

KEYWORD: Guideline F

DIGEST: The evidence and the Judge’s findings show that: Applicant failed to pay his Federal and state income taxes for several years; he failed to file his tax returns for several years; during the time in question his income ranged from \$189,000 to \$245,000; during the time he claimed not to have funds to pay his taxes he paid expensive tuitions for his sons,; he paid his delinquent taxes in large part after receipt of the SOR. Also, his explanation for his failure to file was one undercut by other record evidence, such as Applicant’s status as a retired E-9 with many years experience in filing tax returns; and that the record contains evidence of other, non-alleged, conduct such as his “strategic default” on his home mortgage that resulted in foreclosure. Favorable decision reversed.

CASENO: 14-05476.a1

DATE: 03/25/2016

DATE: March 25, 2016

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Tara R. Karoian, Esq., Department Counsel

**FOR APPLICANT**  
Sheldon I. Cohen, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 10, 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 December 4, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law, in that it contravened the weight of the record evidence, and whether the Judge failed to perform an adequate whole-person analysis, in that he did not evaluate Applicant’s conduct in light of the evidence as a whole. Consistent with the following, we reverse.

**The Judge’s Findings of Fact**

The Judge made the following findings pertinent to the issues raised on appeal: Applicant works for a Defense contractor. He retired from the U.S. military as an E-9. He is married and has two children, ages 20 and 21, both of whom are in college. Applicant has held a clearance for more than 29 years, without incident or concern.

Upon retirement from the military, Applicant planned to move from State A to State B. He put his home in State A up for sale. Due to the collapse of the housing market, Applicant lost well over \$100,000 in the value of this home. From 2006 to 2010, Applicant had a “negative cash flow” concerning this home. Decision at 3. This provided him with a large tax deduction. However, in 2010, his tax liability increased, because the lender foreclosed on the home. This was not raised as a security concern.

In the mid-1990s, Applicant’s wife suffered postpartum depression. She was subsequently diagnosed as paranoid schizophrenic and later as bipolar with manic episodes. In the early 2000s, she heard voices, and she continues to suffer emotional and mental problems. Her paranoia revealed itself in suspicions that Applicant’s mother and others were conspiring against her. She shopped and spent heavily, purchasing items that were never used. Applicant eventually separated her accounts from his. She had medical expenses that were covered in large part by TRICARE.

In the late 2000s, Applicant’s brother and his family moved in with Applicant, due to the brother’s unemployment. Applicant provided food and support for them, both while they were living in Applicant’s house and afterward. Applicant also provided financial support to his sister.

Applicant's SOR alleges a number of delinquent debts, including tax liabilities. Applicant failed to file state tax returns for tax years 2010 through 2013 and Federal returns for tax years 2010 through 2012. Applicant attributed this failure to the demands of his job, his wife's illness, and financial stress. He stated that he had "failed to meet [his] responsibility[.]" *Id.* at 4. Although Applicant drafted his returns and could have filed them, he did not have the money to make his payments. Accordingly, believing that he would have to send money along with his returns, he did not file. He did not obtain legal advice about filing his returns.

Applicant eventually filed and paid his taxes. Those due for tax years 2010 through 2012 he paid in 2014. Those due for 2013 and 2014 he paid in 2015. Applicant has a remaining tax debt to the IRS for \$13,000, which represents the interest and penalties. He plans to pay this off within 12 months.

Applicant's SOR includes a credit card account of a little over \$14,000. Applicant entered into a payment agreement with the collection company, and the resolution of this debt is evidenced by a credit report that shows the debt as "legally paid[.]" *Id.* at 5. The entry for this account does not appear on Applicant's 2015 credit report.

Applicant's SOR alleges other debts for various collection accounts, that the Judge found had been satisfactorily resolved through payment or, in one instance, an ongoing payment plan. The Judge found that Applicant does not use credit cards and has a net remainder of \$3,000 each month. "He promised to timely file and pay his . . . income taxes." *Id.* at 7.

While serving in the military, Applicant received numerous awards and decorations. He enjoys an excellent reputation for candor and honesty. He submitted character references from various persons who have known him for many years, including senior military officials who themselves have held clearances for a long time. They laud Applicant for his duty performance, leadership, trustworthiness, integrity, and contributions to national defense.

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

The Judge noted Applicant's evidence as to the origin of his financial problems. He cited to the collapse of the housing market and evidence that Applicant had a substantial negative cash flow for several years. He also noted the emotional illness suffered by Applicant's spouse, as well as expenses associated with his assistance to his brother and brother's family. The Judge concluded that these problems were beyond Applicant's control. He stated that Applicant had received financial counseling and that Applicant had resolved all of the debts alleged in the SOR save two—a collection account that is covered by a payment plan and the tax penalties. The Judge cited to evidence that Applicant's income for the years in question placed him within the top 4% of U.S. taxpayers. He also noted evidence that Applicant had chosen to spend funds on things such as college tuition and expensive vacations rather than resolve his tax delinquencies. He acknowledged Applicant's admission that he had made poor financial decisions.

He stated that Applicant's failure to file and pay his taxes constituted the most significant security concern, noting however that Applicant has now filed his tax returns and has a payment plan to resolve his remaining debt. "He expressed sincere remorse and assured he will timely file and pay his [Federal] and state taxes in the future." *Id.* at 11. Accordingly, the Judge concluded that Applicant's tax problems were unlikely to recur.

In the whole-person analysis the Judge cited to evidence that Applicant had filed his tax returns before the hearing and had a plan in effect to resolve his tax debt. He noted that the record does not include evidence of any tax liens against Applicant.<sup>1</sup> The Judge concluded that Applicant had acted responsibly by working to resolve his many delinquent debts and had established a meaningful track record of debt payment.

## Discussion

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 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 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 (App. Bd. Aug. 28, 2015).*

Department Counsel argues, *inter alia*, that the record does not support the Judge's favorable findings regarding Applicant's tax debts. We find this argument to be persuasive. Although the underlying tax liabilities have been resolved, with only penalties remaining, the timing of these payments—most of which were made after the SOR and the last of which were just days before the hearing—raise questions as to whether Applicant has made these payments simply because his clearance was threatened. As we stated in an earlier case,

an applicant who begins to resolve debts only after an SOR placed him on notice that his clearance was in jeopardy may lack the judgment and self discipline to follow

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<sup>1</sup>*See, however*, Applicant Exhibit TT, IRS Transcript, at p. 10. The IRS issued notices of intent to levy against Applicant based on his 2010 delinquency.

rules and regulations over time or when there is no immediate threat to his own interests. ISCR Case No. 14-03358 at 4 (App. Bd. Oct. 9, 2015).

The Judge did not discuss this aspect of the case, which impairs his analysis. Moreover, Applicant's own admission that his problems were caused at least in part by poor financial decisions; evidence that his problems were also based on his decision to "walk away" from his mortgage obligation in State A; his admitted failure to ensure that he had sufficient withholding; and evidence of a substantial income during the period in question, undercut the Judge's conclusion that Applicant had met his burden of persuasion under the *Egan* standard. The Judge cited to Applicant's wife's illness and to his brother's financial problems, which were circumstances beyond his control. However, the record shows that Applicant's wife's illness (which manifested itself in part by improvident spending) is also an ongoing feature of their lives. Moreover, job-related stress, which Applicant cited as a causal factor in his debt problems, is something that can reasonably be expected to recur from time to time. Many of the circumstances underlying Applicant's financial problems have not been ameliorated and could arise in the future.

Just as significant are the allegations regarding failure to file tax returns in the first place. It is well settled that

[f]ailure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002).

The Judge's basis for concluding that Applicant had mitigated the concerns arising from his dilatory filing was his "sincere remorse." Decision at 11. His analysis does not include the extent to which Applicant's explanation of his failures to file may have been unreasonable or inconsistent with good judgment. Neither does it address the significance of his having filed his delinquent taxes after he submitted his security clearance application.<sup>2</sup>

We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. However, that deference is not without limits. Where the record contains a basis to question an applicant's credibility (inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect of the record explicitly, explaining why he or she finds an applicant's version of events to be

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<sup>2</sup>Department Counsel argues that Applicant Exhibit TT shows that he failed to file his 2014 Federal return in a timely fashion. This document is not totally clear concerning the date of filing. On the first page it states "Return Due Date or Return Received Date (Whichever is Later) Oct. 05, 2015" and "Processing Date Nov. 9, 2015." On the second page the transcript states "Tax Return Filed . . . 11-09-2015." The date on the second page suggests that Applicant did not file his 2014 return until almost a month from the date due, although this may represent the date upon which the IRS processed Applicant's return. To the extent that this document is ambiguous, it was Applicant's responsibility to provide evidence in clarification. In any event, this document does not detract from Department Counsel's argument that the timing of Applicant's Federal and state tax filings for tax years 2010 through 2013 undercuts his claims of good judgment. The multi-year nature of this delinquency, coupled with Applicant's failure to seek legal advice, are relevant in evaluating the reasonableness of Applicant's conduct.

worthy of belief. *See, e.g.*, ISCR Case No. 10-09035 at 6 (App. Bd. Jun. 10, 2014). Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence.

The dilatory nature of Applicant's various tax filings and payments, along with his own admission that his failures in this regard were due to "poor judgment" (Tr. 2 at 180), undermine the credibility of his claims that his problems were the result of circumstances outside his control and/or that he has manifested a sincere intent to comply with governmental rules. In addition, Department Counsel notes that Applicant initially testified that he had filed at least some of his tax returns on time (Tr. 1 at 48), which was inconsistent with his answers on the security clearance application in which he admitted that he had not done so for the years in question. This lends force to Department Counsel's argument that the Judge based his conclusions in large measure upon a credibility determination that did not sufficiently take into account evidence that impugned Applicant's judgment and reliability.

In summary, the Judge's findings and record evidence show the following: that Applicant failed to pay his Federal and state income taxes for several years; that he failed to file his tax returns for several years; that during the time in question his income ranged from \$189,000 to \$245,000; that during the time he claimed not to have enough funds to pay his taxes he paid expensive private high school and private college tuition for his sons, and took his family on a vacation to the Bahamas; that he paid his delinquent taxes in large part after receipt of the SOR, a substantial payment occurring within days of the hearing;<sup>3</sup> that his explanation for his failure to file was one undercut by other record evidence, such as Applicant's status as a retired E-9 with many years experience in filing tax returns; and that the record contains evidence of other, non-alleged, conduct such as his "strategic default" on his home mortgage that resulted in foreclosure.

Giving due consideration to Applicant's wife's ongoing illness and his problems regarding his home in State A, we find persuasive Department Counsel's argument that the Decision fails to address Applicant's security-significant conduct as a cumulative whole, thereby impairing his treatment of the mitigating conditions as well as the whole-person factors. The Judge's findings, and the evidence upon which they rest, raise questions about Applicant's security eligibility that are not sufficiently put to rest by the favorable evidence in the record or by the Judge's credibility determination. Accordingly, we conclude that the Decision is not sustainable under the *Egan* standard, in that it fails to consider important aspects of the case and runs contrary to the weight of the record evidence.

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<sup>3</sup>The first hearing occurred on September 10, 2015. "[Q]: So what we have here is on September 3<sup>rd</sup>, you made a \$12,000 payment toward your 2012 taxes. You made a \$12,221.80 payment toward your 2011 taxes. And you made a \$2,458.56 payment to your 2010 taxes, all on September 3<sup>rd</sup>, correct? [A]: Yes, ma'am." Tr. 1 at 51-52.

**Order**

The Decision 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