

KEYWORD: Guideline F

DIGEST: Applicant has \$180,000 in delinquent debt for past due taxes and for education loans, approximately \$150,000 of which are owed to the Federal Government. Even if Applicant's plan for his state taxes were sufficient to resolve the concern arising from them, evidence that he has only recently made an offer for compromise to the IRS and is making \$5 a month payments on a plan for the student loans is not sufficient to mitigate the security concerns. The Judge's decision runs contrary to the weight of the record evidence. Favorable decision reversed.

CASENO: 14-03358.a1

DATE: 10/09/2015

DATE: October 9, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-03358
)	
Applicant for Security Clearance)	
)	

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 August 11, 2014, 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 July 8, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip S. Howe 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 unsupported by the weight of the record evidence. Consistent with the following, we reverse the Judge’s decision.

The Judge’s Finding of Fact

Applicant operates a consulting business. Starting in 2007, his company experienced a diminution in income due to the cancellation of several contracts. Applicant owes over \$53,000 in taxes to the Internal Revenue Service (IRS) for tax years 2006 and 2007. He filed his returns but did not pay due to illness and to his having paid off credit card debt instead. Applicant attempted to set up an installment plan but was not able to maintain the payments. Applicant also owes over \$58,000 for tax year 2010. He made an offer in compromise to the IRS for his delinquent taxes and, as of the close of the record, was awaiting a decision.

Applicant owes over \$6,000 in past due taxes to his state for tax year 2010 and \$152 for tax year 2011. He attempted to enter into an installment agreement, but the state required him to make a down payment of one-third of the total amount owed. Subsequently his business improved, and he agreed to the payment terms. This debt is being resolved.

Applicant also owes his home county for real estate taxes of over \$6,000 for tax year 2010 and another \$6,000 each for 2011 and 2012. His mortgage lender has paid these taxes and has folded the amounts into the end term of his mortgage.

Applicant owes nearly \$5,000 to a lender for a student loan on behalf of his daughter. He has been making monthly payments of \$55 since April 2015.

Applicant also owes the U.S. Department of Education over \$40,000 for past due repayments of education loans. He has arranged a rehabilitation agreement with the Department, whereby he makes 10 monthly payments of \$5, after which the amount owed increases.

Applicant has completed a financial counseling course. His budget shows a net remainder of over \$6,000 for the first quarter of 2015. Applicant used credit cards extensively when his consulting income decreased. He paid them off, resulting in his inability to pay his taxes. He also had a kidney removed, which impaired his ability to work. He does not currently have any credit

cards.

The Judge's Analysis

In concluding that Applicant had mitigated concerns arising from his delinquent debts, the Judge cited to evidence of Applicant's business downturn and medical problem, which he concluded were circumstances beyond Applicant's control. He also noted that Applicant's property tax debts had been paid by his mortgage lender; that he had hired a tax consultant to submit an offer in compromise to the IRS; and that he has rehabilitation agreements with his student loan creditors. He also cited to evidence that Applicant had successfully disputed one of the education loans that appeared on his credit report.

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). The applicant bears the burden of mitigating the security concerns raised by admitted or proven facts alleged in the SOR. *See* Directive ¶ E3.1.15. The 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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

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* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's application of the mitigating conditions was not supported by the weight of the record evidence. In doing so, he cites to what he views as a relative paucity of evidence of debt repayment, given the extent of Applicant's financial problems.

We note first of all that Applicant's security concerns arise from delinquent debts owed, for the most part, to various Federal, state, and local governmental entities. These include income and property taxes as well as a significant debt to the Federal Government for student loans. A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an

applicant's reliability, trustworthiness, and ability to protect classified information.¹ As we noted in an earlier case

A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information . . . [We] have . . . noted that a person who has a history of not fulfilling their legal obligation to file income tax returns may be said not to have demonstrated the high degree of judgment and reliability required for access for classified information. ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000).

Although in the case before us Applicant filed his tax returns, his substantial debts to the Federal, state, and local governments raise questions of equivalent urgency about his eligibility for a clearance. The Judge properly concluded that Applicant's circumstances raised security concerns under Guideline F.

Turning to the issue of mitigation, we find persuasive Department Counsel's argument that the evidence that Applicant had supplied was not enough to meet his burden of persuasion under the *Egan* standard. Department Counsel cites to evidence that, a few weeks before the hearing, Applicant submitted an offer in compromise to the IRS² and that he had made nominal payments on his Federal education loan. In addition, we note evidence that, on the day of the hearing, Applicant repaid a loan of \$1,000 to a person who testified in his behalf as a character witness. Tr. at 47. While this evidence is relevant, the timing of these actions diminishes the weight to which they might otherwise have been entitled. *See, e.g.*, ISCR Case No. 14-00279 at 3 (App. Bd. Jan. 23, 2015) for the proposition that the timing of debt payment is a relevant factor in evaluating an applicant's case for mitigation of Guideline F concerns. The reason that timing is important is that an applicant who begins to resolve debts only after an SOR placed him on notice that his 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.

In addition, we note testimony that undercuts the Judge's conclusion that Applicant's debts necessarily arose from circumstances outside his control.

[Department Counsel]: Did you, in your company, have a . . . system in place to make sure that you were withholding the correct amount of money during the course of the

¹See Directive, Enclosure 2 ¶ 18 regarding the concern under Guideline F: "Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

²We note that the actual terms of this offer are not contained in the record. Applicant testified that he had submitted the offer to the IRS, with a reply expected by the end of August 2015, nearly three months after the hearing. He also submitted a proof of retainer by the tax assistance attorney who prepared the offer. As the record stands, the Judge was in no position to evaluate the facial reasonableness of the offer.

year?

[Applicant]: We tried to do that. Tr. at 82.

Department Counsel continued this line of questioning: “So the problem wasn’t that you didn’t earn enough; the problem was the you . . . weren’t keeping back enough money . . . to pay your taxes at the end of the year?” Applicant did not respond directly to the question, testifying instead about his effort to pay off credit card debt and about his medical problem. Tr. at 83. At no point did Applicant clearly address the material issue of whether or not he had adequate withholding from his income and, if not, why not. As it is, this colloquy should have been sufficient to raise a doubt in the Judge’s mind as to the extent to which Applicant’s own business decisions were a significant cause of his tax delinquencies, thereby impairing the Judge’s favorable application of Mitigating Condition 20(b).³

We also find persuasive Department Counsel’s argument that the evidence referenced above is not sufficient to demonstrate that Applicant has made a good-faith effort to pay his debts or that his financial problems are under control. As Department Counsel notes, the mere presence of mitigating evidence “does not justify . . . making an overall favorable determination in the face of disqualifying conduct such as Applicant’s[.]” Appeal Brief at 8. Especially in regard to his debts to the Federal Government, Applicant’s evidence in mitigation, at best, announces an intention to pay them off at some unspecified time in the future. *See* ISCR Case No. 09-02926 at 2 (App. Bd. May 11, 2014), which states that evidence of a plan to resolve delinquent debts in the future is not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner.

To sum up, Applicant owes about \$180,000 in delinquent debt for past due taxes and for education loans, approximately \$150,000 of which are owed to the Federal Government. Even if one concludes that Applicant’s payment plan for his state taxes is sufficient to resolve the concern arising from them, evidence that he has only recently made an unspecified offer for compromise to the IRS and is making \$5 a month payments on a rehabilitation plan for the student loans⁴ is not sufficient to mitigate the concerns that arise from his Federal debts. The Judge’s decision runs contrary to the weight of the record evidence and is not sustainable.

³Directive, Enclosure 2 ¶ 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[.]”

⁴As the Judge found, the student loans were on behalf of Applicant’s children. One of them is a surgical nurse at a hospital in a large U.S. city and another is employed in a professional position at the Defense contractor with which Applicant is seeking employment. *See* the Judge’s comment to Applicant: “[Y]our ship is taking water, to use a nautical term. And you need help. I don’t know why they haven’t paid . . . But you’re telling me you just don’t think . . . that you should force your daughters to pay for their education.” Tr. at 102. Despite this line of questioning, the Judge did not address the reasonableness of Applicant’s having undertaken sole responsibility to repay these loans.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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