

KEYWORD: Guideline F

DIGEST: A Judge is required to evaluate an applicant's security concerns in light of the entirety of the record evidence. Adverse decision affirmed.

CASENO: 16-04053.a1

DATE: 09/19/2018

DATE: September 19, 2018

In Re:)	
)	
-----)	ISCR Case No. 16-04053
)	
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 March 23, 2017, 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 19, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Candace Le'i Garcia 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 failed to consider all of the evidence; whether the Judge failed to apply properly the mitigating conditions; 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 was first granted a security clearance in 1985. In 1999, Applicant's wife quit her job following the birth of a child. After this, she and Applicant fell behind on their debts. Applicant's financial problems were further exacerbated by delays in payments he received in his Defense contracting business. As a consequence of his difficulties, Applicant became "overwhelmed." Decision at 3. He failed to pay his quarterly taxes and to file his tax returns for 2005 through 2014. The IRS entered two liens against Applicant, for nearly \$287,000 and \$270,000 respectively. His state taxing authority entered a lien of nearly \$98,000 against him as well. In 2016, the IRS entered a third lien against Applicant.

Applicant was not satisfied with the quality of work he received from an accountant who prepared his taxes for him in 2004, nor with the work of a tax firm he hired in 2009. He also consulted with another individual to assist him, to no avail. He finally enlisted the aid of a tax attorney. Applicant has entered into an Offer in Compromise (OIC) with the IRS, and he has made payments in order to show good faith. Once the OIC is accepted, Applicant will make monthly payments of nearly \$3,100 for two years, thereby resolving his Federal tax liability. Once this is accepted, Applicant expects to begin resolving his outstanding state tax liabilities. Applicant filed his delinquent Federal and state income tax returns in early 2016.

Applicant's wife returned to work in 2010 and earns about \$50,000 a year as of the date of the hearing. Applicant has no retirement plans, savings, or other assets. As of the hearing he was delinquent on his mortgage payment. Applicant has been "conservative" with his estimated tax withholdings since 2016, and he makes monthly, rather than quarterly, payments. Applicant and his wife have a budget and, although they have not received financial counseling, they have benefitted from the advice of his tax attorney and the tax company.

The Judge's Analysis

The Judge noted that, although Applicant has filed his returns, he still has a significant amount of unresolved tax debt. She concluded that Applicant's finances are not yet under control and there is insufficient evidence to permit a conclusion that they are unlikely to recur. She also found that there is insufficient evidence of responsible action in regard to Applicant's tax problems. She noted, for example, that he did not become actively involved in resolving his problems until late 2015 and that he did not hire his current tax attorney until mid-2016.

Discussion

Applicant contends that the Judge did not consider all of the evidence in the record. He cites, for example, to his OIC with the IRS, his having filed his tax returns, and what he terms the unique circumstances underlying his problems. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record, nor are they sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02391 at 4 (App. Bd. Aug. 7, 2018).

Applicant contends that the Judge did not extend appropriate weight to mitigating condition 20(g).¹ He cites to evidence of his OIC and his having filed his tax returns. The judge is correct that 20(g) does not apply to the record in Applicant's case. The first prong of 20(g) is that the individual has made arrangements with the appropriate tax authority. As of the close of the record, no such arrangements were in place. Of course, even under mitigating condition 20(g), a Judge is entitled to consider the circumstances underlying an applicant's tax problems. Indeed, a Judge is required to evaluate an applicant's security concerns in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 17-01213 at 4 (App. Bd. Jun. 29, 2018). Mere belated filing, in and of itself, may not be enough to establish mitigation within the meaning of the Directive. In this case, the Judge made rather extensive findings about Applicant's circumstances, particularly evidence that he became "overwhelmed" by his tax problems. Nevertheless, the Judge concluded Applicant waited until relatively late to begin seriously to address his financial issues. We find nothing in the Decision or in the record that would undermine the Judge's analysis of the mitigating conditions. We resolve this issue adversely to Applicant.

Applicant contends that the Judge did not perform an adequate whole-person analysis. However, we conclude that the Judge satisfied the requirements of the Directive in that she evaluated Applicant's financial concerns in light of the record as a whole. *See, e.g.*, ISCR Case No. 17-01291 at 3-4 (App. Bd. Aug. 17, 2018). We give due consideration to the case that Applicant has cited. However, Hearing Office decisions are binding neither on other Hearing Office Judge's nor on the Appeal Board. Each case must be decided on its own merits. *See, e.g.*, ISCR Case No. 17-02391 at 4.

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

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

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)). 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 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