

Date: September 7, 2023

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In the matter of: )  
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 Applicant for Security Clearance )  
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ISCR Case No. 22-00578

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 30, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On July 12, 2023, Defense Office of Hearings and Appeals Administrative Judge Edward W. Loughran denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged five tax liens filed against Applicant, including three Federal liens filed in August and December 2012 totaling approximately \$84,000 and two state liens filed in April 2011 and September 2012 totaling approximately \$69,000. The SOR further alleged that Applicant received a Chapter 7 bankruptcy discharge in 2013. The Judge found against Applicant on the three Federal tax liens, and in favor of her on the remaining allegations. On appeal, Applicant asserts that the Judge failed to properly consider all relevant evidence and failed to properly apply

the mitigating conditions, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **Judge's Findings of Fact and Analysis**

Applicant is in her mid-50s. She is married and has one adult child. She has worked for her current employer or a predecessor company since 2012.

In 2008, Applicant purchased a restaurant, where she had previously worked as a waitress and manager, for about \$1.2 million. She paid \$150,000 down and financed the balance for about \$10,000 per month. Applicant began having difficulty maintaining the restaurant due to the recession and because a highway bypass diverted drivers around her small town. She stopped paying the restaurant's property taxes, and she also stopped paying the Internal Revenue Service and state taxing authority the payroll taxes she withheld from her employees' wages. Applicant returned the restaurant to its prior owners after they threatened to foreclose in 2012.

Applicant retained an attorney, who negotiated an offer-in-compromise with her state taxing authority to address the state tax liens. She completed payments on the negotiated amount in 2016, and the state liens were released in December 2020. With respect to the Federal liens, Applicant contacted the IRS several times and was told in 2017 and 2018 that she owed so much in comparison to her income that the IRS considered the liens uncollectable. The IRS indicated that it would maintain the liens on Applicant's property so that it could collect the profit from any sale, and it would withhold any refunds she would otherwise receive, but that it would not actively collect on the liens unless Applicant's income significantly increased. She was also told that the IRS could not collect taxes after ten years, and she decided to not make any payments and wait until the debts were more than ten years old and uncollectable.

The Judge found that the failure of Applicant's restaurant was a circumstance beyond her control and left her in a difficult situation, but her not paying payroll taxes was not an acceptable option. Moreover, "Applicant has done nothing to resolve the federal payroll taxes . . . except to wait until they become more than ten years old and uncollectable." Decision at 6. The Judge was therefore unable to find that Applicant acted responsibly under the circumstances, nor that she made a good-faith effort to pay the payroll taxes. Because no mitigating conditions could be applied to the unpaid payroll taxes, the Judge concluded that Applicant's financial issues continue to cast doubt on her current reliability, trustworthiness, and good judgment.

### **Discussion**

On appeal, Applicant contends that the Judge erred in failing to apply mitigating conditions AG ¶¶ 20(a), 20(b), and 20(g). Applicant's arguments, as discussed more below, amount to a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant first asserts that the Judge erred in declining to apply mitigating condition AG ¶ 20(a), arguing that the “evidence establishes that there were unique circumstances that heavily contributed to the outstanding tax debt, such as the recession and the failure of [Applicant’s] restaurant in 2012.” Appeal Brief at 11. A judge need not discuss all potentially applicable analytical factors set forth in the Directive, including the mitigating conditions. *See, e.g.*, ISCR Case No. 12-05512 at 3 (App. Bd. Jan. 12, 2017) (citation omitted). Additionally, AG ¶ 20(a) was of limited application because Applicant’s Federal tax liens, all of which were entered in 2012, remained unresolved as of the hearing. The liens therefore represented a continuing course of conduct, which undermines any argument that Applicant’s tax debts are not recent or are unlikely to recur. *See* ISCR Case No. 09-01309 at 4 (App. Bd. Apr. 29, 2010).

Applicant next challenges the Judge’s finding that mitigating condition AG ¶ 20(b) did not apply to her Federal tax debt. AG ¶ 20(b) applies when 1) the conditions that resulted in the financial problem were largely beyond the person’s control, *and* 2) the individual acted responsibly under the circumstances. The Judge acknowledged that the “failure of Applicant’s restaurant was beyond her control,” satisfying the condition’s first prong. Decision at 5. The Judge went on to find, however, that Applicant’s initial decision to not pay payroll taxes, and her subsequent inaction in resolving the Federal liens other than through waiting until they became more than ten years old and uncollectable, were insufficient to invoke the second, “responsible action” prong of AG ¶ 20(b).

Applicant argues that “despite the Administrative Judge’s erroneous assertions to the contrary, [Applicant] acted reasonably and responsibly under the circumstances to resolve the outstanding debts.” Appeal Brief at 12. Throughout her appeal, Applicant repeatedly emphasizes that she contacted the IRS several times in hopes of resolving the Federal tax liens but was told that the IRS considered the debt uncollectable. *See* Appeal Brief at 4-5, 12. Beyond that, she took no other action to resolve the liens. She appears to contend that these IRS contacts amount to responsible action under AG ¶ 20(b)’s second prong, warranting full application of the mitigating condition. Applicant simply disagrees with the weight that the Judge placed on her limited resolution efforts, which, as previously stated, is insufficient to demonstrate that the Judge’s decision is arbitrary, capricious, or contrary to law.

Finally, Applicant contends that the Judge erred by not applying AG ¶ 20(g), which affords mitigation when “the individual has made arrangements with the appropriate tax authority to . . . pay the amount owed and is in compliance with those arrangements.” While acknowledging that she has made no such repayment arrangements with the IRS, Applicant contends that she should receive credit under AG ¶ 20(g) because her inability to resolve the Federal tax debt was “through no fault of her own.” Appeal Brief at 13. Applicant’s argument is without merit. The plain language of the mitigating condition would require in this case demonstrated compliance with repayment arrangements that have *actually* been established, not just attempted. Neither an actual repayment arrangement nor compliance therewith exist in this case.

Applicant’s brief relies on hearing-level decisions in unrelated Guideline F cases to argue that the Judge erred in his analysis of this case. Her reliance on those decisions is misplaced. The facts and concerns at issue in the cited cases are *easily* distinguishable from the instant case. Moreover, how particular fact scenarios were decided at the hearing level in other cases is

generally not a relevant consideration in the Board’s review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021). The decisions that Applicant cites have no direct relationship or unique link to Applicant’s case that would make them relevant here. *See also* ISCR Case No. 19-03174 at 2 (App. Bd. Feb. 10, 2021).

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which 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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

### **Order**

The decision is **AFFIRMED**.

Signed: James F. Duffy

James F. Duffy  
Administrative Judge  
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi  
Administrative Judge  
Member, Appeal Board

Signed: Allison Marie

Allison Marie  
Administrative Judge  
Member, Appeal Board