

KEYWORD: Guideline F

DIGEST: Conduct not alleged in the SOR may be considered for limited purposes such as assessing an applicant’s credibility; evaluating an applicant’s evidence of extenuation, mitigation, or changed circumstances; considering whether an applicant has demonstrated successful rehabilitation; or providing evidence for whole-person analysis. Non-alleged conduct, of course, cannot be used and considered in a manner that contravenes the notice requirements in the Directive. While non-alleged conduct may be relevant in establishing an SOR allegation, it may not become the basis for denying or revoking a security clearance. Adverse decision remanded.

CASENO: 12-11375.a1

DATE: 06/17/2016

DATE: June 17, 2016

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John B. Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

F. Whitten Peters, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 12, 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 February 29, 2016, 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 decision was arbitrary, capricious, or contrary to law. Among his allegations of error, Applicant contends the Judge erred in finding Applicant’s tax returns were not filed “as required” under financial considerations disqualifying condition 19(g)<sup>1</sup> and the Judge violated Applicant’s due process by finding he failed to file his 2004-2006 and 2011-2014 tax returns when he had no notice those returns were at issue. For reasons that follow, the Board remands the Judge’s adverse security clearance decision.

### **The Judge’s Findings of Fact**

Applicant is a 55-year-old employee of a defense contractor. He had an exemplary military career, including several combat tours in the Middle East, before retiring in 2004. He has held a security clearance since at least 1982 and has no history of security violations.

The SOR alleged that Applicant failed to file his Federal and state income tax returns for 2008-2010, and they remained unfiled when the SOR was issued. His security clearance application of September 2011 and background interview of October 2011 document that he failed to file his Federal and state tax returns in a timely manner for the years alleged. In his Answer to the SOR, he admitted that he had not filed his 2008-2010 state tax returns at the time of the SOR. He denied that he failed to file his 2008-2010 Federal tax returns by asserting, but not documenting, they were filed.

Applicant failed to file his 2007-2014 Federal and state income tax return in a timely manner and may have been late in filing his tax returns for 2004-2006. He filed his Federal income tax return for 2008 on April 15, 2012; for 2009 on April 15, 2013; for 2010 on September 23, 2013; and for 2011 on April 15, 2015. After receipt of the SOR, he hired a tax firm to prepare his remaining tax returns. He filed his state income tax returns for 2008-2011 on July 11, 2015. He filed his Federal and state income tax returns for 2012 on October 23, 2015; for 2013 on October 27, 2015; and for 2014 on October 29, 2015.

Applicant attributed his tax filing issues to a series of family circumstances. He married in the late 1980s, divorced in 2001, and had two children from that marriage. He married again in 2003 and has four children from his second marriage. One child was hospitalized in 2003. In 2005-2006,

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<sup>1</sup> Directive, Enclosure 2 ¶ 19(g) states, “failure to file annual Federal, state, or local tax returns as required or the fraudulent filing of the same.”

he had custody and child support issues with his ex-wife over one child. He later had similar custody and support issues involving another child. In 2008, he began a two-year expansion of his house. Between 2012 and 2013, one of his children attempted suicide three times and received counseling. In 2012, his wife had surgery. In 2014, Applicant's mother had a serious heart attack. He spent a significant amount of time with his mother during her recovery. His job also required him to work long days.

Applicant disclosed his tax filing problems on his 2011 security clearance application and kept his facility security officer (FSO) informed about his tax situation. He addressed his taxes by filing extensions and making additional payments with the extension requests if he thought he owed the IRS more taxes. He took care to file his income tax returns before the three-year deadline to obtain a refund. He had no delinquent debts or other financial problems. His FSO and another coworker consider him honest and trustworthy.

### **The Judge's Analysis**

The first paragraph of the Judge's Analysis, including its footnotes, states:

The Government established a case for disqualification under Guideline F, and Applicant failed to mitigate the security concerns. Applicant failed to timely file his state income tax returns from 2007 to 2014, a period of eight years, if not all the way back to 2004, a period of 11 years.<sup>2</sup> While the SOR only alleged tax years 2008-2010, those were the only years Applicant reported to the Government.<sup>3</sup> And while the Government did not move to amend the SOR to allege tax years 2004-2007 and 2011-2014, I have considered Applicant's entire course of conduct as evidence of a plan or pattern.

The Judge concluded that what Applicant "cites as a justification for his failure to timely file his Federal and state income taxes is simply described as the ebb and flow of life." Decision at 7. He noted that the period from October 2012 to April 2014 was especially difficult for Applicant given his child's three suicide attempts, his wife's medical issues, and his mother's heart attack, but observed Applicant was already substantially behind on filing his taxes when these events began.

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<sup>2</sup> "¶ 19(g) failure to file annual Federal, state, or local tax returns as required or the fraudulent filing of the same;"

<sup>3</sup> "Of course, Applicant could not be required to report his failures to file for tax years 2011-2014, as the Government apparently made no further inquiry about his taxes after his October 2011 subject interview. However, he failed to report that he was late filing his taxes for 2007 on his September 2011 clearance application. Section 26: Financial Record, c asks Applicant "Have you failed to pay Federal, state, or other taxes, or **to file a return, when required by law or ordinance?** (emphasis added) Applicant answered "no," although he reported his failure to file his 2008-2010 taxes in the remarks section. Nevertheless, his 2007 Federal taxes had been filed three years late, just in time for Applicant to be entitled to his refund. The Government did not allege falsification of Applicant's clearance application, and I am not considering this omission as a falsification. But, I have considered the general issue of Applicant's credibility, and I have considered the failure to file the 2007 taxes on the general issue of pattern or plan, or lack of mistake."

He found Applicant's busy work schedule was a contributing factor, but was also a constant in his life. The Judge noted that, despite having a clear understanding that his tax issues were a security concern after completing his security clearance application and background interview, Applicant did not file his 2008 Federal tax return for another six months, his 2009 Federal tax return for another year, and his 2010 Federal tax return until September 2013. He further stated that Applicant's filing of the tax returns to obtain refunds seemed more of a motivating factor than a concern over his financial or legal obligation to do so, and noted it was not until receipt of the SOR in June 2015 that he hired a tax consultant and took sweeping action to address his delinquent Federal tax filings, each of which was filed after the extension deadline, but before he would lose any refund.

The Judge concluded that none of the mitigating conditions applied. He found that Applicant's over-withholding of taxes so that he did not owe past-due taxes and the IRS lack of enforcement action against him did not mitigate the judgment concerns raised by his pattern of failing to file in a timely fashion. His exemplary careers and the absence of security violation "are undercut by at least eight years of security-significant conduct regarding his taxes coincident with that performance." *Id.* at 8.

## Discussion

Applicant contends the Judge erred in finding his tax returns were not filed "as required." In that context, he argues that the decision did not cite to any tax law, that he was not subject to certain tax statutes (26 U.S.C. §§ 6651 and 7203), and that he followed IRS guidance that he had three years to file a tax return. He pointed out that he did not owe the IRS any past-due taxes for any of the years in question, and the IRS did not impose any penalties on him. He did not raise these specific arguments at the hearing, and the Judge's decision did not address them.

Applicant's argument that his tax returns were filed "as required" as long as he filed them before the expiration of the three-year statute of limitation<sup>4</sup> for claiming a tax refund is not persuasive and ignores the Internal Revenue Code's tax filing deadline<sup>5</sup> and six-month automatic extension provision.<sup>6</sup> The IRS form for applying for an automatic extension specifically notes that a late filing penalty is usually charged if the tax return is filed after the due date, including extensions.<sup>7</sup> No evidence was presented that Applicant was granted any tax filing extensions other than the six-month

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<sup>4</sup> 26 U.S.C. § 6511.

<sup>5</sup> 26 U.S.C. § 6072 ("In the case of returns under section . . . 6013 [joint income tax returns by husband and wife] . . . (relating to income tax under subtitle A), returns made on the basis of the calendar year *shall be filed* on the 15<sup>th</sup> day of April following the close of the calendar year . . . .")(emphasis added).

<sup>6</sup> 26 U.S.C. § 6081(a) as implemented by 26 CFR 1.6081-4 ("**In general.** An individual who is required to file an individual income tax return will be allowed an automatic 6-month extension of time to file the return after the date prescribed for filing the return if the individual files an application under this section in accordance with paragraph (b) of this section.")(emphasis in original).

<sup>7</sup> Page 2 of IRS Form 4868.

automatic extension. The fact that the IRS may waive a late filing penalty does not constitute proof that tax returns were not filed late. Furthermore, his argument regarding the three-year statute of limitation for claiming a tax refund is unfounded. The three-year statute of limitation is not a grant of a filing extension, but only a limitation upon claiming a refund.

In his security clearance application dated September 9, 2011, Applicant answered “no” to the question that asked whether he failed to file a tax return when required by law or ordinance, but noted that he was in the process of “finalizing his 2008-2010 returns and seeking refunds for overpayment [in accordance with] Federal law allowing 3 years for a refund *after normal date of filing*.” (Emphasis added.) In his background interview, he acknowledged that the IRS was aware he had not filed his 2008-2010 tax returns on time. In his Answer to the SOR, he admitted the allegation in SOR ¶ 1.b that he failed to file his state tax returns for 2008-2010. While denying the allegation in SOR ¶ 1.a pertaining to his 2008-2010 Federal tax returns, he stated that he did not file those tax returns “on time.” At the hearing, he testified that he filed his tax returns late. Tr. 23-24. Applicant’s admissions throughout the security clearance process were sufficient to establish that he did not file his 2008-2010 Federal and state income tax returns in a timely manner. The Judge’s material findings that Applicant’s 2008-2010 tax returns were not filed “as required” was based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also contends that the Judge violated his due process by finding he failed to file his 2004-2006 and 2011-2014 tax returns when he had no notice those returns were at issue. Noting that neither Department Counsel nor the Judge amended the SOR, he argues that he had no notice that any tax returns other than those alleged in the SOR and 2007, which he discussed at length during the security clearance review process, would be at issue or serve as a basis for a clearance denial.<sup>8</sup> We find Applicant’s argument persuasive.

Directive ¶ 4.3 requires that an unfavorable clearance decision shall not be made without first providing the Applicant with notice of the specific reasons for the proposed action and an opportunity to respond to the reasons.<sup>9</sup> ¶ E3.1.3 further provides that an unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as national security permits. The Appeal Board has stated:

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<sup>8</sup> In his brief, Applicant claimed the Judge declined to hold the record open to receive additional documents. At the hearing, Applicant’s Counsel noted that Applicant attempted unsuccessfully to obtain an IRS transcript to clarify the dates of his earlier tax returns and offered to try to obtain Applicant’s filing extension requests if that would be helpful. No specific request was made to leave the record open and the Judge stated he did not believe receipt of the extension requests would be necessary for his purposes.

<sup>9</sup> Executive Order 10865 dated Feb. 20, 1960, as amended, states “. . . an authorization . . . may not be finally denied or revoked . . . by the head of a Department or his designee . . . unless the applicant has been given the following: (1) A written statement of reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.”

It is well-settled that administrative pleadings are not judged by the strict standards of a criminal indictment. . . . To the contrary, administrative pleadings should be liberally construed and easily amended. . . . The purpose of an SOR is to give an applicant adequate notice of the allegations against him or her so that the applicant has a reasonable opportunity to respond to them. . . . In assessing the sufficiency of an SOR, it is necessary to balance the need for fair notice to an applicant against the need to avoid transforming the SOR pleadings into a game of wits in which a minor or technical misstep is decisive. . . . As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0554 at 4 (Jul. 24, 2000)(citations omitted).

The Appeal Board has also stated that conduct not alleged in the SOR may be considered for limited purposes such as assessing an applicant's credibility; evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; considering whether an applicant has demonstrated successful rehabilitation; or providing evidence for whole-person analysis under Directive ¶ 6.3. *See*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006). *See also*, ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003). Non-alleged conduct, of course, cannot be used and considered in a manner that contravenes the notice requirements in ¶¶ 4.3 and E3.1.3 of the Directive. While non-alleged conduct may be relevant in establishing an SOR allegation, it may not become the basis for denying or revoking a security clearance.

In the present case, the SOR only alleged that Applicant failed to file Federal and state income tax returns for a three-year period, 2008-2010. In his brief, Applicant concedes that the filing of his 2007 tax returns was fairly encompassed in the SOR, because it was addressed in detail throughout the security clearance process. At the hearing, he offered into evidence his tax returns for 2011-2014. The issue regarding his 2005-2006 tax returns arose during his cross-examination when he testified that he would have to examine those tax returns to determine their timeliness, but he would not be surprised if he was slightly behind in those years. Tr. at 66. He testified he did not remember being late for 2004. Tr. at 73. Given the limited record evidence regarding his 2004-2006 tax returns, the timeliness of the filing of those returns is at best unclear. Nevertheless, the Judge expanded the period of Applicant's tax returns under review from three years (2008-2010) as alleged in the SOR to at least eight years (2007-2014) and possibly eleven years (2004-2014). In essence, he more than doubled and possibly almost quadrupled the number of tax years in question. The Judge's findings of fact include extensive discussion of events outside the years alleged in the SOR. In the first paragraph of his Analysis, the Judge stated that "while the Government did not move to amend the SOR to allege tax years 2004-2007 and 2011-2014, I have considered Applicant's entire course of conduct as evidence of a plan or pattern."<sup>10</sup> Decision at 6. Reading the Judge's decision as a whole, we conclude that his consideration of the non-alleged years went beyond the limited purposes for which non-alleged conduct may be used. After examining the record, we conclude that the Judge's

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<sup>10</sup> Of course, the non-alleged conduct could be admitted and considered for the purposes cited by the Judge. Evidence of other crimes, wrongs, or acts may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See*, Federal Rule of Evidence 404(b). *See also*, ISCR Case No. ISCR 10-03732 at 6, n. 4 (App. Bd. Jun. 14, 2013).

consideration of the non-alleged years as a basis for applying disqualifying condition 19(g) deprived Applicant of his right under the Directive to receive adequate notice of the reasons why the government proposes to deny or revoke his access to classified information as well as his right to have a reasonable opportunity to respond to those reasons. Under the facts of this case, we conclude the Judge's error is harmful. *See, e.g.*, ISCR Case No. 09-02752 at 6 (App. Bd. Apr. 6, 2010).

Accordingly, we remand this case for a new Decision in which the application of any disqualifying conditions is based on established facts relating to the SOR allegations.

### **Order**

The Judge's adverse security clearance determination is **REMANDED**.

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