 until 1999, retiring in the grade of E-7. He held a security clearance from 1996 to 1999. Applicant was granted a clearance in 2004 while working as a contractor. His SOR alleged about \$37,000 in unpaid Federal tax debts, one based on a 2009 tax lien and another on a lien entered in 2011. The SOR also alleged a charged-off utility bill for about \$450. Applicant has paid each of these delinquent accounts.

Applicant has a long history of tax problems. For each tax year from 2001 to 2009, he made inconsistent payments on various installment plans that he had with the IRS. In 2009 and 2011, the IRS filed the liens alleged in the SOR. In addition, in September 2014, the IRS notified Applicant that he owed additional tax liabilities for 2011 through 2014, which were not covered by liens.

Applicant acknowledged that he had no reason for his failure to pay his taxes on time. He claimed that he was ignorant of his company's finances and that he had placed other concerns over his taxes. He bought a home in 2012 for about \$380,000 and, between 2010 and 2015, financed the purchase of six cars. Moreover, in 2015, he began purchasing his partner's interest in the company for about \$800,000.

Applicant asserts that henceforth he will pay his taxes on time. He states that his company is doing well and will take withdrawals from the company as necessary to satisfy his tax liabilities.

The Judge's Analysis

The Judge stated that the two tax liens were "merely symptoms of Applicant's history of tax problems." Though noting that his entire tax history was not alleged, she concluded that the two liens "provided Applicant with sufficient notice that his entire tax history would be a matter of concern." Decision at 5. She stated that his having resolved all of the SOR allegations was not sufficient to mitigate the concern arising from his pattern of failing to pay his tax obligations. She concluded that Applicant's tax problems raise two Guideline F Disqualifying Conditions: 19(a) and (c).¹ In a footnote, the Judge stated that she would consider the non-alleged conduct for the purposes set forth in cases such as ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).²

¹Directive, Enclosure 2 ¶ 19(a): "inability or unwillingness to satisfy debts;" and ¶ 19(c): "a history of not meeting financial obligations[.]"

²For example, to assess credibility; to evaluate the applicant's case for mitigation; to consider whether the applicant has demonstrated rehabilitation; or to perform a whole-person analysis.

The Judge stated that Applicant's tax problems did not occur under circumstances that were unlikely to recur or that resulted from causes beyond his control. Rather, she found that his problems were rooted in the priorities that he assigned to his spending and that there is nothing in the record to suggest that he will act differently in the future. She found that Applicant's tax problems were ongoing and that he failed to establish that they are under control, beyond his promise to pay his taxes in the future. Given Applicant's long history of service to the Government, both as a military member as well as a civilian employee and Federal contractor, his handling of his taxes is "troubling." Decision at 6. She concluded that Applicant had not established a track record of rehabilitation or reform.

Discussion

Applicant raises an issue of due process. Specifically, he argues that the Judge erred by concluding that his entire tax history raised a security concern. Noting that his entire history was not explicitly alleged and that the Judge did not amend the SOR, he contends that he was not placed on notice as to the security concerns at issue, thereby impairing his ability to prepare a case for mitigation.

An SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment and it does not have to allege every possible fact that might be relevant at the hearing. *See, e.g.*, 14-06440 at 3-4 (App. Bd. Jan. 8, 2016). So long as an SOR places an applicant on notice of the matters to be addressed in the DOHA proceeding, it satisfies the requirements of the Directive. *See, e.g.*, ISCR Case No. 14-05127 at 6 (App. Bd. Jun. 24, 2016). We evaluate a Judge's Decision in its entirety and do not consider individual sentences in isolation. *See, e.g.*, ISCR Case No. 11-13664 at 5 (App. Bd. Aug. 15, 2013). A decision to amend an SOR is discretionary with the Judge. *See, e.g.*, ISCR Case No. 14-00019 at 4 (App. Bd. Sep. 18, 2014).

The Directive presumes a nexus between admitted or proven facts under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). When an applicant's circumstances raise security concerns, as in cases in which the applicant has a history of not paying debts, he or she has the responsibility to present evidence in mitigation. Directive ¶ E3.1.15. In evaluating an applicant's case, a Judge should consider the totality of the record evidence. *See, e.g.*, ISCR Case No. 15-00424 at 2-3 (App. Bd. Apr. 20, 2016).

Applicant bases his argument on the sentences that we quoted in our summary of the Judge's analysis. We construe his argument to mean that tax liens issued in 2009 and 2011 are not sufficient to place Applicant on notice regarding delinquencies extending back several years before then. Our reading of the Decision as a whole does not support his argument. First, two tax liens that went unpaid for several years in and of themselves constitute a history of not paying debts. More to the point, a tax lien does not necessarily pertain to delinquencies that were incurred only in the year that the lien was issued. Indeed, in this case Applicant's own evidence—both in his Response to the SOR and at the hearing—establishes that the 2009 lien covered delinquent taxes that went back to 2001. IRS Form 668, Attached to Response to SOR; Applicant Exhibit A. Therefore, evidence directly

pertinent to the SOR allegations shows a fairly extensive history of tax delinquencies. That being the case, it was Applicant's task to present evidence in mitigation and the Judge's to evaluate his clearance eligibility in light of the whole record, which includes evidence of non-alleged tax delinquencies.³ Applicant cannot fairly complain that the Judge subjected him to surprise by basing findings and conclusions upon evidence that he himself submitted. We have considered the entirety of Applicant's argument and conclude that he was not denied reasonable notice of the concerns that would be addressed in the hearing, nor was he otherwise denied due process. That the Judge apparently did not consider amending the SOR evidences no abuse of discretion.

Applicant challenges the Judge's mitigation analysis. Among other things, he argues that the Judge erred in entering adverse findings under Directive, Enclosure 2 ¶ 19(b). He contends that his indebtedness was not caused by frivolous or irresponsible spending. We find no reference in the Decision to this disqualifying condition. The Judge did enter adverse formal findings for SOR ¶ 1(b), but these addressed one of the tax liens discussed above. Moreover, although she made findings about Applicant's having purchased six cars over a five-year period, her analysis focused exclusively on Applicant's tax debts.

Applicant notes the Judge's comment that he had resolved the SOR allegations. Reading this in context, we conclude that the Judge simply recognized that Applicant had paid the tax debts addressed in the allegations. However, this did not compel her to enter a favorable decision. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015) (Even if an applicant has actually paid his debts, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's eligibility for a clearance). Nor did it preclude her from considering that Applicant had other, non-alleged, tax debts that were still ongoing as of the close of the record.⁴ Otherwise, Applicant's challenge to the Judge's mitigation analysis consists of a disagreement with her weighing of the evidence. This is not enough 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. 14-06686 at 2 (App. Bd. Apr. 27, 2016).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. A person who fails repeatedly to fulfill his or her legal obligations, such as paying taxes, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir.

³Another of Applicant's documents shows that he owed taxes for years not covered by the two tax liens alleged in the SOR. IRS Letter, dated September 2, 2014, Attached to Response to SOR. As noted in Footnote 2 above, this non-alleged conduct is relevant for a number of reasons, including mitigation and the whole-person analysis.

⁴The Judge found that tax debts from 2012 and 2013 were not resolved. This finding was based upon the tax letter referenced *supra*, Footnote 3. Applicant challenges the sufficiency of this finding, noting his testimony that he had paid all of his tax debts. Tr. at 20. In fact, the Judge cited to Applicant's testimony on this matter. It is a Judge's job to resolve conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014). We find no reason to conclude that the Judge's finding is erroneous. Even if she erred, it did not likely exert a material effect on the overall outcome of the case.

1960), *aff'd*, 367 U.S. 886 (1961). 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 Y. Ra’anan
Michael Y. 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