

KEYWORD: Guideline F

DIGEST: Applicant did not file or pay Federal income taxes for several years, under circumstances that, however painful, do not explain or excuse the failure. Moreover, despite his awareness of this problem, he did not undertake corrective action until the IRS sought to levy against his military retirement pay. This places Applicant's financial problems squarely within the ambit of Guideline F. Favorable decision reversed.

CASENO: 16-01211.a1

DATE: 05/30/2018

DATE: May 30, 2018

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In Re: )  
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----- ) ISCR Case No. 16-01211  
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Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Ross D. Hyams, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 15, 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 March 7, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuider 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 adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the Judge’s decision.

### **The Judge’s Findings of Fact**

Applicant has been employed by a Defense contractor since 2013 and seeks to retain a clearance that is a requirement of his job. He has held clearances at various levels since 1974. Applicant served in the military from 1976 until 1997, when he retired as an O-5. He has a master’s degree and has attended schools while in the military.

Applicant’s SOR contains one allegation, that he owes the IRS a little over \$54,500 on a tax lien. This lien arose from Applicant’s failure to file his tax returns from 2002 to 2005.<sup>1</sup> This tax lien is established by Applicant’s admission and by the evidence in the record. Applicant attributed his tax problem to difficulties he experienced during the time in question. He went through a very contentious divorce, and his mother, father, grandmother, and brother-in-law passed away. The result of these stressors was Applicant’s becoming depressed and anxious, and “things just slipped.” Decision at 3.

Applicant received notice of the lien in 2013, whereupon he hired a tax relief firm. The firm advised Applicant that the IRS had closed out his account as “not collectable.” *Id.* The firm also advised that Applicant did not need to worry, because the statute of limitations would soon run on his tax debt. This was not correct, and Applicant discontinued his relationship with the firm. He began working with the IRS himself. He has entered into a payment plan with the IRS, paying \$1,600 a month. He believes that the total amount currently owed may be erroneous, so he has appealed the penalties and tax rate that the IRS applied to his debt. However, pending the outcome

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<sup>1</sup>The subject of Applicant’s failure to file timely his tax returns for the years 2002 through 2005 made up a considerable portion of the following: the testimony at the hearing, Department Counsel’s closing arguments, the Judge’s Findings of Fact, the Judge’s Analysis, and Department Counsel’s appeal brief. The Board notes with some concern that this subject was not alleged in the SOR. Nor was the SOR amended at the Hearing, although either party or the Judge is permitted to do that to ensure that the SOR conforms to the evidence. *See* Directive ¶ E3.1.17. On this record, we conclude that the subject was fairly part of the essence of the case and that Applicant had adequate opportunity to address the issues concomitant with tax filing. Still, going forward, in similar situations, we strongly encourage parties and Hearing Office Judges to make appropriate amendments to the SOR and, as necessary, offer the parties reasonable opportunities to address such amendments.

of this appeal, he has continued to make monthly payments. As of the date of the hearing, Applicant had reduced the debt to a little over \$16,000.

Applicant has not missed filing his taxes since the time at issue in this case. He is current on all his debts and lives within his means. He provided documentation that he filed his 2002 to 2005 tax returns.

### **The Judge's Analysis**

The Judge cited to Applicant's having hired a tax firm, although he ultimately did not retain the firm's services. He acknowledged that failure to file tax returns and pay taxes when due is a serious concern. However, he extended favorable application to mitigating condition 20(g): "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements."<sup>2</sup> He concluded that Applicant's payment agreement with the IRS provides assurance that his tax problems are being resolved and will not 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 national security eligibility will be resolved in favor of the national security." Directive, Enclosure 2, App. A ¶ 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).

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;

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<sup>2</sup>Directive, Enclosure 2, App. A ¶ 20(g).

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 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's decision did not address significant contrary record evidence. He contends that, when the record is viewed as a whole, the circumstances underlying Applicant's delinquent taxes and the timing of his effort at resolving his problem undercut the Judge's favorable decision.

We find Department Counsel's argument to be persuasive. We note the Judge's findings and the record evidence addressing Applicant's personal circumstances during the time in question. While these matters were clearly painful to Applicant, we find no nexus between them and Applicant's tax failures. That is, the record does not establish a rational connection between these circumstances and Applicant's failure to have filed or paid his tax debts. As it stands, the record shows that Applicant has repeatedly failed to fulfill significant legal obligations, which does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017).

Moreover, as Department Counsel argues, Applicant did not begin resolving his tax problems until 2013, when the IRS sought to levy against his retirement income. In prior cases, we have stated that applicants who only begin to address their security-significant conduct when their personal interests are at stake may be lacking in judgment and reliability. They may be unwilling to observe other legal requirements, such as abiding by the rules and regulations governing classified information, when their interests are not imperiled. *See, e.g.*, ISCR Case No. 15-03208 at 5 (App. Bd. Mar. 7, 2017) (“[A]n 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”).

We addressed mitigating condition 20(g) in ISCR Case No. 17-01807 (App. Bd. Mar. 7, 2018), observing that

[t]he mere filing of delinquent tax returns or the existence of a payment arrangement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. The timing of corrective action is an appropriate factor for the Judge to consider in the application of [this mitigating condition]. pp. 3-4.

We find the concerns addressed in this earlier case to be applicable here. Applicant did not file or pay Federal income taxes for several years, under circumstances that, however painful, do not explain or excuse the failure. Moreover, despite his awareness of this problem, he did not undertake corrective action until the IRS sought to levy against his military retirement pay. Tr. at 49. This places Applicant's financial problems squarely within the ambit of Guideline F.

The concern under Guideline F is not simply that an applicant might be tempted to compromise classified information in [order] to pay his debts. A Judge should also consider the extent to which an applicant's circumstances cast doubt upon his judgment, self-control, and other characteristics essential to protecting national security information. This obligation is rooted in the language of the Directive, which states that failure to meet financial obligations may indicate unwillingness to abide by rules and regulations, thereby raising questions about an applicant's ability to protect classified information. Directive, [Encl. 2, App. A] ¶ 18. *See* ISCR Case No. 15-01737 at 3 (App. Bd. Feb. 14, 2017).

Failure to comply with tax laws suggests that an applicant has a problem with complying with well-established government rules and regulations. Voluntary compliance with such rules and regulations is essential for protecting classified information. *See, e.g.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). Despite his relatively belated payment plan, Applicant's presentation, viewed as a whole, does not demonstrate the good judgment and reliability sufficient to satisfy the standard set forth in *Egan*, 484 U.S. 518. We conclude that the Judge's analysis does not consider important aspects of the case and runs contrary to the weight of the record evidence. The favorable 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