

KEYWORD: Guideline F; Guideline K

DIGEST: The Government offered into evidence reports of investigation for each of the three alleged security violations. Each investigation concluded that Applicant failed to follow applicable security procedures during the incident in question. We give deference to the findings and conclusion of security personnel in such investigations. Adverse decision affirmed.

CASENO: 15-08385.a1

DATE: 05/23/2018

DATE: May 23, 2018

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In Re:)	
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-----)	ISCR Case No. 15-08385
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 20, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 27, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard 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 decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant is a 60-year-old employee of a defense contractor. In his security clearance application (SCA) of November 2014, Applicant disclosed that he failed to file his Federal and state income tax returns for 2012 and 2013. He attributed that failure to his decision to stop using an accountant and to procrastination. At the hearing, he provided tax transcripts for 2009-2016 that showed he filed his 2012 and 2013 Federal income tax returns in May 2015 and that he failed to file his 2015 Federal income tax return in a timely manner. He filed that latter tax return a month before the hearing. He was due Federal tax refunds for 2009-2016. He presented a certificate showing he is in good standing with all state tax requirements.

Applicant’s employer cited him once in 2012 and twice in 2014 for security infractions stemming from a failure to follow proper procedures while performing trusted downloads. No evidence was presented that any classified or sensitive information was compromised during these incidents. He was directed to complete remedial training. Applicant estimates he performed more than a 1,000 downloads since commencing his employment. He attributes the security infractions to honest mistakes. In 2016, he failed to lock a door to a secured laboratory properly .

The Judge’s Analysis

Applicant has a problematic financial history. Mitigating condition 20(g) applies because he is now in compliance with Federal and state tax requirements.¹ His tax filing deficiencies were not willful or deliberate, but “were due to negligence, carelessness, or inattention due to procrastination.” Decision at 6.

Applicant has a problematic history of handling protected information. He committed three security infraction in 2012-2014 due to failing to follow proper procedures. More recently, he failed

¹ Directive, Encl. 2, App. A ¶ 20(g) states, “the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.”

to lock a door on a secured laboratory properly . His security infractions were due to negligence, carelessness, or inattention.

Although the SOR allegations involve different guidelines, the Judge considered the allegations together. He noted the common thread in them is negligence, carelessness, or inattention that represent a recurring pattern of questionable judgment and irresponsibility. While Applicant impressed the Judge as sincere, dedicated, and hard-working, he failed to meet his ultimate burden of persuasion to show that granting him access to classified information is clearly consistent with the national interest.

Discussion

Applicant questions the fairness of the security clearance process due to the ten-month delay that occurred between the hearing and the issuance of the Judge's decision. He surmises that the delay may have occurred due to an increase in the Judge's workload and argues that delay caused "impressions from other [intervening] cases on [the Judge's] mind to interfere with his impressions gathered at Applicant's hearing, leaving the Judge to perhaps rely exclusively on his notes and the transcript." Appeal Brief at 4. He further argues that "[t]he negative impact of an overloaded adjudication process is prejudicial to Applicant in that the Judge's whole perception cannot be contained in his notes and in that the process which includes a live appearance before the Judge is now taking away the benefits of such a live encounter." *Id.* Applicant's arguments are not persuasive. His arguments amount to speculation about why the delay occurred and what impact, if any, the delay may have had on the Judge's adjudication of the case. The Appeal Board will not speculate about such matters. Absent a showing that the timing of the issuance of the Judge's decision caused an identifiable prejudice to the appealing party, mere proof of a delay is not sufficient to warrant remand or reversal of a Judge's decision. *See, e.g.* ISCR Case No. 02-32581 at 3 (App. Bd. Jun. 9, 2005). Applicant has not established that any identifiable prejudice occurred in his case.

In his analysis, the Judge stated "the failure to timely file tax returns and pay tax when due bears close examination and is a matter of serious concern to the federal government." Decision at 6. Applicant challenges the Judge's use of the phrase "and pay tax" in that sentence, noting that he has always overpaid his taxes. When reviewing a Judge's decision, we do not consider individual sentences in isolation but rather consider them in light of the decision in its entirety. *See, e.g.*, ISCR Case No. 11-13664 at 5 (App. Bd. Aug. 15, 2013). When the challenged sentence is viewed in light of the decision as a whole, we note it is not referring to the facts in Applicant's case, but instead is stating a general principle pertaining to security clearance adjudications. The Judge made clear in his findings of fact that Applicant was due refunds from the IRS for 2009-2016. Applicant has not established that the Judge erred in misconstruing the evidence regarding his payment of taxes.

Applicant cites to 26 U.S. Code § 6511, which sets forth time limits for claiming a Federal tax refund, and argues the IRS was not concerned with his tax filing delays because they simply paid some of the refunds without any sanctions or warnings. He argues that he has leeway in filing his tax returns when a refund was due. This argument is misplaced. In general, security clearance adjudications are not concerned about whether an applicant is eligible to receive a tax refund, but rather with, among other matters, his or her willingness to abide by rules and regulations, including tax filing deadlines, which is indicative of whether he or she will comply with security requirements to protect classified or sensitive information. Even if an applicant has corrected his or her tax problems and is now motivated to prevent such problems in the future, a Judge is not precluded from carefully considering an applicant's security worthiness in light of longstanding prior behavior evidencing irresponsibility. *See, e.g.*, ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015) (discounting a "no harm, no foul" or "all's well that ends well" mitigation analysis in a tax deficiency case). *See also*, ISCR Case No. 15-01031 (App. Bd. Jun. 15, 2016) (reversing a Judge's grant of a security clearance for an applicant who was entitled to tax refunds for each of the three years in which he failed to file his tax returns in a timely manner). In this case, Applicant has failed to show that the Judge erred in concluding that his tax filing deficiencies "were due to negligence, carelessness, or inattention resulting from procrastination." Decision at 6.

Applicant argues that there is no direct linkage between his failure to file tax returns in a timely manner and a failure to comply with security requirements. We note the Directive presumes there is a nexus or rational connection between proven circumstances under any of its guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). Direct or objective evidence of nexus is not required. *See, e.g.*, 12-00084 at 3 (App. Bd. May 22, 2014). Furthermore, in this case, Applicant's argument is rendered fatuous by his repeated security violations.

Applicant claims that one of the alleged security infractions involved a subject matter expert (SME) who failed to give him full and accurate information about a download that led to the infraction. He argues the incident was the SME's, and not his, fault. While he failed to identify in his appeal brief which of the three alleged security infractions involved the SME, we believe he may be referring to the incident that occurred in July 2014. We do not find Applicant's argument persuasive. The Government offered into evidence reports of investigation for each of the three alleged security violations. Government Exhibits 3-5. Each investigation concluded that Applicant failed to follow applicable security procedures during the incident in question. We give deference to the findings and conclusion of security personnel in such investigations. *See, e.g.*, ISCR Case No. 10-07070 at 8 (App. Bd. Apr. 19, 2012) ("[B]ecause of the unique position of employers as actual administrators of classified programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contradicted without a cogent explanation."). Additionally, in responding to the SOR, Applicant admitted each of the alleged security violations. We conclude Applicant's argument that the SME was responsible for one of the security violations is an insufficient basis to successfully challenge any of the Judge's findings or conclusions under Guideline K.

Applicant also makes a number of arguments that amount to a disagreement with the Judge’s weighing of the evidence. For example, he emphasizes that he is now in compliance with all Federal and state tax requirements; that he never failed to pay his taxes; that, based on the number of downloads he has performed over the years, three infractions is infrequent; and that over four years have passed since the occurrence of any matter alleged in the SOR. These arguments are 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016). In this regard, we note that security violations “strike at the heart of the industrial security program.” Once it is established that an applicant has committed security violations, he or she has a “very heavy burden” of persuasion as to mitigation. Accordingly, a Judge must give any claims of reform or rehabilitation “strict scrutiny.” *See, e.g.*, ISCR Case No. 16-01077 at 3 (App. Bd. Apr. 25, 2018). The Judge’s conclusion that Applicant failed to meet his ultimate burden of persuasion is sustainable.

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, Encl. 2, App A. ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility 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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge

Member, Appeal Board