

KEYWORD: Guideline F

DIGEST: From 2009 to 2013, Applicant did not have any Federal or state taxes withheld and also did not file Federal or state income tax returns. IRS filed a tax lien against Applicant for about \$98,000, and he established an installment agreement with the IRS in which he agreed to pay \$66 per month on his Federal tax debt for 2009-2013. Decision reversed.

CASENO: 15-05478.a1

DATE: 10/2/2017

DATE: October 2, 2017

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 15-05478
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 16, 2016, 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 decision on the written record. On June 5, 2017, 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 54-year-old financial planner who has been working for a defense contractor since 1987. From 2005 to 2011, he also worked part-time as a real estate agent. He earned a master's degree in 1997 and was granted a security clearance in 2005.

Applicant attributes his financial problems to the collapse of the real estate market in 2008. He had a rental property that became vacant for a few months that caused him to lower the rent. Income from his real estate activities, which accounted for about 25% of his total income, disappeared. Accounts, including his mortgage, became delinquent. His pay was garnished. While he was able to settle a number of accounts for less than the full balance, others were charged off or sold to collectors.

From 2009 to 2013, Applicant did not have any Federal or state taxes withheld "because he had insufficient funds available to pay his income taxes" (Decision at 3) and also did not file Federal or state income tax returns. He hired a tax preparation firm and legal representation to assist him. He filed his Federal income tax returns for 2009-2013 on April 11, 2014. For those years, his annual adjusted gross income ranged from about \$90,000 to \$110,000. In early 2015, the Internal Revenue Service (IRS) filed a tax lien against Applicant for about \$98,000, and he established a installment agreement with the IRS in which he agreed to pay \$66 per month on his Federal tax debt for 2009-2013. "While Applicant failed to submit any documentation to support his contention that he has a history of 20 months (as of September 2016) of making his monthly payments, based on his overall actions in resolving various accounts, I am confident that he has made his modest monthly payments." Decision at 3.

Applicant contends that he filed his state income tax returns and paid all of his state income taxes for the years in question, but failed to submit any documentation to support that contention. However, he was issued a state tax refund in 2015.

Applicant had an unpaid balance of \$166 on a department store charge card. He claimed the account was resolved several years ago, but failed to submit supporting documentation. While the account has not been resolved, it is of little security significance.

Applicant also had an automobile loan that was past-due about \$600 with an unpaid balance of about \$27,000. In his SOR response, Applicant indicated the automobile was involved in an accident and delays in insurance payments occurred. He denied the loan went into default and stated the account was paid in July 2015.

Applicant did not present a budget or other information that showed his monthly income, expenses, and net monthly remainder. Besides information about him seeking tax assistance, he presented no evidence of financial counseling. There is no evidence of any other delinquent accounts. His finances improved in 2014 and now seem to be under control.

## The Judge's Analysis

The evidence established disqualifying conditions 19(a), 19(c), and 19(g).<sup>1</sup> Applicant's financial difficulties were attributable to the national economic recession during 2007-2009, which had a continuing negative impact over the ensuing years. He was unable to keep his accounts current or pay his taxes. He reached out to creditors in a good-faith effort to resolve the debts and was able to resolve a significant number of debts, file his Federal income tax returns, and establish an installment agreement with the IRS. He commenced a long road to recovery before the SOR was issued and is making positive efforts to resolve his debts. "Despite the absence of any financial documentation from Applicant regarding his current finances, it is still possible to conclude that his financial problems are under control." Decision at 7. In the whole-person analysis, the Judge stated that Applicant was making positive efforts to resolve his debts.

## Discussion

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 national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. ¶ 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 (9<sup>th</sup> 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).

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<sup>1</sup> This decision was issued three days before a revision of the adjudicative guidelines became effective. The previous version of the adjudicative guidelines that the Judge applied included the following applicable disqualifying conditions: ¶¶ 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." The current Directive contains similar disqualifying conditions. *See* Directive, Encl. 2, App. A ¶¶ 19(a) "inability to satisfy debts;" 19(b) "unwillingness to satisfy debts regardless of the ability to do so;" 19(c) "a history of not meeting financial obligations;" and 19(f) "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local taxes as required[.]"

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 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).

Department Counsel argues that the limited record in this case does not support the Judge’s favorable mitigation and whole-person analysis. Department Counsel contends that the Judge erred in his assessment of the security significance of Applicant’s Federal and state tax problems as well as in his evaluation of Applicant’s actions in addressing those problems.<sup>2</sup>

A security clearance represents an obligation to the Federal Government to protect national secrets. Accordingly, failure to honor other obligations to the Government has a direct bearing on assessing an applicant’s reliability, trustworthiness, and ability to protect classified information. *See, e.g.*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015).<sup>3</sup> A person who fails repeatedly to fulfill his or her legal obligations, such as filing and paying taxes when due, does not demonstrate the high degree of judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-04159 at 3 (App. Bd. Aug. 1, 2016). In this case, Applicant failed to file his 2009-2012 Federal or state income tax returns in a timely manner<sup>4</sup> and failed to pay his 2009-2013 Federal income taxes as required, which resulted in a \$98,000 Federal tax lien. His 2009 Federal income tax return was filed about four years late. These failures to comply with Federal and state tax laws suggest that Applicant has a problem with voluntarily abiding by well-established government rules and regulations, which calls into question his suitability for a security clearance. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016).

Turning to the issue of mitigation, we find persuasive Department Counsel’s argument that Applicant has not supplied enough evidence to meet his burden of persuasion under the *Egan* standard. Department Counsel asserts the Judge erred in finding that Applicant had insufficient funds available to pay his income taxes. It is axiomatic that the amount of income taxes imposed

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<sup>2</sup> In the appeal brief, Department Counsel raises no issues or arguments addressing the Judge’s favorable finding regarding the two consumer debts alleged in SOR ¶¶ 1.c and 1.d.

<sup>3</sup> *See also*, Directive, Encl. 2, App. 2 ¶ 18 regarding the concern under Guideline F: “Failure 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 or sensitive information.” This quoted sentence is from the revised adjudicative guidelines; however, this sentence is identical to the previous version except for the addition of the words “or sensitive” near its end.

<sup>4</sup> In appeal brief, Department Counsel notes Applicant filed his 2013 Federal income tax return in a timely manner.

over a given period never exceeds a certain percentage of the income earned.<sup>5</sup> In his security clearance application (SCA) and SOR response, Applicant indicated that he reduced his Federal and state tax withholdings to settle debts and mitigate the effects of garnishments. His hope was that, after reducing his tax withholding in 2009, he would be able to bounce back financially the following year. This approach did not work and he did not have sufficient Federal and state tax withholdings taken from his pay for 2009-2013. Department Counsel convincingly argues that the Federal tax debt was the result of Applicant's choice to reduce his tax withholdings over several years, and his decision to prioritize the payment of other expenses over his legal obligation to pay his taxes. Given these circumstances, the Judge's conclusion that Applicant was unable to pay his Federal and state income taxes (Decision at 7) is not supportable.

Department Counsel also argues that the Judge's analysis of the timing of Applicant's actions in attempting to resolve his tax problems is flawed. The Judge emphasized that Applicant filed his Federal tax returns about a year before the SOR was issued. However, the record reflects that Applicant did not file those tax returns until after he submitted his SCA and underwent his background interview. *See, e.g.*, ISCR Case No. 14-00279 at 3 (App. Bd. Jan. 23, 2015) for the proposition that the timing of the resolution of financial problems is a relevant factor in evaluating an applicant's case for mitigation of Guideline F concerns. The reason that timing is important is that an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests. In this case, Applicant's filing of his Federal income tax returns for 2009-2012 after submitting his SCA and undergoing his background interview diminishes the weight to which such remedial action might otherwise have merited.

The lack of corroboration of Applicant's statements about his actions in mitigation is an additional consideration in this case. It is clear from statements by the Judge in the decision that he acknowledged Applicant's lack of corroboration in key areas. First, while Applicant submitted a copy of his IRS installment agreement in his response to the SOR, he did not submit proof that he made any installment payments during the 20 months between the date of the installment agreement and his response to the File of Relevant Material (FORM).<sup>6</sup> Notwithstanding this lack of corroboration, the Judge stated that he was "confident" Applicant made those monthly payments.<sup>7</sup>

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<sup>5</sup> In recent years, for example, the Federal tax rates had ranged between 10% and 39.6% depending on an individual's income. *See*, <https://www.irs.com/articles/2014-federal-tax-rates-personal-exemptions-and-standard-deductions>. In 2012, the Federal income tax rates ranged between 10% and 35%. *See*, <https://www.irs.gov/pub/irs-prior/i1040tt--2012.pdf>.

<sup>6</sup> We note that the revised adjudicative guideline contains a new mitigating condition that addresses tax issues. Directive, Encl. 2, App. A, ¶ 20(g) that states, "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements." Since Applicant presented no proof of payments under the IRS installment agreement before the record closed, he has not met the requirement of the second prong of that mitigating condition. Therefore, remanding the decision to the Judge for consideration of this new mitigating condition is not warranted.

<sup>7</sup> In the past, the Appeal Board has held that it is reasonable for a Judge to expect applicants to present documentation about efforts taken to resolve financial problems. *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008).

This lack of corroboration undercuts the Judge’s determination that Applicant has demonstrated a “‘meaningful track record’ of debt reduction.” Decision at 10. In the past, the Appeal Board has stated that a “‘meaningful track record of debt reduction” generally includes establishing a plan to resolve financial problems and taking significant action to implement that plan. *See, e.g.*, ISCR Case No. 07-06482 at 2 (App. Bd. May 21, 2008). In this case, Applicant had not provided corroborating documentary evidence that he has taken significant timely action to implement the IRS installment agreement.<sup>8</sup> Second, Applicant did not submit his state income tax returns in either responding to the SOR or the FORM. The only documentary evidence to support Applicant’s contention that he filed his 2009-2013 state income tax returns is a copy of a state income tax refund dated August 2015.<sup>9</sup> The record contains no documentary evidence confirming when his 2009-2013 state income tax returns were filed. The absence of such proof, including documentary proof that he filed his 2014 and 2015 Federal and state income tax returns, undermines the Judge’s conclusion that Applicant “has now embraced the paradigm of timely filing income tax returns.” Decision at 9.

Additionally, Department Counsel challenges the Judge’s conclusion that Applicant’s “financial problems are under control.” Decision at 7. Department Counsel correctly points out that the record contains no evidence of Applicant’s personal financial information such as a budget. Specifically, there is no information in the record about his monthly expenses. Additionally, the Judge’s statement that Applicant has no other delinquent debts (Decision at 10) is contradicted by record evidence. Applicant’s most recent credit report in the record, which is dated March 2016, reflects that he had two non-alleged accounts that became delinquent in late 2015 and early 2016 and that he had a non-alleged second mortgage that was charged-off for about \$67,000. The record contains no evidence these non-alleged debts were resolved. The Judge’s failure to address the non-alleged debts in the decision impairs his mitigation and whole-person analysis. In short, the record evidence does not support the Judge’s conclusion that Applicant’s financial problems are under control.

Furthermore, Department Counsel maintains that the Judge’s analysis under the whole-person concept is erroneous. Department Counsel notes that analysis references no additional facts or reasons why the limited record in this case supports a favorable decision. Of note, Applicant presented no character reference letters or work performance evaluations. The whole-person evidence presented consists of Applicant’s statements about himself in his SCA, his SOR response, and his FORM response. Thus, the Judge’s whole-person analysis essentially is a repetition of his mitigation analysis, which for the reasons stated above was flawed.

We conclude that the Judge’s decision failed to consider important aspects of the case, failed to provide an satisfactory explanation for its conclusions, and runs 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>8</sup> In the Reply Brief, Applicant presented documents not previously submitted to the Judge for consideration. The Appeal Board is prohibited from considering new evidence on appeal. Directive, ¶ E3.1.29.

<sup>9</sup> The tax year for which the refund applies is not specified in the document.

**Order**

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan  
Administrative Judge  
Member, 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