

KEYWORD: Guideline F

DIGEST: A credibility determination based solely on a written record is not entitled to the same deference as one based observing a witness's demeanor. Favorable decision reversed.

CASENO: 15-01031.a1

DATE: 06/15/2016

DATE: June 15, 2016

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In Re: )  
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 ----- ) ISCR Case No. 15-01031  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Bryan Olmos, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 15, 2015, 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 decision on the written record. On March 4, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White 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 decision was arbitrary, capricious, or contrary to law.<sup>1</sup> Consistent with the following, we reverse.

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

Applicant is a 58-year-old employee of a defense contractor. In his security clearance application dated July 29, 2014, he disclosed that he had not filed his 2011, 2012, and 2013 Federal income tax returns in a timely manner and explained that he calculated he would receive a tax refund for each of those years.

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

In his response to the SOR, Applicant stated, "my decision to delay filing was completely unrelated to any financial over-extension or unpaid debt circumstances encountered on my behalf. I delayed filing a tax return specifically due to the fact that, in each case, I pre-determined that I would receive a tax refund. The pre-determined calculation was based on my known tax deductions for each year." He also stated he regretted failing to file his tax returns in a timely manner, understood that filing late because he expected a refund was an unacceptable practice, and pledged to file his tax return before the April 15 deadline.

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

The Judge found that Applicant's failure to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner established security concerns under disqualifying condition 19(g).<sup>2</sup> The Judge concluded that Applicant was under the impression that there was nothing legally wrong with filing his income tax returns late as long as he paid more taxes than was owed. He noted that Applicant filed his 2011 Federal income tax return before submission of his security clearance application and the other two tax returns after becoming aware of the potential security concerns for not having done so. He determined that Applicant correctly understood that he was entitled to a refund for each year and concluded Applicant's late filing of Federal income tax returns was not serious because it merely delayed his receipt of substantial refunds for each year. He stated that

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<sup>1</sup> Department Counsel also raised the issue of whether the Judge erroneously excluded Applicant's personal subject interview from the record. We need not address that issue to decide this case.

<sup>2</sup> Directive, Enclosure 2 ¶ 19(g) states, "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

Applicant's credible statement of intent to file timely in the future indicates that recurrence is unlikely. He concluded that Applicant's tax filing problems were fully resolved and the security concerns were fully mitigated.

## Discussion

Department Counsel argues that the limited record in this case does not support the Judge's favorable credibility and mitigation analysis. He points out that Applicant did not file his 2012 Federal income tax return until after submission of his security clearance application and did not file his 2013 tax return until after issuance of the SOR. He contends that the Judge, in limiting his analysis to the resolution of the tax filing obligations, failed to assess adequately the overriding issues of Applicant's lack of judgment and his history of failing to abide by rules and regulations. He asserts that Judge took the position of "no harm, no foul," which the Appeal Board has discounted in the past.<sup>3</sup> Department Counsel's arguments have merit.

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371, U.S. 156, 168 (1962)). "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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g., ISCR Case No. 05-03635 at 3* (App. Bd. Dec. 20, 2006).

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<sup>3</sup> ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). ("The fact that Applicant has purportedly corrected his federal tax problem, and the fact that he is now motivated to prevent such problems in the future, does not preclude careful consideration of Applicant's security worthiness in light of his longstanding prior behavior evidencing irresponsibility. . . . Department Counsel argues that the Judge took a "no harm, no foul" approach to Applicant's course of conduct and employed an "all's well that ends well" analysis that did not give appropriate weight to Applicant's multi-year inaction regarding his income tax filing and payment duties. The Board concludes that these are fair characterizations of the Judge's resolution of the case. . . . By failing to analyze and discuss these matters in any depth, the Judge has failed to consider an important aspect of the case.") (Citations omitted).

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. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). In his Answer to the SOR, Applicant admitted "that over the past years I have not been in compliance with filing an annual Federal tax return prior to the April deadline. In addition, I admit that, in some cases, I have delayed filing a tax return for two or three years." By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).

Much of the Judge's mitigation analysis is predicated upon his conclusion that Applicant has resolved his tax filing problems. Applicant's tax filing delinquencies were not due to conditions beyond his control. Department Counsel questions why someone would calculate their taxes, determine they are owed a refund, and delay filing for that refund. Department Counsel also correctly points out the record does not support the Judge's conclusion that "Applicant was under the impression that there was nothing legally wrong with filing his income tax returns late as long as he had already paid more taxes than were owing for that year." Additionally, the timing of resolution of financial problems is relevant in determining the extent to which an applicant has demonstrated mitigation. ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). Even though Applicant stated in his security clearance application that his delinquent tax returns had either been filed or were "in progress," he thereafter failed to comply with the filing requirement for his 2013 Federal income tax return for over a year and did so only after issuance of the SOR. This delay was not explained and caused Department Counsel to question whether Applicant had previously calculated his taxes. Overall, the Judge's favorable mitigation determination runs contrary to the weight of the limited record evidence and is not sustainable.

Department Counsel also challenges the Judge's determination that Applicant made a "credible" statement to file timely tax returns in the future. When an applicant waives a hearing and chooses to have his or her case decided on the written record, the Judge has no ability to make a credibility determination based on observation of the applicant's demeanor. Accordingly, a credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observations of a witness's demeanor. *See, e.g.*, ISCR Case No. 04-12680 at 3 (App. Bd. May 21, 2007). Department Counsel notes that Applicant has

not provided proof that he has fully complied with Federal income tax filing requirements for 2014. The absence of such evidence undercuts the Judge's determination that Applicant's assurance of reform and rehabilitation is credible.

We conclude that the Judge's decision failed to consider important aspects of the case and improperly relied on a credibility assessment in place of record evidence. The decision ran contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

### **Order**

The Decision is **REVERSED**.

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

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

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