DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: November 18, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-02168
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Andre M. Gregorian, Esq., Department Counsel
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Carl Anthony Marrone, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 23, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On September 5, 2024, Defense Office of Hearings and Appeals Administrative Judge Charles C. Hale granted Applicant security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged various tax concerns, including that Applicant failed to timely pay his federal and state income taxes for at least tax years 2011 and 2015 through 2020 and that he carried approximately $73,000 in delinquent federal and state tax balances. During the March 2024 hearing, the SOR was amended to further allege that Applicant failed to timely file his federal and state tax returns for tax years 2021 and 2022.

Judge's Findings of Fact

Applicant, in his mid-30s, was married from November 2017 until his divorce in January 2019, and he has two children. He has held a security clearance since 2007.

From 2010 until 2014, Applicant earned $70,000 per year. He was laid off in October 2014 and remained unemployed for about six months. In March 2015, he took a position paying $75,000 per year. In February 2016, he took a new job that paid $100,000 per year, but he left after a year because of poor performance and was unemployed from February 2017 until September 2017. Applicant started a new job with his current security clearance sponsor in September 2017 and his annual salary is currently $170,000. Per his April 2023 financial statement, his monthly net remainder after paying all other expenses was just over $6,400.

Applicant attributed his financial problems to his periods of unemployment from October 2014 to March 2015 and February 2017 to September 2017 and needing the money to help with family. He acknowledged not having sufficient funds withheld for tax purposes and testified that he used the money owed to the federal and state taxing authorities to meet other obligations, such as "life expenses," childcare, credit cards, and phone bills. Decision at 3.

Applicant asserted that he entered into payment plans with both the Internal Revenue Service (IRS) and state taxing authorities. He explained that he resolved the 2011 and 2018 federal tax delinquencies and is required to make $700 monthly payments for the remaining 2019 and 2020 balances. He is required to make monthly payments of about $550 for his state tax balance, which was about $12,000 as of January 2024. Applicant asserted that his state plan was established in 2020 but failed to provide documentation supporting that start date. His installment agreements reflect that he makes his payments on time and makes occasional lump sum payments in addition to his regular payments.

Finally, Applicant denied that he failed to timely file his 2021 and 2022 federal and state tax returns. He filed an extension for tax year 2021 and testified that the IRS and state had received but not yet processed all of the returns. He further testified that he owes about $21,000 for the two additional tax years, which are not part of his payment plans with the IRS or state.

Discussion

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 produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions 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).

On appeal, the Government challenges one of the Judge's factual findings and argues that his applications of the mitigating conditions and Whole-Person Concept were arbitrary, capricious,

and not supported by the record evidence. A judge's decision can be arbitrary or capricious if: "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts 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." ISCR Case No. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). For the reasons stated below, we reverse the Judge's decision.

2021 and 2022 Tax Returns

In the second of his two-sentence favorable mitigation analysis, the Judge found that there was "sufficient evidence that [Applicant] filed his 2021 and 2022 returns on time." Decision at 7. The Government challenges this finding as "unsupported and otherwise contradicted by the record," and contends that this amounts to harmful error due to the Judge's heavy reliance on the erroneous finding in his mitigation analysis and, in particular, his application of AG ¶ 20(g).[1] Appeal Brief at 11. This argument has merit.

The "sufficient evidence" relied upon by the Judge in making the challenged finding appears to rest entirely in Applicant's 2022 prepared federal return, electronically signed by his tax preparer on October 15, 2023, coupled with Applicant's explanation that "the IRS and state had received his tax returns but had not processed them," which he knew because "his tax preparer had received an acknowledgement that his 2021 and 2022 state returns had been accepted." Decision at 3.

Applicant produced no documentation regarding the status of his 2021 or 2022 state tax returns and declined to produce the acknowledgment purportedly received by his tax preparer. He did, however, produce his 2021 and 2022 federal tax account transcripts, which reflect that as of March 14, 2024 – just six days before the hearing – neither tax return was filed. Applicant Exhibit (AE) Z at 6, 9.[2]

While Administrative Judges have responsibility for, and broad discretion in weighing evidence, that discretion is not unlimited. *See* ISCR Case No. 99-0511 at 13-14 (App. Bd. Dec. 19, 2000) (citations omitted). When conflicts exist within the record, a judge must weigh the evidence and resolve those conflicts based upon a careful evaluation of factors such as the evidence's "comparative reliability, plausibility and ultimate truthfulness." ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). No such evaluation occurred in this case. Although the Judge acknowledged that Applicant provided IRS transcripts, he failed entirely to reference, let alone analyze, the unfavorable information contained therein.

[1] 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.

[2] It is also worth noting that, while Applicant was granted an extension until October 2023 to file his 2022 federal return (*see* AE U at 25; AE Z at 9), he received no extension to file his 2021 federal return. The Judge found that Applicant "filed for an extension for tax year 2021," which is also in error, albeit likely a typographical and therefore harmless one. Decision at 3.

Here, Applicant's federal tax account transcripts are the record's most recent and formal documentary evidence concerning his 2021 and 2022 returns, and they unambiguously reflect that the returns are unfiled. Applicant had the opportunity to provide evidence to support his testimony that his returns were filed and accepted but not yet processed, but he declined to do so. Although the Judge had to consider Applicant's hearing testimony, he could not uncritically accept it in the face of other significant, relevant, and material conflicting evidence. *See* ISCR Case No. 01-07292 at 4 (App. Bd. Jan. 29, 2004) (citation omitted). It was therefore arbitrary and capricious for the Judge to find that Applicant's 2021 and 2022 tax returns have been filed. Moreover, because these errors formed the basis for the Judge's mitigation of SOR ¶¶ 1.k and 1.l, the resulting favorable formal findings are unsustainable.

Mitigation and Whole-Person Analyses

With respect to the remaining SOR allegations, the Judge found that Applicant's history of tax problems established disqualifying conditions AG ¶¶ 19(a), 19(c), and 19(f).[3] He went on to find that the concerns were mitigated because "Applicant provided supporting documentation to demonstrate his good-faith efforts to remedy his significant amount of outstanding taxes, and he is systematically paying his Federal and state tax debts." Decision at 6-7. The Government argues that the Judge's mitigating analysis is "altogether unsupported by a reasonable reading of the record as a whole." Appeal Brief at 13.

The Government first challenges the Judge's application of AG ¶ 20(b), which affords mitigation when the conditions that resulted in the financial problem were largely beyond the person's control *and* the individual acted responsibly under those circumstances. The Judge did not specifically identify which circumstances he found met the foregoing criteria, but it appears he relied on Applicant's five months of unemployment from October 2014 to March 2015 and seven months of unemployment from February to September 2017, which the Judge noted left Applicant "unable to initially pay the amounts due upon filing." Decision at 2.

Applicant's unemployment coincided with only three of his ten years of tax deficiencies, the last of which was in 2017, and he has been consistently employed since then. While the Judge may have reasonably determined that the unemployment was beyond Applicant's control and contributed to his financial problems for a discrete number of tax years, it is wholly unclear how those circumstances contributed to Applicant's tax deficiencies *prior to* his unemployment or how they continue to impact his tax failures to-date.[4] Rather, Applicant's tax delinquencies were predominantly caused by his failures to have sufficient amounts withheld from his pay or to pay his tax obligations on a quarterly basis as required. Such failures were, by their nature, within his control. *See* ISCR Case No. 06-19154, 2008 WL 2002588 at *3 (App. Bd. Apr. 9, 2008).

[3] AG ¶ 19(a): inability to satisfy debts; AG ¶ 19(c): a history of not meeting financial obligations; AG ¶ 19(f): failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

[4] Applicant bore the burden of establishing a nexus between his unemployment history and tax deficiencies. *See* ISCR Case No. 07-09304, 2008 WL 4917777 at *2 (App. Bd. Oct. 6, 2008).

The Government also contends that the Judge erred in reaching the second, "responsible action" prong of AG ¶ 20(b). In finding that Applicant acted responsibly, the Judge relied exclusively on his repayment efforts, noting that "he is systematically paying his Federal and state tax debts." Decision at 6-7. Those repayment efforts also formed the basis of the Judge's application of AG ¶¶ 20(d)[5] and 20(g), both of which afford mitigation when an individual has consistently engaged in resolution efforts, and which are also challenged by the Government.

In response to the Government's appeal, Applicant contends that the record establishes he is "doing everything that he can to resolve his situation." Reply Brief at 4. This is simply not true. To his credit, the record reflects that Applicant has participated, with varying consistency, in several IRS installment agreements since approximately 2019[6] and a state installment agreement since approximately 2020.[7] While resolution efforts are properly considered in determining if an individual acted responsibly in response to financial problems and such participation may open the door for consideration of the other mitigation conditions, the evaluation of a security clearance applicant's reliability and judgment cannot hinge solely on whether he has taken corrective measures regarding the instant problem. Instead, such evaluation must also include consideration of the individual's reform and rehabilitation – *i.e.*, his actions to prevent similar problems from recurring. Indeed, once an individual understands how his behavior incurs a negative consequence, we expect "good judgment" to include modifying that behavior when and as possible. In this case, Applicant has decidedly made no such modification and the record is devoid of any evidence that he has reformed his conduct.

As the Government highlights, Applicant has repeatedly failed to honor promises to address his future tax obligations. In August 2021, he explained that his delinquencies resulted from having no taxes withheld from his pay and indicated his intent to begin paying quarterly taxes to avoid a significant year-end tax liability. GE 2 at 6. One year later, in July 2022, Applicant again acknowledged "learning that I need to manage the allocations of my tax payments better throughout the year." GE 2 at 3. Despite his assertions, his 2022 and 2023 prepared federal returns reflect that Applicant declined to modify his approach, made no such advanced payments, and owed his full tax obligation for those years. AE Z at 7; AE DD at 5. As of his March 2024 security clearance hearing, Applicant had still never paid quarterly taxes, despite acknowledging his ability to afford them. Tr. at 98, 102-103. He again expressed that he has "a different plan going forward," to include payment of quarterly taxes. Tr. at 102. Years of similar broken promises strip his latest of credibility, and whatever credit the Judge afforded Applicant's promises to change his tax payment approach in the future was undue. *See* ISCR Case No. 17-01213, 2018 WL 3413537 at *3 (App. Bd. Jun. 29, 2018) (citation omitted) ("[A] promise to change one's conduct in the future does not constitute evidence of reform and rehabilitation that requires a favorable security clearance decision.").

[5] AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

[6] Applicant's current IRS installment agreement to address his 2018, 2019, and 2020 federal tax balances was established in approximately March 2022, and he has previously participated in other IRS installment agreements to address his 2016, 2017, and 2018 federal tax balances. *See* AE H; AE Z; AE BB.

[7] AE E; AE F; AE Y.

Given the total absence of evidence of reform and rehabilitation in this case, questions remain about whether Applicant has demonstrated the judgment, reliability, and willingness to abide by well-established rules and regulations required for granting a security clearance.

Conclusion

It is well-established that a person who is unwilling to fulfill his legal obligations, such as filing and paying taxes as required, "does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810, 2000 WL 1247732 at *4 (App. Bd. Jun. 8, 2000) ("It is untenable for an applicant to refuse to accept his or her legal obligation to comply with the federal tax laws and then insist that the federal government must grant him or her the privilege of handling classified information.").

When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The former is appropriate when the legal errors can be corrected through remand *and* there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence. If the identified errors cannot be remedied on remand, the decision must be reversed. Such is the case when, after addressing the identified error, the Board concludes that a contrary formal finding or overall grant or denial of security clearance eligibility is the clear outcome based on the record. ISCR Case No. 22-01002, 2024 WL 4445514 at *3 (App. Bd. Sep. 26, 2024) (citation omitted).

The Government has met its burden on appeal of demonstrating reversible error below. Considering the record as a whole, the Judge's findings are arbitrary and capricious as they fail to consider important aspects of the case, fail to articulate a satisfactory explanation for material conclusions, and run contrary to the weight of the record evidence. Accordingly, the Judge's favorable decision is not sustainable under *Egan*.

Order

The decision in ISCR Case No. 22-02168 is **REVERSED**.

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board