KEYWORD: Guideline F

DIGEST: The Judge failed to address that Applicant did not file his Federal income tax return for 2009 as required. His 2009 IRS tax transcript reflects that the IRS filed a substitute tax return for him in early February 2012 and determined he owed an additional $44,731 of taxes for that tax year. Applicant changed his W-4 exemptions to "ten" for 2011. Due to that change in exemptions, Applicant testified "they weren't taking any taxes out" of his pay. Id. He used the extra money to purchase a custom motorcycle, which was an item on his "bucket list." When analyzing a case, a Judge must consider the evidence as a whole and not view it in an isolated or piecemeal manner that focuses only on matters favorable to one party. In this case, the Judge erred by failing to analyze significant matters that undermined his mitigation analysis. Favorable decision reversed.

CASENO: 17-00944.a1

DATE: 02/15/2019

DATE: February 15, 2019

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| Applicant for Security Clearance | ) | |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**
Tara R. Karoian, Esq., Department Counsel

**FOR APPLICANT**
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 24, 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 October 3, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

**The Judge's Findings of Fact**

Applicant, who is 60 years old, has been an employee of a defense contractor since 2015. He has been married twice and has three adult children. He admitted the sole SOR allegation that asserted he had a Federal tax lien of about $48,000 filed against him in 2014. This lien was incurred because he owed past-due income taxes for 2009-2011.[1] He attributed this debt to not being prepared to be the owner-operator of a business, to suffering a heart attack in 2009 that resulted in a period of unemployment, and to helping his daughter with her expenses.

In 2017, Applicant made two Offers in Compromise to the IRS. In December 2017, as evidenced by IRS correspondence and his banking statements, he reached an installment agreement with the IRS to make monthly payments of $878. He also received financial counseling.

**The Judge's Analysis**

"Applicant's tax lien has been addressed through an agreement with the IRS. He is making payments pursuant to that agreement. He has also received financial counseling to ensure that future financial problems are unlikely. Mitigation under AG ¶ 20 has been established." Decision at 5.

**Discussion**

Department Counsel argues that the record in this case does not support the Judge's favorable mitigation analysis. She also contends that the Judge did not consider important aspects of the case and his analysis runs contrary to the weight of the record evidence. Department Counsel's arguments have merit.

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'"

[1] Applicant's IRS tax transcripts reflected that, as of February 2018, he owed $46,219 of past-due taxes and interest for 2009, did not owe past-due taxes for 2010 (his 2010 tax debt was resolved in 2012), and owed $870 of interest for 2011. Applicant's Exhibit (AE) N.

*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 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.,* ISCR Case No. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *Id.*

At the outset, we note Department Counsel's arguments are of mixed merit. She repeats an argument that the Board has rejected at least twice, *i.e.*, "Mitigating Conditions 20(d) and 20(g) must be read in concert and harmony with the overall parameters of analysis set forth by the Appeal Board." Appeal Brief at 13. This is not accurate. As we have previously stated, "The Appeal Board and Hearing Office Judges are creatures of the Directive. While some analysis and precedents might survive amendments to the Directive or guidelines, it is mistaken to believe that the guidelines are somehow inferior to the Appeal Board's decisions. More succinctly, the provisions of the Directive, including the guidelines, are controlling." *See, e.g.*, ISCR Case No. 17-01213 at 4, n.2 (App. Bd. Jun. 29, 2018) and ISCR Case No. 16-03187 at 4, n.4 (App. Bd. Aug. 1, 2018). Furthermore, Department Counsel's relevant arguments rely entirely on case law that predates the current guidelines without any acknowledgment that the content of the new guidelines may have narrowed or superceded the prior case law.

That said, Department Counsel's other arguments, such as her contention that the Judge did not consider important aspects of the case, are meritorious. She points out that the Judge failed to address that Applicant did not file his Federal income tax return for 2009 as required. His 2009 IRS tax transcript reflects that the IRS filed a substitute tax return for him in early February 2012 and

determined he owed an additional $44,731 of taxes for that tax year.[2] AE N. She also notes that Applicant changed his W-4 exemptions to "ten" for 2011. Tr. at 37. Due to that change in exemptions, Applicant testified "they weren't taking any taxes out" of his pay. *Id*. He used the extra money to purchase a custom motorcycle, which was an item on his "bucket list." *Id.* and 65-66. When analyzing a case, a Judge must consider the evidence as a whole and not view it in an isolated or piecemeal manner that focuses only on matters favorable to one party. *See, e.g.*, ISCR Case No. 14-05005 at 8 (App. Bd. Sep. 15, 2017). In this case, the Judge erred by failing to analyze significant matters that undermined his mitigation analysis.

Department Counsel also challenges that Judge's conclusion that Applicant's recent installment agreement mitigates the security concerns arising from his past-due taxes for 2009 and 2011. First, she argues the Judge erred in failing to address the timing of Applicant's actions to address his tax deficiencies. As we have previously stated, a Judge may consider the underlying circumstances of tax debt in evaluating an applicant's reliability and judgment. *See, e.g.*, ISCR Case No. 17-00378 at 3 (App. Bd. Nov. 2, 2018). Furthermore, an applicant who resolves financial problems after being placed on notice his or her security clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. *See, e.g.*, ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). Applicant's 2009 IRS tax transcript reflects that he made one $100 payment towards his 2009 tax deficiency before the SOR was issued in March 2017. AE N. After issuance of the SOR, he made sporadic payments and submitted an Offer in Compromise (which was later withdrawn) before he entered into an installment agreement with the IRS one month prior to the hearing. In her brief, Department Counsel also points out that Applicant has been consistently employed since 2005 (with the exception of a four-month period in 2009-2010), and he had an adjusted gross income (AGI) of about $117,000 in 2014.[3] Additionally, Department Counsel notes that Applicant only submitted proof of one payment under the installment agreement, which was made after the hearing was held. She argues that proof of one payment under a 62-month installment plan is less than convincing evidence that Applicant was adhering to or in compliance with the installment agreement.[4]

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[2] Applicant's 2009 IRS tax transcript also reflects that his tax return for that year was received on February 14, 2012.

[3] Tr. at 35-36, Government Exhibit 1, and AE N. Applicant's IRS tax transcripts reflect that he filed as "Single" for 2009-2011 and his AGI for those years ranged from about $47,400 to $78,100; he filed as "Head of Household" for 2012 and his AGI was about $51,600; he filed as "Married Filing Joint" for 2013 and 2014 and his AGI for those years was about $83,700 and $117,000; and he filed as "Married Filing Separate" for 2015 and 2016 and his AGI for those years was about $53,300 and $44,700.

[4] In the decision, the Judge failed to identify the specific mitigating conditions that applied. He noted five mitigating conditions were potentially applicable. Those mitigating conditions are set forth in Directive , Encl. 2, App. A ¶¶ 20(a)-(d) and (g) as follows:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

"National security eligibility determinations take into account a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment." Directive , Encl. 2, App. A ¶ 1(b). Failure to comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). In this case, Applicant failed to address his significant 2009 Federal income tax debt for a number of years and did so only after his security clearance was in jeopardy. Such a failure raises questions about whether he has demonstrated the high degree of judgment and reliability that is required for granting an individual access to classified information.

We conclude that the Judge's decision failed to consider important aspects of the case and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

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> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
>
> (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
>
> (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; [and]
>
> (g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

As written, the Judge's decision leaves us guessing which mitigating conditions he concluded either fully or partially applied. This was error. As we have previously stated, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018).

## Order

The Decision is **REVERSED**.

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