KEYWORD: Guideline F

DIGEST: The Judge found that Applicant filed her 2011 state tax return in 2014. In fact, the record shows that she filed her 2011 state return on April 14, 2015, one day before she submitted her security clearance application. The timing of an applicant's remedial action is a relevant factor in evaluating his or her clearance eligibility. We also note the Judge's finding that, beginning in 2015, Applicant had filed all of her returns since 2011. However, there is no documentary evidence in the record that Applicant had, in fact, done so for that year. Affirmative decision reversed.

CASENO: 16-02322.a1

DATE: 03/14/2018

DATE: March 14, 2018

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	

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 October 11, 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 20, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Gregg A. Cervi 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 supported by the weight of the record evidence. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant has worked for a Defense contractor since 2013. She worked for other Federal contractors from 2004 to 2012. She has previously held a security clearance. Applicant failed to file her Federal and state income tax returns for 2009 and 2010. She also filed them late for 2011 to 2015, finally submitting them to appropriate tax authorities in 2015 and 2016. Applicant received refunds for 2011 to 2014 and did not owe any penalties or interest. Applicant filed her state income tax returns for 2011 in 2014 and for 2012 to 2014 in 2016.

Applicant attributed her tax filing delinquencies to poor management and to disorganization due to frequent overtime work. She also stated that time spent in visiting her ill mother and later in settling her mother's estate affected her tax filings. Beginning in 2015, Applicant filed her tax returns for each year since 2011. During the years in which she did not file returns, Applicant did not owe taxes either to the IRS or to her state. There is no evidence of tax liens against Applicant or garnishment action by Federal or state tax authorities.

Applicant has no delinquent debts, owns her own home, and has about $148,000 in assets. Applicant has a net monthly remainder of about $660 after expenses.

The Judge's Analysis

The Judge stated that Applicant's filing delinquencies are not attributable to causes beyond her control. He went on to conclude, however, that she had taken action to correct the problem and has filed all of her returns since 2011. He stated that 2009 and 2010 are not likely to be filed, in view of Applicant's having "alluded that documents necessary to do so are unavailable." Decision at 5. The Judge noted Applicant's overall financial health and personal circumstances such as the death of Applicant's mother that took time and attention away from other obligations. Although conceding that failing to file tax returns impugns Applicant's willingness to comply with rules and regulations, the Judge found that she had expressed a willingness to comply with tax laws in the future.

Discussion

Department Counsel challenges the Judge's mitigation analysis. He argues that there is insufficient record evidence to support a favorable application of 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."[1] He also argues that the Judge failed to evaluate the record evidence as a whole.

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 (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 ultimate resolution of a case does not necessarily turn on whether one or more of the disqualifying or mitigating conditions applies, in whole or in part, to the facts of a case. Rather, it requires sound discretion in light of the totality of the record evidence. *See, e.g.,* ISCR Case No. 15-03592 at 2 (App. Bd. Jun. 14, 2017).

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

We note first of all the Judge's finding that Applicant filed her 2011 state tax return in 2014. In fact, the record shows that she filed her 2011 state return on April 14, 2015, one day before she submitted her security clearance application. The timing of an applicant's remedial action is a relevant factor in evaluating his or her clearance eligibility. *See, e.g.*, ISCR Case No. 15-03778 at

[1]Directive, Encl 2, App. A ¶ 20(g).

3 (App. Bd. Aug. 4, 2017).[2] We also note the Judge's finding that, beginning in 2015, Applicant had filed all of her returns since 2011. However, although a failure to file a Federal or state tax return for 2015 was alleged in the SOR, there is no documentary evidence in the record that Applicant had, in fact, done so for that year. The tax returns that she submitted in her answers to DOHA interrogatories end at 2014.

As stated above, in a DOHA proceeding, it is the applicant's job to present evidence to mitigate concerns raised in an SOR, and a paucity of mitigating evidence can undermine an applicant's effort to obtain a clearance. *See, e.g.*, ISCR Case No. 16-02246 at 2-3 (App. Bd. Dec. 8, 2017). In this case, though the File of Relevant Material (FORM) placed Applicant on notice of significant limitations in the mitigating information contained in the record and notified her of her right to make a documentary response, Applicant provided nothing. As it stands, the record shows that Applicant attributed her filing delinquencies to circumstances that are not unique nor of a nature in and of themselves to explain or excuse her failures to only have filed some of her returns.

Moreover, the Judge's analysis of mitigating condition 20(g) does not explain why he concluded that Applicant had made an arrangement with taxation authorities. That is, under the facts of this case, the Judge does not explain how it is that the filing of some of her overdue returns at times that were either contemporary with or subsequent to the submission of the SCA constitute an arrangement with the taxation authorities in the sense implied by the mitigating condition (analogous, for example, to a payment plan), or how her limited filings demonstrate compliance with any such arrangement, assuming that one can be inferred. These matters undermine the Judge's conclusion that Applicant had met her burden of persuasion, as does Applicant's failure to have provided an IRS tax transcript for 2010 without explaining why it was that such a document was not available.[3]

A Judge must evaluate the evidence as a whole, including the extent to which an applicant may have left important matters unaddressed. *See, e.g.*, ISCR Case No. 10-03125 at 3 (App. Bd. Apr. 13, 2012), in which the Judge's whole-person analysis cited to an insufficient quantum of mitigating evidence. In the case before us, given the totality of the evidence that was before the Judge, and considering Applicant's failure to respond to the FORM, we conclude that his analysis failed to consider important aspects of the case. Under the facts of this case, the Judge's favorable decision is not sustainable.

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[2] *See also* ISCR Case No.14-03358 at 4 (App. Bd. Oct. 9, 2015) to the effect that an applicant who begins to resolve financial problems only after being placed on notice that his or her clearance is 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 or her interests.

[3] *See* Appeal Brief at 3, note 3: "The unavailability of the transcript for 2010 raises questions as to why the tax transcript for that one year could not be produced or whether Applicant had some reason for not producing it in response to the Government's Interrogatories . . . The Government followed up on its request for the 2010 tax transcript in a second set of Interrogatories and Applicant again reported in her May 19, 2010 Response that she had not received it. It is unclear whether she made a second request to the IRS for the 2010 transcript."

Order

The Decision is **REVERSED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board