

KEYWORD: Guideline F; Guideline E

DIGEST: Guideline F concerns include failure to file tax returns. Each such instance is a separate act. Adverse decision affirmed.

CASENO: 11-06622.a1

DATE: 07/02/2012

DATE: July 2, 2012

In Re:)
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 -----) ISCR Case No. 11-06622
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 6, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On April 12, 2012, after considering the record, Administrative Judge Matthew E. Malone 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 Government had presented substantial evidence of security concerns; whether the Judge failed to consider all of the record evidence; whether the Judge’s whole-person analysis was erroneous; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor and requires a clearance for the purposes of his job. He graduated from a U.S. service academy in 1984, leaving active duty in 1988. He received a Master’s degree in computer science. Applicant held a security clearance while in the military. He has held one for most of the past 20 years as a civilian.

Applicant did not file federal or state income tax returns for the years 2005 through 2010. His stated reason for not having done so was his dislike of paperwork. He discussed his reason in his security clearance application, in a clearance interview, and in answers to DOHA interrogatories. He also stated that he would hire an accountant and file his returns by September 2011. However, by the close of the record, he had not done so. Intentional failure to file a federal tax return is a misdemeanor, punishable by fines and/or imprisonment. Applicant’s state of residence also requires the filing of income tax returns.

In 2004, Applicant was terminated from a job with a Defense contractor for improperly charging his time to a government contract when he was actually using the internet for purposes unrelated to work. Applicant claimed that other employees did the same, but his supervisor was looking for an excuse to fire him because of several instances of narcolepsy-induced tardiness.

In the Analysis, the Judge concluded that Applicant’s failure to file income tax returns met the criteria for Financial Considerations Disqualifying Condition (FCDC) 19(g).¹ He stated that the filing of tax returns is a basic financial obligation of most income-earning citizens. Noting that Applicant had not submitted any of the delinquent returns by the close of the record, the Judge concluded that he had failed to mitigate the security concerns arising from this conduct. The Judge found in Applicant’s favor regarding a Guideline E allegation concerning his having been fired from a previous job. However, the Judge concluded that Applicant’s failure to file tax returns raised

¹Directive, Enclosure 2 ¶ 19(g): “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same[.]”

Personal Conduct Disqualifying Condition (PCDC) 16(c).² He stated that Applicant's disdain for paperwork, an attitude probably common among taxpayers, was not a sufficient excuse to decline to perform duties imposed by law. In the whole-person analysis, he stated that Applicant's intentional failure to perform acts required by law impugns his judgment and willingness to follow rules and regulations. This, in turn, raises a reasonable concern that Applicant could fail to observe those rules governing the protection of classified information. Accordingly, the Judge denied Applicant a clearance.

Applicant contends that the Judge erred in concluding that his conduct raised security concerns under Guidelines F and E. When, as here, an applicant requests a decision on the written record, the Government must provide to the applicant "a copy of all relevant and material information that could be adduced at a hearing." Directive ¶ E3.1.17. At a hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." *See, e.g.*, ISCR Case No. 11-03500 at 3 (App. Bd. Feb. 28, 2012). Applicant admitted that he failed to file his tax returns, as alleged. Even though the allegations pertaining to his filing delinquencies were not controverted, the Government presented evidence in the form of Applicant's answers to questions on the security clearance application, a summary of his interview, and his answers to DOHA interrogatories. Accordingly, the underlying facts are not in doubt; the only issue to be resolved is Applicant's contention that these facts do not constitute security concerns.

Applicant contends that the evidence does not show that he has failed to satisfy debts, as set forth in the security concern under Guideline F. He points to evidence that he had actually been entitled to refunds each year in question. Directive, Enclosure 2 ¶ 18 provides, in part, that

[f]ailure or inability 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 information.

That the financial obligations addressed by this concern include the filing of tax returns is evidenced by the plain language of FCDC 19(g), the disqualifying condition that the Judge found applicable in this case. Applicant's argument that the concern is limited to failure to pay monetary debts is without merit. Applicant also argues that the Judge unreasonably multiplied the significance of his conduct, treating a single act, his failure to file tax returns, as a pattern or series of failures. However, the SOR alleged, Applicant admitted, and the Judge found that the security significant conduct in this case occurred over several successive years. Each instance constitutes a separate act.

²Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

Although this failure may be viewed as a continuing course of conduct, ongoing as of the close of the record, the evidence demonstrates that this conduct consists of multiple failures. Again, Applicant's argument is without merit. The Government has presented substantial evidence of Guideline F security concerns.

Applicant contends that the Judge erred in finding security concerns under Guideline E. He argues that his circumstances do not meet the criteria set forth in PCDC 16(c), which references conduct from several adjudicative areas. He also argues that favorable application of this disqualifying condition is inconsistent with the Judge's conclusions under Guideline F.

Security related conduct can be alleged under more than one Guideline and, in an appropriate case, given independent weight under each. *See, e.g.*, ISCR Case No. 04-09251 at 3 (App. Bd. Mar. 27, 2007). In this case, the Judge's Guideline E analysis focused on Applicant's disdain for complex paperwork. The Judge concluded that Applicant manifested his disdain through conduct touching on more than one Guideline³ and which evidenced a knowing and willful failure to comply with rules or regulations. These conclusions are supported by the record and are consistent with the Judge's adverse formal findings under Guideline E. Moreover, these conclusions are sufficiently distinct from those the Judge made under Guideline F, which focus on Applicant failure to discharge financial obligations, so as to support an adverse decision under both Guidelines. Neither a SOR, nor the Guidelines themselves, are to be measured against the requirements of criminal pleadings or statutes. *See, e.g.*, ISCR Case No. 02-15383 at 2-3 (App. Bd. Jul. 20, 2003). The disqualifying conditions listed in the Directive under each Guideline are not exhaustive and exclusive; rather, they are illustrative. Even if an applicant's circumstances do not meet the specific language of any of the disqualifying conditions presented under a given Guideline, a Judge may still conclude that the conduct falls within the scope of the Guideline's security concern. *See, e.g.*, ISCR Case No. 07-02485 at 4 (App. Bd. May 9, 2008). A clearance decision must be a commonsense determination made in the interests of national security. *See* Directive, Enclosure 2 ¶ 2(c). The Judge's ultimate conclusions in this case do not unreasonably magnify the security significance of Applicant's conduct or otherwise present his case so as to make it appear more egregious than his circumstances warrant.

Applicant contends that the Judge failed to consider favorable record evidence, such as his having held a clearance for many years without incident or concern. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-06975 at 2 (App. Bd. Apr. 19, 2012). The Judge made findings concerning Applicant's history of holding a clearance. However, his findings and analysis support his conclusion that Applicant had failed to mitigate the security concerns arising from his delinquent tax filings. Applicant has not rebutted the presumption that the Judge considered all of the evidence, nor has he demonstrated that the Judge mis-weighed the evidence. Applicant cites to other persons who, he contends, have been permitted to serve the

³The Judge noted that Applicant's filing delinquencies could have been alleged under Guideline J, Criminal Conduct. Reading his decision as a whole, we do not conclude that the Judge was raising security concerns not alleged in the SOR. Rather, he was addressing the extent to which Applicant's conduct applied to more than one adjudicative area, an explicit concern of PCDC 16(c).

U.S. in various capacities despite tax problems. This is evidence from outside the record, which we cannot consider. Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board”). In any event, each case must be decided on its own merits. *See* Directive, Enclosure 2 ¶ 2(b). *See also* ISCR Case No. 09-04216 at 3 (App. Bd. Jan. 31, 2011).

Applicant contends that the Judge’s whole-person analysis was not adequate. He states that the service academy he attended evaluated him under such a standard and found him worthy of a commission. He contends the Judge should have found him worthy of a clearance. However, the Judge’s decision took into account the entirety of the record evidence that was before him. Applicant was given an opportunity to respond to the File of Relevant Material but did not do so. Given the record, which includes Applicant’s admitted conduct of security significance, we find no error in the Judge’s whole-person analysis. 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)). 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, 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 Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. 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