

KEYWORD: Guideline F

DIGEST: The Directive states that it is an applicant's job to submit evidence in mitigation of the concerns raised by an SOR. Directive ¶ E3.1.15. This includes character evidence, should an applicant choose to provide it. Adverse decision affirmed.

CASENO: 16-02243.a1

DATE: 11/30/2018

DATE: November 30, 2018

In Re:

Applicant for Security Clearance

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) ISCR Case No. 16-02243
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Danel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 29, 2016, 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 September 25, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr. 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 whole-person analysis was erroneous in that he failed to consider the entirety of the evidence, thereby rendering his decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant has a history of failing to file and pay his Federal income tax returns. He did not file them in a timely fashion from 2005 through 2010, and the IRS has placed liens against Applicant’s assets due to non-payment. In 2015, the IRS levied over \$197,400 against Applicant’s assets. Applicant has had payment plans with the IRS, but his actual payments have been sporadic. In October 2015 the IRS levied \$730 from Applicant’s retirement pay. Applicant’s state has also filed liens against his assets. Court records disclose a lien of over \$45,000 due to Applicant’s failure to have paid his state taxes. Applicant has been in touch with state taxing authorities but has not been able to secure a payment plan.

Applicant attributed his failure to file his Federal returns to a friend of his wife. During a period when Applicant and his wife were separated, the friend was supposed to file the returns but did not do so. Applicant stated that he only found out about this after he and his wife reconciled. The Judge found this explanation to be lacking credibility, noting, for example, evidence that the IRS sent him inquiries about his delinquent returns, which should have placed him on notice of the problem. Applicant’s problems were also affected by his financial support to his son. The Judge found that the documents Applicant submitted were not clear and that he had not submitted evidence that might have shown a history of payments.

The Judge’s Analysis

Although Applicant did provide evidence that he had attempted to contact the IRS in an effort to secure installment plans for repaying his Federal tax debt, his financial support for his son diverted funds that could have been spent on resolving his tax problems. The Judge concluded that there are no clear indications that Applicant’s tax problems are being resolved. Applicant did not submit character references which might have supported a favorable result under the whole-person concept.

Discussion

Applicant contends that the Judge's observation that Applicant did not submit character references demonstrates that he devoted undue attention to that matter and failed properly to evaluate the record as a whole. He states that the Judge shifted the burden to Applicant to provide evidence of good character and that the Judge did not consider the favorable evidence that was contained in the record.

The Directive states, however, that it is an applicant's job to submit evidence in mitigation of the concerns raised by an SOR. Directive ¶ E3.1.15. This includes character evidence, should an applicant choose to provide it. *See, e.g.*, ISCR Case 14-03754 at 2 (App. Bd. Mar. 19, 2015), in which a Judge noted an absence of character evidence in his analysis. Applicant's argument that the Judge somehow improperly shifted the burden of persuasion to him is without merit. We construe the challenged sentence about character references as simply a comment on the overall state of the evidence. We have previously noted that a Judge may find that, in a given case, none of the mitigating conditions are sufficient *per se* to mitigate an applicant's security concerns but nevertheless conclude that the record as a whole will support a favorable decision through the whole-person analysis. *See* ISCR Case No. 02-05110 at 5 n.7 (App. Bd. Mar. 22, 2004). The Judge in the case before us appears to have concluded that there is nothing in the record that would support a favorable decision in this manner. Our examination of the record¹ persuades us that the Judge evaluated Applicant's concerns in light of the record that was before him, as the Directive requires. Directive ¶ 6.3.

As noted above, Applicant cites to evidence that the Judge did not explicitly discuss, arguing that he failed to consider it. A Judge is presumed to have considered all of the evidence in the record, and Applicant's arguments are not enough to rebut that presumption. 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. 17-02145 at 3 (App. Bd. Sep. 10, 2018). A Judge is not expected to discuss every piece of evidence, which would be a practical impossibility.

The record supports a conclusion 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)). A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, 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. 17-01256 at 3 (App. Bd. Aug. 3, 2018). The Judge's adverse 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*

¹Applicant also submitted new evidence to include his Certificate of Release or Discharge from Active Duty (DD 214). The arguments in the brief suggest that the Judge should have considered the content of the DD 214. Of course, the Judge could not consider documents that were not part of the record. The Board is not permitted to consider new evidence. Directive ¶ E3.1.29.

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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board