

KEYWORD: Guideline F

DIGEST: The record does not support the Judge's conclusion that Applicant's tax debt had been forgiven . There is record evidence of Applicant having an extensive history of tax problems. Favorable decision reversed.

CASENO: 07-16427.a1

DATE: 02/04/2010

DATE: February 4, 2010

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In Re:)	
)	
-----)	ISCR Case No. 07-16427
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 12, 2009, DOHA 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 October 22, 2009, after the hearing, Administrative Judge Wilford H. Ross 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 issues on appeal: whether the Judge’s application of the pertinent mitigating conditions was erroneous and whether the Judge’s whole-person analysis was erroneous. Finding error, we reverse.

Facts

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor and is currently making \$61,000 a year. He seeks to retain a previously granted security clearance.

Applicant failed to file his state and Federal income tax returns in a timely manner for several years between 1982 and 1990. As a result of this, Applicant was denied a security clearance in 1993.¹

He accrued a tax debt to the IRS of \$55,000. He consulted with three different tax resolution specialists and made payments to the IRS. However, he found repayment of the amount to be difficult. He received a document from the IRS to the effect that his taxes “were not collectable at this time.” Decision at 3. He also stated that he no longer owed the debt under the statute of limitations. Applicant enjoys an excellent reputation for efficiency at his job.

Analysis

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). 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.

Once a concern arises regarding an Applicant’s security clearance eligibility, 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 presents

¹Applicant was subsequently granted a security clearance in 1996 and again in 2003. Government Exhibit 1, Security Clearance Application, at 33; Department Counsel Brief at 4.

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).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See e.g.*, ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge concluded that Applicant had mitigated the security concerns in his case. In doing so, he applied three Financial Considerations Mitigating Conditions: 20(a)², 20(c),³ and 20(d).⁴ In applying these mitigating conditions, the Judge focused attention upon the extent to which Applicant's tax debts were not collectible and upon Applicant's efforts to resolve his debts, including the use of tax resolution firms and attempts to develop payment plans. Decision at 6. He also noted that Applicant currently files his returns and pays his taxes.

Department Counsel argues that the Judge's favorable decision did not take into account significant contrary record evidence. This argument is persuasive. The Judge's decision rested in large measure upon his conclusion that Applicant's tax debt had been “forgiven.” Decision at 6. However, Applicant's own evidence casts doubt upon this conclusion. Applicant submitted a letter from the IRS, for example, in which he was advised that “[y]ou were in a not collectible at this time status, not never collectible.” The record contains no further elaboration on the meaning of this advice; however, this letter does not support a conclusion that the IRS had actually forgiven Applicant's tax debt, as the Judge stated. Furthermore, we note Applicant's own testimony that the debt is still gathering interest, from which a reasonable person could conclude that the IRS does not

²Directive ¶ E3.20(a): “[T]he 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 judgement[.]”

³Directive ¶ E3.20(c): “[T]he person has received or is receiving counseling for the problems and/or there are clear indications that the problem is being resolved or is under control[.]”

⁴Directive ¶ E3.20(d): “[T]he individual initiated a good-faith effort to repay over due creditors or otherwise resolve debts[.]”

view the debt as having been extinguished. Tr. at 30-31. Tellingly, Applicant stated in his response to the SOR that the IRS would not seek to collect the monies owed “*unless my financial situation changes drastically.*” (emphasis added) The record contains no evidence of a written communication from the IRS absolving Applicant of the \$55,000 tax liability or otherwise forswearing some kind of collection effort.⁵ Even assuming that judicial enforcement of the debt has been precluded by the statute of limitations, we have consistently held that reliance upon such a remedy is not normally a substitute for good-faith efforts to pay off debt.⁶

We also note other record evidence, for example Applicant’s testimony and other statements to the effect that his tax problems reach as far back as 1977 and that, when the IRS notified him of his tax liability, he simply ignored the warnings. He further testified that, when faced with mounting IRS debt, he elected not to pay his tax.⁷ This testimony is not consistent with Applicant’s claim of good judgement and reliability, nor does it establish that Applicant’s response to his financial problems demonstrates good-faith. Additionally, Applicant was previously denied a security clearance based, in part, upon his tax problems. Insofar as he was, therefore, on notice as to the security significance of these issues, his reliance upon a tenuous theory of debt forgiveness seriously undercuts his case for mitigation.

To sum up, there is substantial record evidence that: Applicant became delinquent in his Federal taxes due to his own actions, which he himself characterized as foolish; he was denied a security clearance in 1993, due in part to his failure to pay his taxes. Despite this, Applicant permitted his tax delinquencies to remain; Applicant’s plan of addressing these debts was to rely upon his view that the tax debt has been forgiven. The record contains no corroboration for Applicant’s assertion that the IRS has forgiven the debt. The debt is, in fact, increasing through the accrual of interest. The record does not support a conclusion that Applicant has mitigated the

⁵See Tr. at 31: “Q: Do you have . . . anything to support that claim? A: No, I do not. Q: No documentation from the IRS? A: No, I do not.”

⁶See ISCR Case No. 07-16841 at 4 (App. Bd. Dec. 19, 2008)(“[R]eliance upon the non-collectibility of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive.”) See also ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007)(“[T]he Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of this [mitigating condition.]” See also ISCR Case No. 03-20327 at 4-5 (App. Bd. Oct. 26, 2006).

⁷Applicant testified that he originally got into trouble with the IRS in 1977 and 1978 as a result of his employment outside the U.S. The IRS notified him that he owed taxes for those years. “Honestly, I did not properly rectify it. I ended up just ignoring their notifications. . . . Q: And did you decide to stop filing returns altogether for a period of time? A: Yes, I did, I think from sometime in the 80's[.]” Tr. at 25 - 26. “Q: And do you recall your reason for not filing taxes? A: Well, it’s not a reason . . . it was stupidity actually. I thought that they were wrong; that I was being unduly persecuted, and I just stopped filing my returns. It was a very, very bad decision, but that was basically it.” “Q: So, you preferred the alternative of just never paying [your tax]? A: Not a good decision; but, yes.” Tr. at 38.

security concerns arising from his tax delinquencies. Under the facts of this case, we conclude that the Judge's favorable decision is not sustainable, because it fails to consider an important aspect of the case and that it offers an explanation for the decision that is contrary to the weight of the record evidence. ISCR Case No. 03-22861, *supra*. As a consequence, we conclude that the Judge's decision is not sustainable upon this record.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. 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