

KEYWORD: Guideline F

DIGEST: Failure to comply with Federal 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. Applicant failed to file his Federal income tax returns for a nine year period in a timely manner. These failures raise questions about Applicant judgment and reliability. Much of the Judge's mitigation analysis is predicated upon his conclusion that Applicant has resolved his tax filing problems and owes no back taxes for year 2009 through 2014. The record does support such a conclusion. Favorable decision reversed.

CASENO: 15-06440

DATE: 12/26/2017

DATE: December 26, 2017

| | | |
|----------------------------------|---|------------------------|
| In Re: |) | |
| ----- |) | |
| Applicant for Security Clearance |) | ISCR Case No. 15-06440 |

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 February 28, 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 hearing. On August 11, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuidier 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

The sole SOR allegation, as amended, asserted that Applicant failed to file his Federal income tax returns for 2005 through 2014. Evidence presented at hearing established the SOR allegation. Applicant claimed that he did not file his income tax returns because his pay was subject to maximum tax withholdings, and he owed no further taxes for the years in question. He believed that, because he was owed a refund, he was not required to file. The Judge found Applicant’s testimony credible. When informed that he was required to file Federal income tax returns, he took immediate corrective action. He hired an accountant and filed all the required tax returns. He offered into evidence his 2009-2015 Federal income tax returns that reflect he qualified for a refund for each of those years. He is now current on his Federal income tax obligations.

The Judge’s Analysis

In his analysis, the Judge discussed a number of Appeal Board decisions that address tax filing deficiencies. He noted that new adjudicative guidelines became effective in June 2017. He concluded Applicant made arrangements with the Federal Government in 2016 to file all required tax returns and is in compliance with those arrangements. He further indicated that there was sufficient assurance that Applicant’s financial problems are resolved, are under control, and are unlikely to recur.

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 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 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 record in this case does not support the Judge’s favorable mitigation analysis. He also contends that Judge’s credibility assessment is inconsistent with the record evidence. Department Counsel’s arguments have merit.

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 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). In this case, Applicant failed to file his Federal income tax returns for a nine year period in a timely manner. These failures to comply with Federal tax laws raise questions about whether Applicant has demonstrated the high degree of judgment and reliability that is required for granting an individual access to classified information. *Id.*

Much of the Judge’s mitigation analysis is predicated upon his conclusion that Applicant has resolved his tax filing problems and did not owe any back taxes for 2009 through 2014. Department Counsel argues the Judge erred in his analysis of mitigating condition 20(g).¹ In doing so, Department Counsel notes that Applicant presented no proof that he filed his Federal income tax returns for 2005-2008. Applicant did not contact the Internal Revenue Service (IRS) directly to verify that he did not have to file his tax returns for those years, but instead relied upon a causal conversation with an acquaintance in concluding he only needed to file his tax returns for the previous seven years. Applicant testified the causal conversation was “[w]ith a friend of a friend’s wife who works at an investigative branch of the Internal Revenue Service.” Tr. at 29-30.² The

¹ Directive, Encl. 2, App A. ¶ 20(g) states, “the individual has made an arrangement with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.”

² IRS advises individuals to file prior Federal income tax returns regardless of their reasons for not having filed a required return. *See*, <https://www.irs.gov/taxtopic/tc153> - Topic Number 153 -What to Do if You Haven’t Filed Your Tax Return. Topic Number 153 also states that “the statute of limitation for the IRS to assess and collect any outstanding balances doesn’t start until a return has been filed.”

Judge erred in finding Applicant filed all required tax returns. Applicant's testimony falls short of providing substantial evidence to support the finding that all required tax returns were filed. *See, e.g.,* ISCR Case No. 96-0897 at 2-3 (App. Bd. Dec. 9, 1997). Additionally, Department Counsel questions how Applicant could have known he did not owe any taxes in any particular year. Applicant engaged in a side business that generated income ranging from about \$3,700 to \$4,400 for 2012, 2013, and 2015 and he qualified for tax refunds in those years that ranged from about \$980 to \$1,130. Applicant's Exhibits (AE) H-K and N. Considering Applicant's extra income from the side business and the relatively small amount of his tax refunds, Department Counsel persuasively argues that it would have been difficult for Applicant to have known that he qualified for a refund in a particular year without preparing his tax return for that year. Yet, the Judge failed to explain adequately how Applicant knew he always qualified for a tax refund. Such shortcomings in the decision undermine the Judge's mitigation analysis.

Additionally, Department Counsel argues the timing of the resolution of Applicant's tax filing problems is relevant in determining the extent to which he has demonstrated mitigation. *See, e.g.,* ISCR Case No. 14-05476 at 4 (App. Bd. Mar. 25, 2016). Department Counsel noted that Applicant only filed one of the Federal income tax returns in question (2014) before receipt of the SOR. This filing occurred after Applicant submitted his security clearance application (SCA) and underwent his background interview. He filed his Federal income tax returns for 2009-2013 after he received the SOR. The timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because 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 2009-2014 after submitting his SCA, undergoing his background interview, or receiving the SOR undercuts the weight such remedial action might otherwise merit. Overall, the Judge's favorable mitigation determination runs contrary to the weight of the record evidence and is not sustainable.

Department Counsel further contends the Judge erred in accepting as credible Applicant's explanation that he believed he was not required to file annual income tax returns. Specifically, Department Counsel highlights matters the Judge failed to discuss in the decision that raise questions about whether Applicant was forthcoming about his tax filing deficiencies. First, in his security clearance application (SCA) submitted in November 2014, Applicant was asked whether he failed to file his Federal income tax returns in the last seven years. Applicant responded to that question by disclosing only his failure to file his 2013 tax return. Government Exhibit (GE) 1 at 26. It is unknown why Applicant would disclose his failure to file for 2013, but not for the other six years covered in that SCA question. Next, in his background interview in April 2015, Applicant disclosed that he also did not file his Federal income tax return for 2014 and "possibly other years." GE 2. At the hearing, Applicant admitted that he had not filed his Federal income tax returns for at least the ten years prior to his receipt of the SOR, and he could not remember when he last filed a tax return. Tr. at 27-28, 44-46. Applicant's responses in his SCA and during his background interview raise questions about whether he was forthcoming during the investigative process. While the Board gives deference to a Judge's credibility determinations, that deference is not without limits. Where, as here, the record contains a basis to question an applicant's candor, the Judge should

address those aspects of the record explicitly, explaining why he or she finds an applicant's version of events to be worthy of belief. Failure to do so suggests that the Judge has merely substituted a favorable impression of Applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). A Judge's credibility determination can be rejected if it "is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason, or on no reason at all.'" *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, at 69-70 (4th Cir. 1996), citing *NLRB v. McCullough Environmental Services, Inc.* 5 F.3d 923, 928 (5th Cir. 1993).

We conclude that the Judge's decision failed to consider important aspects of the case and improperly relied on a credibility assessment in place of record evidence. The decision ran 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.

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