

KEYWORD: Guideline F: Guideline E

DIGEST: The Judge’s analysis did not give appropriate weight to Applicant’s intentional decade-long inaction regarding his income tax filing and payment duties. The Judge also erred by concluding that Applicant had fully resolved the issue of outstanding tax returns. The record evidence, viewed as a whole, is not sufficient to mitigate security concerns under the Egan standard. Favorable decision reversed.

CASENO: 12-05053.a1

DATE: 10/30/2014

DATE: October 30, 2014

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In Re:)	
)	
-----)	ISCR Case No. 12-05053
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 13, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On July 23, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mary E. Henry granted Applicant’s

request for a security clearance. Department Counsel appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Department Counsel raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board reverses the Judge's favorable security clearance decision.

The Judge made the following findings: Applicant is 59 years old. In 2000, Applicant prepared his federal and state income tax returns for the tax year 1999. As a result of his earnings that year, Applicant owed approximately \$10,000 in federal income taxes. He did not think the IRS allowed payment plans, so he did not discuss the possibility with the IRS. Instead, he did not file his income tax returns for that year. He also did not file his federal and state income tax returns for the years between 2000 and 2011 because he felt he would be in trouble with his employer or the IRS. During this time period, he increased the amount of money being withheld from his paycheck for his yearly taxes. He believed the increase would satisfy the amount of tax he owed. He stated his decision not to file tax returns resulted from ignorance and stupidity.

The IRS filed a tax lien against Applicant in 2011 for \$126,512 in past-due taxes, plus interest and penalties. The IRS instituted garnishment of his wages, taking out between \$2,600 and \$2,700 per paycheck. Between May 2011 and December 2012, Applicant paid the IRS about \$107,000. He has paid his federal tax bill in full. With the assistance of a tax professional, Applicant filed several outstanding federal tax returns in September 2011. Applicant has not filed his federal income tax returns for the tax years 2001 and 2002. His tax professional advised him that, according to the IRS, he did not have to file income tax returns for those years. Applicant does not know why the IRS is not requesting his income tax returns for those years. Applicant has requested a letter from the IRS to verify that he did not need to file the income tax returns. He has not received any letter.

Applicant moved from State X to State Y in 2010, where he still lives. Applicant has not filed his past due income tax returns for State X because his tax professional told him that State X would not accept income tax returns due earlier than the last three years. Since moving to State Y, Applicant has filed his state income tax returns there and paid any income taxes owed. He filed income tax returns with State X as a non-resident for the years 2011, 2012, and 2013 and received refunds. State X has not filed a lien against Applicant. His tax professional has told Applicant he would not have received refunds from State X if he owed back income taxes. After the hearing, Applicant contacted State X, which advised him that he did not have a tax liability. He has not received a written statement of account from State X.

The Judge reached the following conclusions: Applicant took control of his income tax debt after the IRS garnished his pay. Applicant understands that he exercised poor judgment and recognizes the negative financial problems he can create for himself by not filing his taxes timely. He is aware of the negative impact such conduct could have on his eligibility to maintain a security

¹The SOR included an allegation of falsification under Guideline E. The Judge made a finding favorable to Applicant on this allegation. That favorable finding is not at issue on appeal.

clearance and possibly, his job. He finally took responsibility for this conduct. In all other aspects of his life, he has acted responsibly and has shown good judgment. It is unlikely that he will fail to file future income tax returns. Regarding his failure to file his income tax returns as a concern under Guideline E, Applicant's decision to ignore his income taxes raises serious questions about his judgement and trustworthiness. He has taken the necessary steps to change his behavior and to prevent a recurrence of this problem. By taking affirmative action to correct his past income tax issues, Applicant eliminated his vulnerability to exploitation, manipulation, or duress, and has removed questions or doubts as to his eligibility and suitability for a security clearance.

Department Counsel argues that the Judge's decision is arbitrary, capricious, and contrary to law because it is unsupported by a reasonable reading of the record as a whole. He asserts that even though Applicant has now resolved his outstanding tax liabilities, the underlying manner in which the delinquencies were incurred and the manner in which he addressed them are the primary focus of this security clearance proceeding. He states that the Judge employed a piecemeal analysis wherein she erroneously focused on Applicant's extinguishment of his tax liabilities, rather than the circumstances surrounding Applicant's failure to file tax returns in the first place. Department Counsel argues that Guideline F Mitigating Conditions ¶20(a)² and ¶20(c)³ have limited, if any, applicability to the facts of this case and in no way serve to overcome the Government's case. Department Counsel further argues that the Judge erred when she uncritically accepted Applicant's assertion that he was not required to file tax returns for his state income taxes that were due prior to the three most recent tax years. 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.

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 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

²"[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 judgment[.]"

³"[T]he person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control."

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

Department Counsel asserts 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 intentional decade-long 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. 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. 1060), *aff’d*, 367 U.S. 886 (1961). 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. Indeed, the Board has previously 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 to classified information. *See, e.g.*, ISCR Case No. 98-0608 at 2 (App. Bd. Jun. 27, 2000). The evidence in this case indicates that Applicant took no action to file income tax returns or pay delinquent taxes until the IRS instituted lien and garnishment proceedings, which was more than ten years after his initial decision not to file his tax returns. These facts significantly undercut the strength of Applicant’s recent filing and repayment efforts as matters in mitigation. The Judge’s decision does not analyze or comment upon the non-voluntary nature of the commencement of remedial action on the part of Applicant, nor does it adequately explain how his latter-day efforts mitigate the security significant conduct of not satisfying his legal obligations regarding taxes for more than a decade. By failing to analyze and discuss these matters in any depth, the Judge has failed to consider an important aspect of the case.

The Judge’s discussion of the Guideline F mitigating conditions is couched primarily in terms of Applicant’s newfound appreciation of the effects of his lengthy nonfeasance on his financial health and praise for his retirement of delinquent tax debt. Absent is a discussion as to how Applicant’s recent conduct overcomes the Government’s overarching concern about his pronounced lack of judgment regarding tax obligations. We have held that a security clearance adjudication is not a proceeding aimed at collecting an applicant’s debts. *See* ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). Similarly, a security clearance adjudication is not a vehicle aimed at insuring an applicant’s compliance with the tax laws. 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 based on longstanding prior behavior evidencing irresponsibility.

Much of the Judge's mitigation analysis is predicated upon her conclusion that Applicant has fully resolved the issue of outstanding tax returns. However, the record indicates that Applicant has still not filed federal tax returns for the years 2001 and 2002, and he has not filed numerous state income tax returns for the years he lived in State X. The Judge appears to have accepted Applicant's uncorroborated statements that, according to his tax advisor, the filing of the returns was not necessary. While the Judge had to consider Applicant's hearing testimony regarding filing requirements, she was not bound by it. It would be arbitrary and capricious to accept uncritically a witness's testimony without considering whether it is plausible and consistent with other evidence. *See, e.g.*, ISCR Case No. 01-07292 at 4 (App. Bd. Jan. 29, 2004). Also, in making findings of fact, a Judge must make a reasonable, common sense evaluation about the significance of the presence or absence of corroborating evidence. *See, e.g.*, ISCR Case No. 00-0620 at 4 (App. Bd. Oct. 19, 2001). In matters of mitigation, the burden of persuasion rests with Applicant. The Judge's reliance on Applicant's uncorroborated testimony, which contains no cogent explanation as to why the filings were unnecessary, was not reasonable given the circumstances of this case.⁴

Department Counsel argues that the Judge's perfunctory treatment of the security significance of Applicant's ten year history of tax delinquencies is also error under Guideline E and the whole person concept. For reasons previously stated, the Board agrees. We note that Guideline E specifically addresses conduct involving questionable judgment. The Judge's mitigation analysis focused on the elimination of Applicant's future vulnerability to exploitation, manipulation, or duress as a result of the resolution of tax issues. It did not discuss how the recent actions of Applicant overcome the Government's security concerns stemming from his long history of tax law non-compliance.

We conclude that the Judge's decision failed to consider important aspects of the case, and 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 Applicant's security concerns under the *Egan* standard.

⁴This is especially true here, where, at the conclusion of the evidence, the Judge held the record open for a period after the hearing and specifically requested that Applicant obtain a written statement from his tax preparer that addressed the issue of the outstanding tax returns for both State X and the IRS (Tr. at 57). At some point, Applicant redefined the task to mean a direct correspondence from the IRS and State X respectively. No corroborating evidence from any source was forthcoming, yet the Judge proceeded to make findings on the issue based solely on Applicant's testimony.

Order

The decision of the Judge 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