



Department Counsel raised the following issues on appeal: whether the Judge’s favorable applications of mitigating condition 20(d) and of the whole-person factors were contrary to the weight of the record evidence. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant’s wife was self-employed, and she and Applicant were required to file taxes on a quarterly basis. They got behind and, in 2006, hired a one-man firm to address their problem. This person died, and the second firm that they hired went bankrupt in 2012. The next year they hired a third firm, which filed Federal and state income tax returns for tax years 2005 through 2009. Applicant is now current with his state tax authority. He established an installment plan with the IRS and was making payments of \$734 in an effort to address his Federal tax debt of about \$246,000. He has increased his payments to \$1,000 a month to resolve the now \$207,000 debt.

### **The Judge’s Analysis**

The Judge extended favorable consideration to mitigating condition 20(d): “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”<sup>1</sup> He cited to evidence that Applicant has paid his state tax debt and has an installment plan for resolving his Federal obligation.

### **Discussion**

Department Counsel argues that the Judge’s decision did not address significant record evidence that detracted from his favorable conclusions. He contends that the Judge did not consider the evidence as a cumulative whole, thereby impairing his application of the mitigating condition at issue here as well as the whole-person factors.

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

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<sup>1</sup>Directive, Enclosure 2 ¶ 20(d).

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).

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her legal obligations. *See* Directive, Enclosure 2 ¶ 18.<sup>2</sup> *See also 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). Consideration of an applicant's judgment and reliability requires a Judge to consider the evidence as a whole rather than in a piecemeal fashion. *See, e.g.*, ISCR Case No. 12-04813 at 4 (App. Bd. Jul. 31, 2015).

Department Counsel cites to various pieces of evidence that he believes undermine the Judge's favorable decision. For example, Applicant and his wife "fell behind" on their taxes in 2005, a circumstance that continued until 2009. In addition, Applicant owes the IRS over \$38,000 for 2010 and \$33,000 for 2012. The reason for this delinquency was never fully explained. In his clearance interview, conducted in 2014, Applicant attributed it to their reliance on the three tax preparation firms they had employed. Interview Summary at 4, included in Government Exhibit (GE) 2, Answers to Interrogatories. At the hearing, however, he intimated that the problem originated with himself and his wife.

We . . . realized that we [fell] behind on our taxes. And, honestly, we weren't aware that – well, we knew we should have filed them quarterly and didn't. And we realized that we got in over our head. And, basically, that's kind of how it happened. Tr. at 34.

Applicant did not substantially elaborate on this explanation. His IRS transcript for 2005 shows that the couple neither filed nor paid taxes for that year until 2010, at which time they paid only a portion of the amount owed. The total amount still owed as of January 2016, *excluding interest and penalties*, is nearly \$57,000. IRS Account Transcript for 2005, dated January 8, 2016, included in GE 2. Subsequent transcripts show substantial delinquencies for the years following. Even if one finds Department Counsel's brief to be speculative in some regard,<sup>3</sup> it does underscore

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<sup>2</sup>The concern under Guideline F is that "[f]ailure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

<sup>3</sup>"Applicant's excuses that he was poorly served by two tax advisors who disappeared due to death or bankruptcy over a period of six years . . . have no mitigating value. He had plenty of time during that period to have insisted that his tax advisors do the job they were hired to do or to find competent replacements. The more likely reason for the delay is that Applicant failed to provide the necessary documentation for the tax consultants to do their work." Appeal Brief at 12.

the extent to which Applicant's evidence in mitigation leaves serious questions unanswered. That is, Applicant placed much of the blame on his tax preparers, an explanation that the Judge appeared to accept. However, it is clear from the record that he had significant tax delinquencies before hiring his first tax preparer. Indeed, *when including interest and penalties*, his debt for 2005 alone is nearly \$70,000. 2005 Account Transcript. As Department Counsel argues, the record evidence discloses no obvious reason that Applicant could not find a suitable replacement following the death of his first advisor and why he entrusted his tax obligations to persons who failed over a course of years to ensure his compliance with tax laws. *See, e.g.*, ISCR Case No. 06-19154 at 5 (App. Bd. Apr. 9, 2008), in which we stated that, in regard to tax advisors, "an applicant must show that he has in good faith engaged the services of someone who is actually able to provide beneficial advice." Assuming without deciding that a large measure of Applicant's problems can be laid at the feet of his tax preparers, we note his testimony that he engaged the services of the first one in 2006, yet his tax delinquencies persisted for several years thereafter, swelling to over \$200,000.

Department Counsel explicitly challenges the Judge's favorable application of mitigating condition 20(d), quoted above. The Directive does not define "good-faith," but, in the case just cited, we described it to mean "that an applicant's conduct with regard to his financial situation shows, among other things, reasonableness and prudence." *Id.* In the case before us, there is substantial evidence that undermines Applicant's claim to have acted reasonably and prudently. First is his testimony quoted above to the effect that he was aware of his obligation to file quarterly returns, and that he and his wife had actually been doing so for two years prior to 2005. Nevertheless, they stopped making these payments, for reasons not explained. Tr. at 34. Second, this failure persisted for several years, despite Applicant's awareness of his legal obligations, and he amassed tax delinquencies in excess of \$200,000, as noted above. Third, even at the hearing, Applicant did not display a clear understanding of his tax problems, for example how much he had paid and how much he owed.<sup>4</sup>

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<sup>4</sup> "[Department Counsel]: During those two years, were you filing the quarterly returns? [Applicant]: I believe so, but, based on, you know, the information that we have now, I believe so. Yes . . . [Department Counsel]: So, you believe you were filing quarterly? [Applicant]: Yes . . . [Department Counsel]: When did you stop filing those? [Applicant]: Let's see. I'm not positive on that. I believe it was—I think it was 05 . . . [Department Counsel]: When you were filing your tax returns before then, when you were filing them quarterly, did you know that you had owed taxes at that point in time? [Applicant]: No. No, we did not discover it at the time. [Department Counsel]: How were you calculating how much to pay on your taxes? [Applicant] That's a good question. That was mostly my wife's doing. I didn't really take charge of the taxes . . ." Tr. at 33-35. "[Department Counsel]: Do you have an idea of how much you have paid since you started this payment plan? [Applicant]: No, I don't. [Department Counsel]: Do you know about how much you still owe? [Applicant]: . . . I believe it's \$207,000[.]" Tr. at 41.

As Department Counsel notes, \$207,000 is the amount that Applicant disclosed in his security clearance application as his debt to the IRS as of 2014. Appeal Brief at 6; Security Clearance Application, dated August 4, 2014, at 29. Department Counsel persuasively argues that, given the Judge's finding that Applicant's debt had reached \$246,000, it was unlikely that he could have paid it down by nearly \$40,000 making only those payments of \$734 that were required by his original installment agreement. There is no evidence of additional payments, leaving the precise total amount owed to the IRS uncertain based on the record that was before the Judge. Appeal Brief at 6.

In drawing his favorable conclusions under 20(d), the Judge relied on evidence that Applicant entered into a payment plan with the IRS after the hearing. However, as Department Counsel argues, there is no evidence of even a single payment under the plan. *See, e.g.*, ISCR Case No. 14-04565 at 2 (App. Bd. Sep. 18, 2015) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner). We also note that, in his correspondence with the IRS, Applicant had previously advised them that he could not afford to pay more than the \$734 that he had been paying under a previous one, raising a question as to whether he will be able to comply with the new plan. *See* AE D, Letter to IRS, dated January 8, 2015. Moreover, Department Counsel observes that Applicant's concern with resolving his tax problems by means of a new installment agreement appeared to coincide with his effort to obtain a clearance. AE E, Letter to IRS, dated March 4, 2016. *See* 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). Evidence suggesting that, after years of apparent inattention, Applicant was finally energized to come to terms with the IRS when his clearance might be imperiled raises questions about his willingness to follow the sometimes complex rules governing classified information when his personal interests are not at stake. *See, e.g.*, ISCR Case No. 15-01070 at 4 (App. Bd. Mar. 9, 2016), in which we observed that an applicant who waits until his clearance is in jeopardy before resolving debts might be lacking in the judgment expected of those with access to classified information.

The evidence taken as a whole does not support the Judge's conclusion that Applicant's circumstances justified a *per se* application of mitigating condition 20(d), in light of significant record evidence that impugns Applicant's prudence and reasonableness. Moreover, we are persuaded by Department Counsel's argument that the Judge failed to examine Applicant's circumstances as a cumulative whole, thereby devoting insufficient attention to evidence which detracted from Applicant's case for mitigation.

To sum up, Applicant and his wife were making quarterly payments to the IRS for two years. However, in 2005, they stopped doing so, for no reason other than they got behind. They hired a series of tax advisors yet persisted in failing to file and pay taxes as required by law, amassing a tax debt to the Federal Government in excess of \$200,000. Applicant and his wife entered into an installment agreement with the IRS, which the agency cancelled in light of having recalculated the couple's 2012 tax obligations. Motivated at least in part by concern over losing Applicant's clearance, they entered into a new installment agreement after the hearing. He submitted no evidence of payments under the plan. Applicant's testimony at the hearing did not evidence a firm grasp on the origin or extent of his tax problems. This evidence suggests the real possibility that Applicant has difficulty complying with Government rules and regulations.

Applicant's evidence does not support the Judge's conclusion that he has demonstrated the prudence and reasonableness required by mitigating condition 20(d) and the whole-person concept. The Judge's conclusory decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, the decision is not sustainable.

**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