

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 decision ran contrary to the weight of the record evidence and whether the Judge's whole-person analysis was erroneous. 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 has been employed by a Defense contractor since mid-2012. Her annual salary is about \$80,000. Applicant and her husband separated in 2003 but are still married. In 2004 she was fired from a job due to inappropriate conduct with another employee. After that she experienced periods of unemployment and at times held down two jobs to provide for her family.

In her 2012 security clearance application (SCA) Applicant stated that she had not filed Federal income tax returns. In a background interview, she admitted that she had not filed those returns for tax years 2006 through 2011. After her husband left in 2003, she did not have sufficient funds withheld from her pay. This was in order to afford living expenses. She hired a tax professional to assist in filing her returns, although he failed to do so and is no longer in business. She discovered that someone had apparently stolen her identity and received a refund check. She hired another firm that advertises on television but got little results.

In 2012 she hired a tax company that filed her returns for 2006 through 2011. She made an agreement with the IRS to pay \$800 a month toward satisfying her debt. She entered into another installment agreement in 2016 to pay \$500 a month. This will resolve \$35,000 in past-due taxes that include obligations for 2012 through 2014. In addition, Applicant owes about \$5,000 resulting from repossession of a vehicle. She has offered to settle this debt, although it is beyond the statute of limitations. In addition, she paid off an \$8,200 lien for taxes owed in 2002 and 2003.

Applicant has been a victim of financial fraud, resulting in her having to open and close five checking accounts. The most recent incident occurred in January 2016, when someone wrote a check for \$300 on her account. She has received financial counseling and lives a frugal life.

The Judge's Analysis

Though acknowledging Applicant's duty to file and pay taxes, the Judge cited to evidence that Applicant's conduct was done to provide for her children. He cited to evidence of her efforts to resolve her tax problems, such as her having resolved a tax lien and her 2016 payment plan with the IRS. In the whole-person analysis, the Judge noted that Applicant is trying to resolve the debt resulting from the vehicle repossession. He stated that she is not living beyond her means and wants to address her financial problems.

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 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 conclusions are not supported by a reasonable interpretation of the evidence. He states that the Judge did not examine Applicant's security-significant conduct as a cumulative whole, thereby impairing his favorable conclusions about her judgment and reliability.

As Department Counsel argues, the application of Mitigating Conditions does not turn on finding simply that one or more apply to the facts of a case. The Directive requires a Judge to consider the entire record in evaluating the extent to which an applicant has met his or her burden of persuasion. *See, e.g.*, ISCR Case No. 14-00321 at 2-3 (App. Bd. Jun. 5, 2015). Evaluating the totality of the evidence in Guideline F cases, even those in which the applicant has actually paid his or her debts, requires consideration of the circumstances underlying the debts for what they may reveal about the applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 14-02394 at 3-4 (App. Bd. Aug. 17, 2015). 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 those granted access to classified information. *See, e.g.*, ISCR Case 14-06808 at 2 (App. Bd. Nov. 23, 2016).

We note the Judge's findings about Applicant's payment plan with the IRS. We also note his findings about Applicant's financial difficulties, which had an effect on her tax problems. These were matters that the Judge was required to consider, along with all the other evidence in the record. However, we are persuaded by Department Counsel's argument that the Decision does not devote reasonable attention to evidence that contravenes its favorable conclusion. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017) (A Judge is not required to discuss each and every piece of record evidence in making a decision, but the Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision). For example, Department Counsel cites to Applicant's clearance interview, in which she stated that she had failed to file tax returns for a few years prior

to 2000, which predated her job loss and marital separation.¹ This evidence is not consistent with the impression that unfortunate events in the early 2000s led to debt problems that required Applicant to prioritize her spending in order to meet the needs of her children, as she presented it at the hearing. More significantly, the Judge does not address the extent to which Applicant's financial problems do not explain her failure to have filed her returns at all. While difficulty in meeting financial obligations may force an applicant to choose the order in which he or she addresses unpaid debts, they do not provide a plausible excuse to failing to meet an important legal requirement, such as filing returns when due. Indeed, the Directive cites failure to file returns as a disqualifying condition in and of itself, irrespective of whether the underlying taxes have actually been paid, as through withholding, etc. The Judge's failure to address this circumstance significantly impairs his favorable analysis. Indeed, when discussing this failure, the Judge merely cites it as a result of Applicant's financial problems without giving due consideration to the question of whether such problems actually explain or extenuate the failure.

As Department Counsel notes, the Judge mitigated Applicant's concerns through application of Mitigating Condition 20(d). However, the Judge's treatment of this condition, as it applies to Applicant's tax delinquencies, is conclusory. He states that Applicant had made a good-faith effort to resolve the tax debt but does not address that Applicant had been unable to meet the terms of an earlier payment plan, which she terminated after only two months in 2012 due to difficulty in meeting the payments. It is not clear why the Judge concludes that Applicant will be able to meet the terms of her current plan, especially in light of evidence that Applicant entered into it after the hearing and in light of a paucity of evidence that she has actually made payments. We have stated in the past that promises to resolve debts in the future are not a substitute for an actual track record of payment or resolution. *See, e.g.*, ISCR Case No. 14-04565 at 2 (App. Bd. Sep. 18, 2015). Given the facts of this case, the Decision does not explain how it is that Applicant's latest payment plan constitutes anything more than such a promise of future action.

To summarize, we note the Judge's findings and record evidence that Applicant has a rather extensive history of failing to file and/or pay income tax returns. Her failures go back possibly as far as 1996 and are as recent as 2014.² The record does not show that her failures to have done so were due to unfortunate circumstances outside her control. Rather, her financial problems were caused, in significant part, by her own actions, *i.e.*, her having been fired from a job due to misconduct. In any event, as stated above, financial problems do not explain her failure to have *filed* her returns for many years, irrespective of her inability to pay her taxes. Applicant entered into a payment plan with the IRS in 2012 that she could not continue after only a couple of months of payment. Tr. at 65. Her latest plan came after she received the SOR and indeed after the hearing

¹ “[Applicant] has not filed a Federal tax return for income taxes with the Internal Revenue Service (IRS) since sometime between 1996 and 2000. She has not filed or paid income taxes during the last seven years (discrepant). Her husband . . . decided to not have Federal taxes withheld from his paycheck. She fell out of paying taxes and has not filed or paid income taxes since.” Government Exhibit 5, Interview Summary, at p. 2.

² Even at the hearing Applicant was not clear as to the full extent of her tax delinquencies. “[Q]: When you were interviewed, you indicated that you hadn't filed since sometime between . . . 1996 and 2000. [A]: No, I don't know if I said it like that. I – what I said was I had not filed, and I wasn't really sure—I can't remember verbatim what I said, but I do know that when I had my interview . . . I had not filed in years . . . Just like today . . . I couldn't tell him exactly what years.” Tr. at 63.

itself, with the result that there is no evidence of compliance in the record. *See, e.g.*, ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015) (Timing of debt payments is relevant in evaluating an applicant’s case for mitigation). The Judge did not explain how these facts establish “good-faith” under any reasonable interpretation of the Directive. Neither do these facts support a whole-person assessment of good judgment on Applicant’s part sufficient to overcome the concerns raised by her many years of delinquent tax filings.

After considering the record as a whole, we conclude that the Judge’s favorable analysis failed to consider an important aspect of the case. We also conclude that the evidence, viewed as a whole, is not sufficient to meet Applicant’s burden of persuasion under the standard set forth in *Egan, supra*. To the contrary, the Judge’s decision runs contrary to the weight of the record evidence, as Department Counsel argues, and is not sustainable.

Order

The Decision is **REVERSED**.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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