

KEYWORD: Guideline F

DIGEST: The Judge considered non-alleged conduct in its proper context. Applicant was not denied notice of the security concerns against him, nor was he otherwise denied due process. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. The Appeal Board has no authority to make findings of fact. Adverse decision affirmed.

CASE NO: 14-01941.a1

DATE: 03/30/2015

DATE: March 30, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-01941
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

William S. Aramony, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 13, 2014, 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 decision on the written record. On December 9, 2014, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Shari Dam 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 raised concerns beyond the scope of the SOR; whether Applicant was denied due process; 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 is President and CEO of a Government contractor. He has held a security clearance in the past. Applicant failed timely to file and pay his Federal and state income taxes for 2011 and 2012. In addition, in his response to the File of Relevant Material, he stated that he had not paid his 2010 Federal taxes until 2013. The reason for his tax delinquencies was the recession of 2008, which caused a business decline. He also asserted that his late filings were due to the resignation of his operations manager, who did not leave behind sufficient information necessary for the tax filings. Applicant paid his 2012 Federal taxes in April 2014, a year after they were due. He paid his 2011 taxes two years after they were due. He paid his state taxes for both years in June 2014. Applicant paid his state taxes six days after the issuance of the SOR, which he termed coincidental. In addition, in April 2014, he filed a request for a six month extension for his 2013 Federal taxes. He did not provide information regarding whether he filed or paid his taxes for that year. He submitted no character references or evidence that his current financial situation is such that he can meet his tax obligations. Applicant resolved two debts alleged in the SOR that were not related to his tax problems.

The Judge's Analysis

The Judge concluded that Applicant's failure to make timely tax filings and payments raised security concerns. She noted evidence that Applicant's problems were affected by circumstances outside his control, such as the 2008 economic downturn and the resignation of his operations manager. However, she concluded that he had not demonstrated responsible action to a degree sufficient to mitigate the security concerns. She stated that he had not provided evidence of any tax payments until well after they were due or that he had contacted the appropriate tax authorities as soon as he knew he would not file on time. She stated that Applicant had not had any financial counseling and presented no evidence that he had attempted to resolve his tax debts during the time between the dates they were due and the dates they were actually paid.

In the whole-person analysis the Judge noted Applicant's evidence concerning his company's financial difficulties and that he had paid his 2011 and 2012 taxes by the close of the record. However, she also cited to evidence that Applicant had a three year history of late filings and payments and that he had paid his state taxes after the receipt of the SOR. She stated that Applicant's failure to disclose information about his 2010 taxes in his clearance application impaired his credibility. She also noted that Applicant had provided no evidence that he had filed his 2013 tax returns. She stated that Applicant's "actions raise a substantive concern that there is a likelihood that similar problems relating to his legal obligation to timely pay taxes will continue." Decision at 8. Accordingly, the Judge concluded that Applicant had not met his burden of persuasion.

Discussion

Applicant contends that the Judge raised concerns that were beyond the scope of the SOR and improperly resolved them against him. He cites to the Judge's reference to his 2010 and 2013 taxes despite neither being alleged in the SOR. He also cites to other statements by the Judge, for example that he had used funds for ordinary expenses that could have been used for tax payments, in support of his argument. He contends that had the Judge or Department Counsel sought to amend the SOR to include these allegations that Applicant could have addressed and resolved them. As it stands, he argues, Applicant was denied notice of these matters, impairing his effort to present a case in mitigation.

While it is true that the evidence Applicant has cited was not alleged in the SOR, a Judge can consider non-alleged conduct or circumstances for a number of reasons: assessing an applicant's credibility, evaluating his case for mitigation, and performing a whole-person analysis. *See, e.g.*, ISCR Case No. 12-01038 at 3 (App. Bd. Jun. 26, 2013). In this case, we find no reason to conclude that the Judge considered the evidence in question in an improper manner. She cited to Applicant's failure to divulge his 2010 tax issue as part of her credibility determination. In commenting on Applicant's credibility, the Judge was not raising additional concerns that should have been analyzed under Guideline E, as Applicant contends. Indeed, the making of credibility determinations is part of a Judge's job, and we give deference to those determinations. Directive ¶ E3.1.32.1. Moreover, it was reasonable for the Judge to consider the 2010 and 2013 tax problems in evaluating the extent to which Applicant has placed his security significant conduct behind him. The Judge evaluated the non-alleged conduct in its proper context. We resolve this assignment of error adversely to Applicant.

Concerning due process, none of the evidence that Applicant has cited was beyond the reasonable scope of the SOR, insofar as all of it related to the tax delinquencies that were the basis for the security concerns raised. An SOR is an administrative pleading that is not held to the requirements of a criminal indictment. *See, e.g.*, ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 29, 2010). An SOR should give an applicant reasonable notice of the concerns raised in his case, but it cannot be expected to cite to every piece of evidence that might be relevant in evaluating those concerns. Insofar as Applicant's SOR placed him on notice that his 2011 and 2012 tax delinquencies raised questions about his judgment and self-control, it was foreseeable that the Judge would consider other similar conduct in evaluating his case for mitigation. In any event, evidence about the 2010 and 2013 tax filings came from Applicant himself in his response to the File of Relevant Material, vitiating his argument of unfair surprise. Applicant was not denied an opportunity to prepare his case for mitigation, nor were the due process rights afforded him by the Directive otherwise impaired.

Applicant cites to favorable evidence that he contends the Judge failed to consider, for example that he is meeting his ordinary expenses, has hired a different accountant, and has paid off several debts before the issuance of the SOR. He argues that this failure impaired the Judge's whole-person analysis. This argument is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record, nor does it demonstrate that the Judge mis-weighed the

evidence, viewed as a whole. *See, e.g.*, ISCR Case No. 10-00898 at 2 (App. Bd. Mar. 25, 2011). The Judge’s whole-person analysis satisfied the requirements of the Directive in that it considered Applicant’s security-significant circumstances in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-03077 at 2-3 (App. Bd. May 13, 2013). Given Applicant’s tax delinquencies and a paucity of evidence concerning what actions he took to resolve them as soon as they arose and the extent to which Applicant currently has the means to satisfy his tax requirements, the Judge’s adverse decision is sustainable.¹

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

¹Applicant requests that we make “specific findings on the favorable evidence.” Appeal Brief at 14. The Appeal Board has no authority to make findings of fact. *See, e.g.*, ISCR Case No. 02-21242 at 3 (App. Bd. Oct. 20, 2004). We note Applicant’s reiteration that the SOR raised only Guideline F concerns and none under Guideline E.