

KEYWORD: Guideline F

DIGEST: An applicant is entitled to receive an SOR that places him or her on reasonable notice of the allegations being adjudicated. In this case, the Board concludes, after considering the record as a whole, that the SOR issued to Applicant placed him on adequate notice of the allegations against him. In his opening statement at the hearing, Applicant acknowledged that the basis for DoD declining to grant his security clearance was “due to my failure to file Federal and state income taxes for years 2010 through ‘16.” Adverse decision affirmed.

CASENO: 17-01842.a1

DATE: 06/29/2018

DATE: June 29, 2018

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In Re:)	
-----)	ISCR Case No. 17-01842
)	
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 June 6, 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 March 23, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 in his 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 is a 47-year-old college graduate. In late December 2017, he filed his Federal and state income tax returns for 2008 through 2016. He admitted the two SOR allegations that pertain to those tax filing delinquencies. He attributed the delinquencies to misplaced documentation and procrastination. A week before the hearing, he prepared the delinquent tax returns and confirmed his belief that he did not owe any additional Federal or state taxes for those years. He has paid off his mortgage, and his finances are in excellent condition.

The Judge’s Analysis

Applicant did not provide a good reason for his failure to file his Federal and state tax returns in a timely manner. He primarily attributed the delays to procrastination. Although he did not fully appreciate the importance of filing his tax returns on time, his corrective action is “too little, too late to fully mitigate the security concerns arising from his failure to timely file ten years of tax returns.”
Decision at 10

Discussion

In his appeal brief, Applicant states:

Upon receiving the negative decision from the Administrative Judge, I was admittedly surprised and very saddened. I felt that I had more than satisfied the burden of proof that Guideline F was not applicable in this case, and that I am in fact very responsible with my finances and in general. Reading that full response from the Administrative Judge, I realized that his decision was not based on evaluating against Guideline F, which was the initial reason given for not granting me the security clearance in the first place. Instead, he stated his decision was based on not “abiding by well-established governmental rules and regulations.”

... [A]fter sufficiently providing evidence that Guideline F was not applicable in this case, the Judge’s decision was based on different criteria than was the basis of the appeal.¹

To the extent that Applicant is arguing that he was misled by the SOR, that he was not given adequate notice of the Government’s security concerns before the hearing, or that tax filing deficiencies do not fall under Guideline F, we do not find his arguments persuasive. It is well established that an individual’s failure to file income tax returns in a timely manner raises security concerns under Guideline F. In this case, the SOR was in the standard format used by the DoD Consolidated Adjudications Facility (CAF). The first numbered paragraph quoted verbatim *The Concern* under Guideline F,² and it also contained two subparagraphs that stated:

- a. You failed to file your Federal income tax returns for tax years 2010 through 2016, as required. As of the date of this Statement of Reasons, the tax returns remain unfiled.
- b. You failed to file your [state] tax returns for tax years 2010 through 2016, as required. As of the date of this Statement of Reasons, the tax returns remain unfiled.³

While *The Concern* paragraph specifically addresses such matters as an individual’s failure to satisfy debts or live within his or her means, it also states that, “**Failure to . . . 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 or sensitive information.”⁴ [Emphasis added.] The failure to file income tax returns in a responsible manner is encompassed in *The Concern* paragraph and is specifically listed as a disqualifying condition under Guideline F.⁵

An applicant is entitled to receive an SOR that places him or her on reasonable notice of the allegations being adjudicated. Directive ¶ E3.1.3. In this case, the Board concludes, after considering the record as a whole, that the SOR issued to Applicant placed him on adequate notice of the allegations against him. In his opening statement at the hearing, Applicant acknowledged that the basis for DoD declining to grant his security clearance was “due to my failure to file Federal and

¹ Appeal Brief at 1-2.

² Directive, Encl. 2, App. A ¶ 18. In this case, the SOR was issued two days before the revised adjudicative guideline became effective on June 8, 2017, but the quoted concern paragraph is from the then-pending revision. Understandably, DoD CAF used the language from the pending provision because they knew the security eligibility determination in this case would apply the revised guidelines.

³ SOR ¶¶ 1.a and 1.b

⁴ *Id.*

⁵ Directive, Encl. 2, App. A ¶ 19(f) states, “failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required[.]”

state income taxes for years 2010 through '16.” Tr. at 15. The transcript further reflects the focus of the hearing was on Applicant’s tax filing deficiencies. Based on our review of the record, we have no reason to conclude that the SOR was misleading or prejudiced in any identifiable way Applicant’s ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case. Given the SOR allegations against Applicant and the manner in which the hearing was conducted, Applicant was placed on adequate notice as to the issue of security concern. *See, e.g.*, ISCR Case No. 03-20538 at 2 (App. Bd. Jul. 5, 2006).

The balance of Applicant’s arguments amounts to a disagreement with the Judge’s weighing of the evidence. For example, Applicant challenges the Judge’s whole-person assessment by arguing that he has handled proprietary and sensitive customer information in a responsible manner for 23 years. We note, however, that the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant’s appeal brief fails to establish the Judge committed any harmful error. 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 **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