KEYWORD: Guideline F

DIGEST: In this case, we note that Applicant's tax problems date back to 2010 and also include tax deficiencies in a number of subsequent years. Since the inception of his tax problems, significant gaps have occurred during which Applicant has not demonstrated any meaningful efforts to resolve those problems. Additionally, his latest installment agreement was established after the SOR was issued. Given the record that was before him, the Judge did not err in concluding that Applicant had failed to meet his burden to mitigate the security concerns arising from the Federal tax liens. Adverse decision affirmed.

CASENO: 17-03462.a2

DATE: 06/26/2019

DATE: June 26, 2019

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT
David B. Hanley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 2, 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 September 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip J. Katauskas granted Applicant's request for a security clearance. Department Counsel appealed the Judge's decision.

On December 18, 2018, the Appeal Board remanded the case to the Judge to correct identified errors, to provide the parties the opportunity to submit additional evidence, and to issue a new decision. On April 2, 2019, the Judge issued a Decision on Remand in which he denied Applicant's request for a security clearance. Applicant appeal appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant's appeal raises the following issues on appeal: whether the Judge erred in his analysis of the evidence and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's Decision on Remand.

In our prior decision, we noted we did not disagree with the Judge's conclusion that Applicant had mitigated a state tax lien. In the Decision on Remand, the Judge again found for Applicant on that state tax lien, which is not an issue in this appeal.

The current appeal concerns two Federal tax liens totaling about $118,000 that Applicant admitted in his SOR response. The SOR reflects that the larger Federal tax lien was filed in early 2014, and the other was filed in late 2015. Both liens arose from the operation of Applicant's business. In his latest decision, the Judge noted Applicant submitted two exhibits on remand.[1] One of those exhibits (Applicant's Exhibit (AE) I) reflected that Applicant made $72,000 in payments to the IRS under an installment agreement during 2014. The other exhibit (AE J) showed monthly payments of Federal payroll taxes in 2014. In the latest decision, the Judge also noted:

> Applicant remains delinquent on federal quarterly business taxes for the following time periods: December 2010, March and June 2011, September 2011, September 2015, March 2016, June 2016, September 2016, December 2016, March 2017, and June 2017. He remains delinquent in unemployment taxes for December 2013 and December 2016. Applicant remains delinquent on federal corporate taxes for December 2016. In addition, the Government observes that Applicant's total outstanding Federal tax debt at the time of the [second] installment agreement was $109,230. [Decision on Remand at 3, footnote omitted.]

[1] In the Decision on Remand, the Judge incorporated by reference his findings of fact from his earlier decision. He noted the two exhibits that Applicant submitted on remand did not change his original findings of fact. Decision on Remand at 3.

The Judge concluded:

> The open question is whether Applicant's modifications to his business tax practices have been responsible. The Government's strongest evidence on this point is that Applicant has consistently underpaid his federal taxes from 2010 through 2017, notwithstanding installment agreements. . . . Applicant's persistent tax delinquencies are evidence that Applicant's business reforms have not proven to be sufficient. In short, the Government contends that Applicant has not acted responsibly under AG ¶ 20(b).[2] I agree. The Appeal Board found error in my conclusion that Applicant had complied with the IRS guidance that he "keep up with current taxes." [Footnote omitted.] Neither of Applicant's two exhibits submitted on remand give me a factual basis to find that Applicant has kept current with his taxes. [Decision on Remand at 4.]

In his appeal brief, Applicant argues that he has acted responsibly in addressing his tax problems. He points out that he has made payments of $72,000 under his first installment agreement and has been paying a $1,000 a month under a second installment agreement that he entered into in December 2017. He contends that Mitigating Condition 20(g) applies because he has made arrangements with the appropriate tax authority to pay the amount owed and is in compliance with those arrangements.[3] We do not find Applicant's arguments persuasive. In ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018), we observed:

> The mere . . . existence of a payment arrangement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. The timing of corrective action is an appropriate factor for the Judge to consider in the application of mitigating condition 20(g) as well as in considering aspects of other overlapping mitigating conditions, such as, in determining whether an applicant acted responsibly under the circumstances, whether an applicant's past financial deficiencies are unlikely to recur, or whether an applicant initiated good-faith efforts to resolve financial problems. [Footnotes omitted.]

In this case, we note that Applicant's tax problems date back to 2010 and also include tax deficiencies in a number of subsequent years. Since the inception of his tax problems, significant gaps have occurred during which Applicant has not demonstrated any meaningful efforts to resolve

[2] Directive, Encl. 2, App. A ¶ 20(b) states, " 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[.]"

[3] Directive, Encl. 2, App. A ¶ 20(g) states, "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements."

those problems. Additionally, his latest installment agreement was established after the SOR was issued. Given the record that was before him, the Judge did not err in concluding that Applicant had failed to meet his burden to mitigate the security concerns arising from the Federal tax liens.

Applicant further contends that there is no indication the Judge considered the whole-person concept in issuing his Decision on Remand. In that decision, however, the Judge noted in Footnote 14 that he "considered the whole-person concept in reaching my conclusions on remand."

The balance of Applicant's arguments amounts to a disagreement with the Judge's weighing of the evidence. These arguments are not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

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 is **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