



The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 18, 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 April 21, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant’s request for a security clearance. Department Counsel appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: (1) whether the Judge’s decision is inconsistent with the record evidence; and (2) whether the decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board reverses the Judge’s favorable security clearance decision.

The Judge found: Applicant is 49 years old. There was nothing unusual about his finances until about 2008. Because of his frequent overseas and domestic deployments, the family finances were routinely handled by his wife, including the preparing and filing of tax returns. There were times when the tax returns were signed by him and other times when they were signed for him. Applicant had no inkling that there were any unresolved financial issues until 2009 when, during a period of marital discord, his wife remarked that their 2008 federal income tax return had not been filed. Applicant maintained the status quo by not getting involved in income tax preparation or filing. His wife advised him that he might owe the Internal Revenue Service (IRS) \$50,000 or \$60,000 in back taxes. As a result, Applicant was afraid to file the income tax returns for 2009 or 2010 out of fear that he might lose his residence to an IRS seizure. Applicant separated from his wife in 2009 or 2010. He was divorced in early 2011.

A federal tax lien for more than \$110,000 was filed against Applicant in 2011, and another lien for almost \$65,000 was filed in 2012. In late 2011, the IRS started garnishing his wages. Before the garnishment started, Applicant engaged the professional services of a tax consulting company to resolve his 2008 and 2009 federal income tax liability. Applicant contends the tax consulting company eventually filed his federal income tax returns for the years 2008, 2009, and 2010. He stated that he was placed in an installment plan covering the tax arrearages for those years. He failed to submit any documentation to support his contentions of the filing of tax returns or the installment plan. Applicant has been paying the IRS about \$1,500 each month under the installment plan, but because of downsizing at his employment his income has been reduced, his payments have been erratic, and he desires to reduce his payments. He timely filed his federal tax returns for the tax years of 2011, 2012, and 2013. Since he was due refunds for those three tax years, the IRS diverted the refunds to reduce the outstanding balance from the earlier tax years. Although Applicant met with representatives of the tax consulting company, he has never received any financial counseling.

The Judge concluded: Applicant’s financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Applicant attributed his failure to file his federal tax returns on a variety of reasons: his wife routinely handled the family finances including tax returns, he spent significant periods of time each year deployed overseas or

domestically, he was going through periods of marital discord, he went through a separation and divorce, he did not have the money he expected to pay in taxes, and he was afraid of losing his residence. Applicant was for many years a decorated combat warrior who spent significant periods deployed overseas and domestically. He was clearly naive about financial matters. Even after learning that his tax return for the year 2008 had not been timely filed by his wife, he continued to rely on her to file subsequent returns. Applicant may have been confused regarding when and by whom his tax returns were filed, but he was not ignorant of his responsibilities. His failure to take decisive action for three years is acknowledged.

However, he finally took the first step in resolving the outstanding taxes when he engaged the services of a tax consulting company to represent him. The income tax returns were either filed by the tax consulting company or constructed by the IRS for him. This is not a situation where an applicant has an intentional lengthy period of irresponsible inaction regarding his tax filing and payment obligations. Instead there was one year where he was unaware of his wife's failure to file, and two years where he basically withdrew from his responsibility to assure the failure did not continue. While Applicant's judgment and actions in this regard can be characterized as delayed, his eventual positive responses and actions, which took place before the SOR was issued, were, in fact, generated first by involuntary garnishment proceedings, and second by IRS liens. He has embraced the paradigm of timely filing his tax returns, and he has established a good track record of doing so for the last four years. Applicant apparently has still not received counseling from a financial counselor. He contends, without documentation to support his contention, that his monthly surplus available for discretionary savings is variable. There are clear indications that Applicant's financial problems are under control, and that he intends to avoid similar circumstances. Applicant's actions under the circumstances confronting him, do not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant has demonstrated a meaningful track record of debt reduction and elimination efforts. His explanations for his failure to file tax returns and his eventual resolution efforts, are credible. He has mitigated the security concerns arising from his financial considerations.

The Judge concluded that Guideline F mitigating conditions 20(a)<sup>1</sup>, 20(b)<sup>2</sup>, and 20(d)<sup>3</sup> partially applied to the case. Department Counsel 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. Department Counsel argues that the mitigating conditions do not serve to overcome the Government's case. He further argues that the Judge erred when he uncritically accepted Applicant's assertions as to why he did not file the taxes and what he has done to resolve his

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<sup>1</sup>“[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[.]”

<sup>2</sup>“[T]he conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation), and the individual acted responsibly under the circumstances[.]”

<sup>3</sup>“[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

outstanding tax issues. Department Counsel’s arguments have merit. After a review of the record and the Judge’s decision, the Board concludes (1) the Judge’s application of Guideline F mitigating conditions was flawed and not supported by the evidence; and (2) the lack of corroboration of the mitigating evidence relied upon by the Judge—corroboration that he explicitly asked for but did not receive—significantly undercuts his ultimate favorable decision on this record. There were three SOR allegations in this case. Applicant admitted two outright and partially admitted the third.<sup>4</sup> Given this posture, the burden was on Applicant to counter the security concerns presented by the Government by establishing matters in mitigation sufficient to overcome the Government’s case.

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 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The Judge’s discussion of the Guideline F mitigating conditions is couched primarily in terms of Applicant’s newfound appreciation of his responsibilities as a taxpayer and praise for his retirement of delinquent tax debt. Absent is a discussion as to how the mitigating conditions apply to his past conduct and how Applicant’s recent conduct overcomes the Government’s overarching concern about his pronounced lack of judgment regarding tax obligations. Although the Judge did not go into detail as to how the record evidence made applicable the specific language of the mitigating conditions, he based his application of them on his findings that Applicant’s wife handled the family finances, that Applicant had been frequently deployed, and that he had been experiencing marital difficulties. There was little detailed discussion by the Judge, however, as to how these facts prevented Applicant from addressing the tax issues in a timely manner. Indeed, there were few details in the record regarding the extent of Applicant’s deployments, the extent to which Applicant and his wife coordinated the filing of taxes, and the nature of the marital discord. Apart from merely citing these events, Applicant provided no convincing explanation as to why his derelictions were excusable, why they constituted matters that were beyond his control, or why they did not cast doubt on his reliability, trustworthiness, or good judgment.

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<sup>4</sup>This allegation alleged an IRS lien placed against Applicant. Applicant’s written answer to the SOR was unresponsive. At the hearing, the Judge queried Applicant as to whether he admitted or denied the allegation. Applicant admitted the existence of the lien but denied the accuracy of the outstanding amount listed on the SOR (Tr. at 27-29).

Department Counsel is correct in pointing out that many of the Judge's conclusions in the analysis section of his decision cannot reasonably be viewed as matters in mitigation. The Judge noted that Applicant was not ignorant of his legal responsibilities. He noted that Applicant did not address his tax return problem for two years because he did not have the money he was expected to pay in taxes and he was afraid of losing his residence. He noted that when Applicant learned that his wife failed to file the 2008 federal return, for the next two years Applicant withdrew from his responsibility to assure the failure did not continue. The Judge's decision is bereft of any analysis or explanation as to how this evidence provides a rationale for his behavior or constitutes mitigation such that the listed mitigating conditions would apply.

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. *See* ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).<sup>5</sup> 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. 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). 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 his or her 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. ISCR Case No. 12-05053, *supra* at 4. The evidence in this case indicates that Applicant took no action to file income taxes or insure their timely filing until the IRS instituted lien and garnishment proceedings against him. These facts significantly undercut the strength of Applicant's recent filing and repayment efforts as matters in mitigation, particularly where the nature of those filings is unclear on the record.<sup>6</sup> The Judge's decision acknowledges the non-voluntary nature of the commencement of remedial action on the part of Applicant, but it does not adequately explain how his latter-day efforts—prompted by IRS intervention—mitigate the security significant conduct of not satisfying his legal obligations regarding taxes for a number of years. By failing to analyze and discuss these matters in any depth, the Judge has failed to consider an important aspect of the case.

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<sup>5</sup>This is especially true when the evidence supports the Judge's findings that Applicant's payment record on his tax arrearages has been "erratic," and he desires to reduce his payments (Decision at 5).

<sup>6</sup>The Judge was unsure as to whether Applicant's returns were ultimately filed by the tax consulting company he hired or constructed for him by the IRS. (Decision at 8). The record is unclear. The latter possibility would significantly undercut any assertion that Applicant had taken significant initiatives to resolve the issue of the unfiled tax returns.

The lack of corroboration of Applicant's evidence of mitigation is an additional consideration in this case. It is clear from statements by the Judge in his decision that he acknowledged a lack of corroboration of Applicant's testimony in key areas. These include Applicant's failure to submit any documentation to support his contention that he filed his 2008, 2009, and 2010 income tax returns, his failure to submit documents establishing the that he had entered into an installment plan with the IRS, and his failure to provide a personal financial statement that would indicate the amount of a monthly surplus available for savings or spending.<sup>7</sup> Notwithstanding this lack of corroboration, the Judge found that the tax returns had been filed, that there was an installment plan in place with the IRS, and that he has been paying the IRS about \$1,500 each month.<sup>8</sup>

While the Judge had to consider Applicant's hearing testimony regarding these matters, he 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 (. Bd. Oct. 19, 2001). This is a requirement here, where Applicant's testimony about why he failed to take action in the face of the 2008, 2009 and 2010 tax delinquencies is vague and unconvincing. It is also 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 documents evidencing his tax filings, his installment plan, and his payments. With the exception of Applicant's Exhibit G, which has the limitations discussed at Footnote 8, no corroborating evidence was forthcoming, yet the Judge proceeded to make extensive findings based solely on Applicant's testimony.

The Board concludes that the Judge's decision failed to consider important aspects of the case and improperly relied almost exclusively on the uncorroborated testimony of Applicant after the Judge acknowledged the importance of corroborating evidence by explicitly requesting it.<sup>9</sup> 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.

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<sup>7</sup>A personal financial statement might have provided a firmer footing for the Judge's conclusion that "... there are clear indications that Applicant's finances are under control. . ."

<sup>8</sup>Applicant did submit Applicant's Exhibit G, a document generated by a bank, which establishes that he has been making some payments to the IRS. However, it provides only circumstantial evidence of an installment plan, and falls short of establishing that Applicant is engaged in regular monthly payments of about \$1,500 to the IRS. The first entry on the document is for October 2014, the last for April 2015. Although it covers a span of seven months, the document evidences full payment to the IRS for only three of those months. Payments for the other months range only from \$600 to \$100.

<sup>9</sup>The Judge made a specific finding that Applicant's explanations and assertions at the hearing were credible. (Decision at 11). However, the Board has long held that favorable credibility determinations are not a substitute for record evidence. *See, e.g.*, ISCR Case No. 10-07794 at 3 (App. Bd. Oct. 4, 2011).

**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