

KEYWORD: Guideline F; Guideline E

DIGEST: Failure to comply with tax laws suggests that a person has a problem following rules and regulations. Voluntary compliance with rules and regulations is essential to protecting classified information. The timing of Applicant’s attempt to resolve his tax problems undercuts a determination that he has initiated a good-faith effort to resolve them. Favorable decision reversed.

CASE NO: 15-03481.a1

DATE: 09/27/2016

DATE: September 27, 2016

In Re:)	
)	
-----)	ISCR Case No. 15-03481
)	
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 August 18, 2015, 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). Applicant requested a decision on the written record. On May 31, 2016, after considering the record, 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 Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 52-year-old employee of a defense contractor. He has been working for his current employer since March 2012. From July 1996 to March 2012, he worked for another employer.

The SOR alleged Applicant had two delinquent debts totaling approximately \$2,900 and failed to submit his Federal income tax returns for 2009-2012. A collection agency filed a lawsuit against Applicant for the larger credit card debt of about \$2,700 in April 2013. Applicant paid the entire balance of that larger debt in June 2013. Applicant was originally unaware of the smaller medical debt for about \$220 apparently because the creditor had his wrong address. He was able to contact the creditor and verify the debt. He claimed he paid the smaller debt, but did not provide documentation confirming payment.

In his security clearance application, Applicant disclosed that he did not file his Federal income tax returns for 2010 and 2011. In his background interview, he also admitted that he had not filed his Federal income tax returns for 2009 and 2012. He indicated that he was forgetful, lazy, and procrastinated with the filing of those tax returns. In February 2014, he filed his Federal income tax returns for 2009, 2010, and 2011. His Federal income tax return for 2012 was filed in August 2015. In September 2015, the Internal Revenue Service (IRS) issued three notices of intent to seize Applicant's state tax refunds or other property so that funds could be applied toward his unpaid income taxes, penalties, and interest for 2010 (about \$660), 2011 (about \$760), and 2012 (about \$1,340). Due to IRS seizure of tax refunds or Applicant's payments, the remaining tax balances were as follows: 2009 (zero), 2010 (about \$330), 2011 (zero), and 2012 (about \$1,400).

Applicant failed to file a personal financial statement setting forth his income, expenses, and debt payments. In the absence of such information, it is difficult to determine whether his finances are under control or if he is still experiencing financial difficulties. However, two credit reports do not reveal any other delinquent debts. It is unclear if he still has a relatively small remaining income tax balance for 2010 and 2012. "Nevertheless, with the 2014 filing of the tardy federal income tax returns, Applicant's positive resolution of one or both of the other two debts, as well as his relatively recent embrace of the responsibility of timely filing his annual federal income tax returns, it appears Applicant's financial problems are now under control." Decision at 5. No evidence was presented that Applicant received financial counseling.

The Judge's Analysis

The Judge concluded that disqualifying conditions 19(a), 19(c), and 19(g)¹ as well as mitigating conditions 20(c) and 20(d)² were applicable and stated:

Applicant finally severed his psychological restraints (procrastination, laziness, forgetfulness, and a difficulty in maintaining a budget), and addressed one of his delinquent debts in 2013, and his tax issues in 2014, both well before the SOR was issued. Applicant attributed those psychological issues to his failure to file his income tax returns, but those restraints were not beyond his control. However, the blemishes in Applicant's credit reports have been addressed by Applicant when he belatedly initiated a good-faith effort to resolve his delinquent accounts and unfiled federal income tax returns. While Applicant may not have received financial counseling, there are substantial indications that Applicant's financial problems have been resolved and are under control. Applicant finally acted responsibly by addressing his delinquent accounts and unfiled federal income tax returns. Applicant's actions under the circumstances confronting him no longer cast doubt on his current reliability, trustworthiness, and good judgment.³

Under his Guideline E analysis, the Judge also concluded that, for the reasons set forth under his financial considerations analysis, "Applicant fully embraced the paradigm of timely income tax filing and vows not to make that same mistake in the future." Decision at 9. With this newly found understanding of his legal responsibilities, Applicant has taken positive steps to eliminate or avoid similar circumstances.

Discussion

Department Counsel argues that the record evidence does not support the Judge's mitigation analysis. He first asserts that the record contains no factual predicate for the Judge's conclusions that Applicant either acted responsibly by addressing his financial problems or that his financial problems have been resolved and are under control. Further, Department Counsel points out that

¹ Directive, Enclosure 2 ¶¶ 19(a): "inability or unwillingness to satisfy debts;" 19(c): "a history of not meeting financial obligations;" and 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same[.]"

² Directive, Enclosure 2 ¶¶ 20(c): "the 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;" and 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

³ Decision at 8. Of note, Applicant's 2012 Federal income tax return was filed two days before the SOR was issued.

Applicant did not file his 2009-2012 Federal income tax returns until after submitting his security clearance application and undergoing his background interview. He contends that the Judge, in limiting his analysis to the resolution of the tax filing obligations, failed to assess adequately the overriding issues of Applicant's lack of judgment and his history of failing to abide by rules and regulations. Department Counsel claims the Judge took the position of "no harm, no foul" with the delinquent tax filings, which the Appeal Board has discounted in the past.⁴ His 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.

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 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 erroneous, we 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

⁴ ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). ("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. . . . 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. . . . By failing to analyze and discuss these matters in any depth, the Judge has failed to consider an important aspect of the case.") (Citations omitted).

contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In his findings, the Judge acknowledged that Applicant failed to submit a personal financial statement, which made it difficult to determine whether Applicant's finances were under control or if he was still experiencing financial difficulties. The Judge also noted that Applicant did not provide proof of payment of the small medical debt, that he still owed past-due taxes for 2010 and 2012, and that he may not have received financial counseling, yet the Judge concluded there were substantial indications that Applicant's financial problems had been resolved and are under control. This latter conclusion is flawed because it runs counter to the record evidence and the Judge's own findings of fact. Additionally, the Judge characterized Applicant's admitted forgetfulness, laziness, and procrastination as "psychological restraints." The Judge's conclusions that Applicant "severed" those psychological restraints and "fully embraced the paradigm of timely income tax filing and vows not to make the same mistake in the future" are not supported by the record evidence. As best the Board can discern, the Judge, in making those conclusions, relied upon IRS account transcripts that showed Applicant failed to file his 2009-2012 Federal income tax return in a timely manner and Applicant's statement in his background interview that he will make unspecified changes in the future filings of his tax returns. File of Relevant Material Item 7 at 4. Such evidence falls far short of a vow not to make the same mistake in the future and is not sufficient to establish that Applicant has reformed his behavior.⁵

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). Failure to comply with Federal and/or state tax laws suggests that an applicant has a problem with abiding by well-established Government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Applicant's repeated failure to file his Federal income tax returns in a timely manner does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015).

Much of the Judge's mitigation analysis is predicated upon his conclusion that Applicant has resolved his tax filing problems. In that regard, it merits noting that Applicant's tax filing delinquencies were not due to conditions beyond his control. Additionally, the timing of resolution of the financial problems is relevant in determining the extent to which an applicant has demonstrated mitigation. *See, e.g.*, ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). In this case, Applicant did not resolve his tax filing delinquencies until after submission of his security clearance application and after undergoing his background interview. Taking action to resolve the delinquent tax filings well after the initiation of the security clearance process undercuts a

⁵ In his Reply Brief, Applicant provided documents concerning the filing of this 2013 and 2014 Federal income tax returns. Those documents constitute new evidence that the Appeal Board can neither receive nor consider. Directive, Enclosure 3 ¶ E3.1.29.

determination that those actions constitute a good-faith effort to resolve the delinquencies. Overall, the Judge's favorable mitigation analysis is not sustainable.

We conclude that the Judge's decision runs contrary to the weight of the record evidence. Furthermore, the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

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

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

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