

KEYWORD: Guideline F

DIGEST: The extent to which payments under a payment plan establish an aspect of the mitigating condition depends on the circumstances of a given case. Applicant owes \$192,000 to the IRS and \$19,000 to his state tax authority. Applicant entered into the payment plan with the IRS in July 2016. The record contains evidence that Applicant made five monthly payments. Applicant is to continue making monthly payments until the debt is resolved, which would occur after about four years of payments. Given other significant financial obligations that Applicant must fulfill, such as child support payments, and a paucity of evidence as to his ordinary expenses that will need to be balanced with his tax payments, Applicant has not established compliance sufficient to meet the Egan standard. Favorable decision reversed.

CASENO: 16-01726.a1

DATE: 02/28/2018

DATE: February 28, 2018

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| In Re: ----- Applicant for Security Clearance |))))))) | ISCR Case No. 16-01726 |
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 22, 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 October 31, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 favorable decision was unsupported by the weight of the record evidence. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant has worked for a Federal contractor since 2011. Applicant disclosed on his security clearance application (SCA) that he had failed to file and pay Federal taxes for tax years 2010, 2012, and 2013. He also failed to pay Federal taxes for 2014. He had filed his returns by the time he completed his SCA but had not paid his tax debt. In 2016, the IRS filed a lien against Applicant in the amount of \$192,000.

Applicant attributed his tax problem to a reduction in income for 2011. In that year he took off two months to address a medical issue, resulting in a diminution in pay.¹ As a consequence, he could not meet recurring obligations, such as his \$3,400 per month child support payments. He stated that his loss of income and his payment of college tuition on behalf of his oldest child diminished his ability to pay his taxes.

In late 2015, Applicant’s lawyer negotiated a plan to resolve a \$19,000 debt to his state tax authorities. He agreed to pay over \$1,000 a month to resolve this debt. In addition, Applicant reached an agreement with the IRS to pay \$1,900 a month, increasing over time as other obligations such as child support diminish, to discharge his Federal tax obligation. The tax lien will remain in place until Applicant has satisfied his Federal tax debt. As of December 2016, Applicant was in compliance with his payment agreement with the IRS. He has maintained his consumer credit accounts in good standing.

The Judge’s Analysis

The Judge concluded that Applicant’s failure to have paid his Federal taxes for the years in question met the criteria for two disqualifying conditions: a history of not meeting financial

¹Applicant told his clearance investigator in 2015 that he had voluntarily entered an alcohol treatment program. Item 10, 2011 and 2015 Clearance Interview Summaries, at p. 12.

obligations² and failure to file Federal, state, or local income tax return or failure to pay annual Federal, state, or local income tax as required.³ In further concluding that he had met his burden of persuasion as to mitigation, the Judge cited to his payment plans with state and Federal tax authorities. Citing to mitigating conditions 20(d)⁴ and 20(g),⁵ the Judge concluded that Applicant had demonstrated compliance with his payment plans and that his tax problems are under control.⁶

Discussion

Department Counsel argues that the Judge's decision failed to address significant contrary record evidence, thereby impairing her analysis. He argues that the Judge failed to examine the evidence as a cumulative whole. After considering the record that was before the Judge, we find Department Counsel's arguments to be persuasive.

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)*.

²Directive, Encl. 2, App. A ¶ 19(c).

³Directive, Encl. 2, App. A ¶ 19(g).

⁴Directive, Encl. 2, App. A ¶ 20(d): "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

⁵Directive, Encl. 2, App. A ¶ 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."

⁶The Judge also cited to Directive, Encl. 2, App. A ¶ 20(c): "the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control[.]" There is nothing in the record to suggest that Applicant's tax representation firm satisfies the requirement for a counseling service.

Department Counsel bases his argument to a large extent on the size of Applicant's tax debt, the few payments that he had made under his payment plan as of the close of the record, and on a paucity of evidence of an actual nexus between Applicant's circumstances and his failure to pay his tax debt. In noting the Judge's reliance on mitigating condition 20(g), Department Counsel acknowledges that Applicant has established payment plans with the IRS and his state tax authorities, but he argues that the few payments that Applicant had made by the close of the record preclude a conclusion that he is in compliance sufficient to meet his burden of persuasion as to mitigation.

The extent to which payments under a payment plan establish this aspect of the mitigating condition will depend on the circumstances of a given case. In the case before us, Applicant owes \$192,000 to the IRS and \$19,000 to his state tax authority.⁷ Applicant entered into the payment plan with the IRS in July 2016. The record contains evidence that Applicant made five monthly payments (August-December 2016) before the record closed. Under the plan, Applicant is to continue making monthly payments until the debt is resolved, which would occur after about four years of payments. Moreover, given evidence of other significant financial obligations that Applicant must fulfill, such as child support payments, and a paucity of evidence as to his ordinary expenses that will need to be balanced with his tax payments, it is not clear from the record that Applicant has established compliance sufficient to meet the *Egan* standard or that he will necessarily be able to make his payments for the several years remaining on his plan. The Judge's analysis does not consider whether, under the circumstances of this case, Applicant's plan is equivalent to a promise to discharge his debts in the future, which is not enough to establish a track record of debt resolution. *See, e. g.*, ISCR Case No. 14-04565 at 2 (App. Bd. Sep. 18, 2015).

Applicant's reply brief contains substantial new evidence. The Board is not permitted to consider new evidence. Directive ¶ E3.1.29.

Moreover, as Department Counsel argues, even if an applicant has paid his debts or made arrangements to resolve them, a Judge may still consider the underlying circumstances for what they reveal about the applicant's judgment and reliability. By the same token a Judge may consider a paucity of mitigating evidence in evaluating whether the applicant has met his or her burden of persuasion. *See, e.g.*, ISCR Case No. 16-02246 at 2-3 (App. Bd. Dec. 8, 2017).

In this case, the Judge cited to Applicant's two-months of diminished income during which he received medical attention. Department Counsel argues that the record does not establish a nexus between this circumstance and Applicant's tax deficiencies. That is, it does not show how two months of reduced pay resulted in a tax liability of the extent alleged in the SOR and admitted by Applicant. Moreover, the Judge failed meaningfully to address evidence that Applicant lacked the funds to pay his income tax due in part to his payments for his daughter's tuition. While it is understandable that an applicant would want to assist his offspring in paying for higher education, in a case like this, Applicant's payments could suggest misplaced priorities. *See, e.g.*, ISCR Case

⁷The back taxes owed to the state were not alleged in the SOR and the record contains no proof of payments to the state under the purported repayment plan.

No. 09-03724 at 2 (App. Bd. Mar. 23, 2010), in which a Judge denied the applicant a clearance due, in part, to his having prioritized such things as additional education over his responsibility to pay his debts. At the least, tuition payments for an offspring old enough to attend college do not constitute matters that were outside Applicant's control. As it stands, the record does not establish a connection between Applicant's personal circumstances and his failure to address his legal obligation to pay his taxes.

We note other things in the record that undercut the Judge's favorable analysis. For example, despite Applicant's contention that his loss of pay in 2011 was at the root of his tax delinquencies, the record contains evidence that he has previously had tax liens entered against him. For example, Item 6, a Public Trust Questionnaire, discloses a tax lien dated in late 1999, and Item 7, a credit report, shows two tax liens filed against him in late 2005. The existence of tax problems that antedate those alleged in the SOR contravene Applicant's claim that his current delinquencies are due to recent, unusual circumstances.⁸

More significant is the Judge's finding that Applicant had not merely failed to pay his taxes but had failed even to file his returns. Assuming *arguendo* that there is some mitigating force to evidence of Applicant's medical treatment and loss of pay during 2011, such an occurrence would not explain why he failed to file his returns on time in the first place, as the law requires. The duty to file returns and the duty to pay taxes when due are correlative obligations. Even an excusable inability to pay, however, does not necessarily mitigate evidence that for multiple years an applicant did not *submit* his or her returns. Indeed, failure to file tax returns by itself can be a reason to deny a clearance. Such a failure suggests that an applicant has a problem with complying with well-established government rules and regulations, voluntary compliance with which is essential for protecting classified information. *See, e.g.*, ISCR Case No. 15-03208 at 3 (App. Bd. Mar 7, 2017).

To sum up, the record evidence shows that Applicant amassed a substantial debt to the IRS as well as one to tax authorities in his state of residence. The evidence does not establish a nexus between Applicant's diminution in income and his asserted inability to pay his taxes. Neither has Applicant provided evidence of his recurring expenses, precluding a meaningful analysis of his ability to follow through on his payment plan. Applicant has had tax liens filed against him in the past, and his failure to have filed his returns is an independent reason to doubt his eligibility for a clearance, one which evidence of a loss of income or a recent payment plan are not sufficient to mitigate. As Department Counsel argues, the Judge failed to address Applicant's circumstances as a whole, resulting in a Decision that does not consider important aspects of the case and runs contrary to the weight of the evidence.

⁸In a clearance interview conducted in 2011, Applicant was confronted with these tax liens and denied any knowledge of them. Item 10 at p. 6. However, as stated above, Applicant disclosed a 1999 tax lien on his Public Trust Questionnaire. Item 6 at p. 7. The most plausible reading of the evidence is that the one discussed in the interview is the same as the one addressed in the questionnaire. Applicant's denial of a tax lien that he had previously disclosed is an inconsistent statement that has some impact upon his credibility.

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