

Date: August 29, 2022

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| In the matter of:                | ) |                        |
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|                                  | ) |                        |
| -----                            | ) | ISCR Case No. 19-01624 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Patrick J. Hughes, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 12, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing, and the SOR was amended prior to hearing. On November 18, 2021, after the record closed, Defense Office of Hearings and Appeals (DOHA) 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.

This case was remanded to correct errors in the findings of fact. Those issues have been corrected. In his remand decision, the Judge found in favor of Applicant on two of the Guideline F allegations and found against him on one. The Judge’s favorable findings were not raised as an issue on appeal.

On appeal, the Applicant raises the following issues: whether the Judge erred in his findings of fact, whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law, and

whether the Judge properly applied the whole-person concept. Consistent with the following, we reverse the decision.

### **The Judge's Findings of Fact**

Under Guideline F, the amended SOR alleged that Applicant did not timely file his federal income tax returns for at least the 2013 through 2017 tax years (SOR ¶ 1.a.); that he failed to pay his federal income taxes for at least the 2013 through 2018 tax years (SOR ¶ 1.b.); and that he owed the IRS approximately \$28,400 for unpaid income taxes from the 2014 through 2018 tax years (SOR ¶ 1.c.). Applicant denied SOR ¶¶ 1.b. and 1.c. The Judge found against Applicant on SOR ¶ 1.c.

Applicant is in his mid-fifties. He served on active duty between 1984 and 1993 and retired from the Reserve in 2017. Since 2003, Applicant has worked for a defense contractor in a position that required him to deploy overseas in support of U.S. operations. His 2018 security clearance application, subsequent investigation, and documents provided by Applicant revealed that he filed his federal income tax returns late for tax years 2013, 2016, and 2017 and that he accrued tax debt for tax years 2014 through 2018 that totaled \$28,400 by December 2020.

Applicant asserts that he was late in filing some of his federal and state returns starting in 2013 because he found himself owing additional taxes as a result of increased income from working overseas. After filing his 2013 returns, he started addressing his filing discrepancies. In July 2015, Applicant entered into a repayment agreement with the IRS to make \$151 monthly payments to resolve his tax debt. That repayment agreement has been renewed and adjusted to reflect additional debts for subsequent tax years. His monthly payments were increased with each renewal, first to \$191, then to \$250, and now to \$350 each month. His tax debt has also been reduced through diversion of tax refunds.

Applicant retained a private tax preparer who helped him file his returns for the 2018, 2019, and 2020 tax years. By August 2021, Applicant had satisfied the debts for tax years 2014 and 2015 and reduced the arrearage to approximately \$19,000 in unpaid taxes for tax years 2016, 2017, and 2018. Applicant is now current on all of his tax reporting obligations and has adjusted his withholdings to a sufficient level to satisfy his tax obligation.

Applicant's current finances are otherwise sound, with no outstanding debt, a take-home monthly income of over \$10,000, and a healthy investment portfolio. Applicant acknowledged that he has the means to resolve his current tax debt, but has chosen not to do so, as he is satisfied with the monthly payment plan with the IRS.

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

Applicant did not timely file his Federal and state income tax returns for tax years 2013, 2016, and 2017. He has since brought his filing status current, and the allegation at SOR 1.a. is resolved for Applicant.<sup>1</sup> However, Applicant incurred a \$28,400 debt for federal taxes not timely

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<sup>1</sup>The Judge also resolved SOR 1.b. for Applicant "because it is subsumed by the more informative allegation at SOR 1.c." Decision at 6.

paid with his returns for tax years 2014 through 2018, still owes about \$19,000 in unpaid taxes and “is unwilling to resolve his tax debts more expeditiously outside of his agreement with the IRS despite having the means to do so.” Decision at 5–6.

AG ¶ 20(a)<sup>2</sup> does not apply because Applicant’s tax debts are multiple and recent, in that they remain largely unpaid. AG ¶¶ 20(d)<sup>3</sup> and 20(g)<sup>4</sup> apply because Applicant began using installments starting in 2015 to resolve his unpaid taxes. However, the benefit of these mitigating conditions is attenuated by the fact that Applicant chooses not to use the resources he has at hand to more timely resolve his tax debts. At the current \$370 monthly rate of repayment, his \$19,000 remaining balance will take another 51 months to resolve.

AG ¶ 20(b)<sup>5</sup> does not apply because Applicant did not show that his failure to pay his taxes as required arose from circumstances beyond his control. Making more money usually means having to pay more taxes. Although he began repayment agreements with the IRS in 2015, and he adjusted his tax withholdings in 2017, he has not acted to resolve his tax debt consistent with the financial resources at his disposal. As of the close of the record, he still owed past-due taxes from five years earlier in 2016, yet despite having the means to resolve his tax debts almost immediately, his current intent is to make the IRS wait another four to five years for the rest of the taxes owed. His choice to continue investing his disposable income rather than prioritizing resolution of his tax debt weakens any claim that he acted responsibly in the face of any unforeseen circumstances. [Decision at 7.]

## Discussion

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. *See, e.g.*, ISCR Case No. 14-00504 at 3 (App. Bd. Aug. 4, 2014).

Applicant challenges the Judge’s application of the mitigating conditions. With regard to AG ¶¶ 20(d) and 20(g) in particular, Applicant takes issue with the Judge’s conclusion that—although both mitigating conditions apply—“the benefit of those mitigating conditions is attenuated by the fact that Applicant chooses not to use the resources he has at hand to more timely resolve his tax debts.” Appeal Brief at 4, quoting Decision at 7.

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<sup>2</sup> AG ¶ 20(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.

<sup>3</sup> AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

<sup>4</sup> AG ¶ 20(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.

<sup>5</sup> AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person’s control . . . and the individual acted responsibly under the circumstances.

Here, [Applicant] established an agreed upon payment plan with the IRS to pay his taxes. At no time since this agreement was established has [Applicant] missed a payment. Meaning, he is not overdue to his creditor, and he is acting in good-faith to resolve this debt. *See* AG ¶ 20(d). Further, pursuant to AG ¶ 20(g), [Applicant] has consistently complied with the payment arrangement with the IRS, yet the [Judge] fails to credit this simply because of an unreasonable position that [Applicant] should devote his financial resources to clearing this debt as opposed to using it for other investments. The fact that [Applicant] is current on his payment arrangement as mutually agreed to with the IRS is all that should matter here, and to conclude otherwise is arbitrary and capricious. [Appeal Brief at 4.]

Applicant's arguments are of mixed merit. First, we reject the argument that being current on a payment plan—standing alone—mitigates under AG ¶¶ 20(d) and 20(g) and resolves all security concerns. As with the application of any mitigating condition, the Judge must consider all the record evidence and decide whether the favorable evidence outweighs the unfavorable, or vice versa. *See, e.g.*, ISCR Case No. 17-01807 at 3–4 (App. Bd. Mar. 7, 2018). The Judge may properly consider the circumstances under which the tax arrearage accrued, whether Applicant initiated good-faith efforts to resolve the problem, the timing of any such efforts, the length of time that Applicant has been on a payment plan, and his degree of compliance with the plan.

That said, in the case before us, the Judge concluded that mitigating conditions AG ¶¶ 20(d) and AG 20(g) apply. That conclusion is sustainable, as it is consistent with the record that was before him, which included the following evidence: Applicant initiated a repayment plan with the IRS in 2015—three years before he completed the SCA and four years before issuance of the SOR; the payments under the plan increased as the aggregate debt increased; Applicant pays interest under the plan at a rate set by the IRS; Applicant has been in compliance with the plan for seven years; Applicant retained professional assistance and has timely filed since 2018; he has accrued no additional arrearage since 2018; and he had paid off approximately 33% of the aggregate debt by August 2021.

Having found mitigating conditions AG ¶¶ 20(d) and AG 20(g) apply, it is inconsistent for the Judge then to conclude that Applicant nevertheless failed in meeting his burden of persuasion as to mitigation. In reaching his adverse determination, the Judge relies solely on Applicant's failure to pay off the aggregate debt immediately despite having the means to do so. However, the Judge cites to no authority for imposing this additional consideration, nor are we familiar with any. Instead, the Board has held that the mere fact that it might take Applicant a long time to complete a payment agreement is not a reason to deny him a clearance. *See* ISCR Case No. 06-25584 at 3–4 (App.Bd. April 4, 2008). To establish a meaningful track record of debt reform, an applicant is required to demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. *See, e.g.*, ISCR Case No. 14-00504 at 3. Applicant's sustained compliance with the agreement he reached with the IRS demonstrates a track record of debt resolution and undermines the Judge's rationale for denying him a clearance under Guideline F. Under the facts of this case, the Judge's decision fails to draw a rational connection between his finding that AG ¶¶ 20(d) and AG 20(g) have been established and his conclusion that Applicant

has failed to demonstrate that his security concerns have been mitigated. The Judge's decision runs contrary to the record evidence. *See, e.g.*, ISCR Case No. 06-25584 at 4.

Each case must be decided on its own merits. In the one before us, we conclude that the Judge's adverse findings are not sustainable.

**Order**

The decision is **REVERSED**.

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Chairperson, Appeal Board

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

Signed: Moira Modzelewski  
Moira Modzelewski  
Administrative Judge  
Member, Appeal Board