KEYWORD: Guideline F

DIGEST: The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR. The Judge's failure to mention Applicant's 2010 Federal returns contravenes this requirement and renders the Decision not sustainable. Favorable decision reversed.

CASE NO: 12-10933.a1

DATE: 06/29/2016

DATE: June 29, 2016

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 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 February 18, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) 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 favorable findings ran contrary to the weight of the record evidence and whether an evidentiary ruling was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the decision.

The Judge's Findings of Fact

Applicant's SOR alleges delinquent credit card debts and failure to file tax returns. The Judge found that Applicant has established payment plans for the two credit cards and that he has filed his state tax returns for 2008 through 2010. He filed the 2008-2009 returns in 2012 and the 2010 return in 2015.[1] The Judge noted Applicant's SOR answer, in which he stated that he had "no excuse" for the 2008 and 2009 failure to file state income tax returns. The Judge did not discuss Applicant's 2010 Federal return.

The Judge's Analysis

The Judge cited to evidence that Applicant is paying his credit card debts and that he has filed his tax returns. He concluded that there are clear indications that Applicant's problems are under control and that Applicant had initiated a good-faith effort to pay his debts.[2] In the whole-person analysis, the Judge cited to "permanent behavior changes," as a result of which Applicant is not subject to coercion or duress.

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 is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. 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 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

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[1]The SOR contains four allegations, two for delinquent credit card accounts and two that alleged (a) failure to file his state income taxes in 2008 and 2009 and (b) failure to file state and Federal income taxes for 2010.

[2]*See* Directive, Enclosure 2 ¶¶ 20 (c), (d).

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

Department Counsel argues that the Judge's favorable decision is not supported by the record, devoting his argument to Applicant's failure to file his tax returns. Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with these things is essential for protecting classified information. ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Someone who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

In the case before us, Department Counsel notes several things that undermine the Judge's favorable findings. First and foremost, the Judge made *no findings at all* about Applicant's failure to file his 2010 Federal tax return, and he did not discuss it in the Analysis, even though this was alleged as a security concern in the SOR. *See* Directive ¶ E3.1.25: "The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR[.]" *See also* ISCR Case No. 08-07803 at 2 (App. Bd. Sep. 21, 2009) for the proposition that a Judge must enter findings and conclusions about all of the allegations in an SOR. The Judge's failure to mention Applicant's 2010 Federal returns contravenes this requirement and alone renders the Decision not sustainable.

Department Counsel also argues that the record contains little evidence if any to show that Applicant's financial problems are behind him and will not return. We find this argument persuasive, in light of evidence that Applicant failed to pay his debts or file his returns despite a household income of over $170,000[3] and despite his status as a retired senior NCO in the U.S. military, which suggests that he has the education, experience, and judgment to understand his legal duty to satisfy financial obligations.

Moreover, there is no evidence in support of the Judge's conclusion that Applicant has made permanent behavioral changes, or what his prior deficient behavior had been besides inexcusable neglect. In a DOHA proceeding, it is the applicant's job to present evidence that would mitigate concerns raised by SOR allegations that he has admitted and/or that the Government has proved. Directive ¶ E3.1.15. Applicant did not provide a documentary response to the File of Relevant Material (FORM), thereby failing to take advantage of his opportunity to supplement the record with evidence that would demonstrate that his financial problems are under control and that he has

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[3]This figure is drawn from Applicant's unsigned 2010 Federal income tax return, included in Item 3, Answer to the SOR. In his security clearance application (SCA), he stated that he failed to pay the $750 balance due on his 2010 state tax liability due to a decrease in income. He provided no further information on this. However, even if true, such a diminution of income would be entitled to minimal weight in evaluating his failure to *file* his returns.

overcome his admitted tendency to neglect important legal obligations such as filing tax returns.

Department Counsel argues that the Judge erred by not considering the summary of Applicant's clearance interview that was attached to the FORM. He argues that, by not responding to the FORM, Applicant forfeited any objection to this document. We have examined this document and conclude that, regarding the issues that are raised on appeal, it is cumulative to what is contained in Applicant's disclosures in his SCA and in his answer to the SOR. Its inclusion in the record would not likely have resulted in a different decision by the Judge or in different analysis by us on appeal. Therefore, there is no reason to reach the issue of whether the Judge was required to consider the document because it would have made no difference.

The Judge's decision does not consider relevant factors, fails to consider important aspects of the case, and offers an explanation for the decision that runs contrary to the weight of the record evidence. *See* ISCR Case No. 14-02563, *supra*. The Judge's conclusion that Applicant has met his burden of persuasion under the *Egan* standard is not sustainable.

Order

The Decision is **REVERSED**.

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

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

Concurring Opinion of Administrative Judge Michael Ra'anan

I concur with the majority on the resolution of this case. I write separately to expand upon an issue that this case presents. The issue has been appearing in various forms for some time now.

Recently, in many cases where Applicant has selected a decision based on the written record, Department Counsel's File of Relevant Material (FORM) has included a footnote on the subject of

authentication of the Report of Investigation.[4] The footnote might reasonably have been interpreted as encouraging Applicant to take advantage of his or her opportunity to respond to the FORM. The footnote pointed out the possibility that a Judge may (or may not) consider a Report of Investigation contained in the FORM, depending on whether the Judge concluded that Applicant waived their right to object to the ROI because it lacks authentication. In accordance with the Directive, the Judge will normally only consider the ROI if it has been authenticated or if an objection to it has been waived. It is generally understood that waivers need to be knowing and intelligent.

In this case, on appeal, Department Counsel articulates a belief that Applicant's failure to respond to the FORM as a whole should reasonably be construed as including a knowing and intelligent waiver to the ROI because of the footnote.

When an applicant without legal representation fails to respond to a File of Relevant Material as a whole, how plausible would it be to believe that they chose to make a knowing and intelligent waiver to the requirement for authentication of the ROI? Can we reasonably devise a rule to address the issue? How much does language in a footnote, written by a party-opponent (lawyer) contribute to the analysis? How much does a specific applicant's educational level matter? (In the case before us, Applicant has no college education reported in his security clearance application.) Does it matter that the issue was raised once in the FORM–an eight page document which was part of a sixty page package? Does it matter that Applicant is not even obliged to respond to the FORM? Had the issue been squarely put before the Applicant in a much shorter document that required a response would that have been more properly tailored to the problem? For example, in this case record, I note there was a one page document for attachment to Applicant's response to the SOR for selecting a Hearing or a FORM. Would all or many the problems posed by the footnote approach have been solved, if the ROI question had been incorporated into that one page document (that appears more obligatory) as part of the answer to the SOR?

I am not sure I know the answers to all the pertinent questions. I do recognize the need to protect the rights that were put in the Directive and the need for an efficient system for resolving the question of admissibility ROIs in FORM cases where Applicant has not responded to the FORM.

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

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[4]This is not the place to lay out the history and context of the concern about Reports of Investigation, except to say that the special procedures accorded them under the Executive Order and the Directive suggest that they were considered by some to present a heightened problem for the provision of due process in security clearance cases.