

KEYWORD: Guideline F

DIGEST: The precedential value of our decisions may be affected by later changes or revisions of the Directive. To the extent that Applicant is arguing that all prior Appeal Board decisions involving tax cases are no longer of any precedential value solely due to the recent addition of mitigating condition 20(g), we do not find such an overbroad argument persuasive. Adverse decision affirmed.

CASENO: 16-02981.a1

DATE: 08/01/2018

DATE: August 1, 2018

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 4, 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 29, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact**

The SOR alleged that Applicant had Federal tax liens exceeding \$154,000; had a delinquent mortgage debt of about \$11,000 with a balance exceeding \$177,000; had delinquent student loan exceeding \$22,000, and had delinquent consumer debt exceeding \$3,000. Before the hearing, Department Counsel amended the SOR to add an allegation that, on various occasions, Applicant failed to file her annual tax returns for 2005-2013 as required. Applicant denied the SOR allegations. The Judge found in favor of Applicant on most of the SOR allegations, but he found against her on the Federal tax liens and tax return filing deficiencies.

Applicant is 55 years old and has been working for her current employer since 2014. She is divorced and has two adult children. She has attended college classes, but has not, to date, earned a degree. She served in the military and received an honorable discharge.

Tax records confirm that Applicant failed to file her 2005-2013 Federal tax returns in a timely manner and that she has three Federal tax liens from 2014-2016 for about \$77,500, \$62,900, and \$13,800. She attributed her tax filing and paying deficiencies to undergoing various surgeries over a number of years, including three during the period from 2014 to 2016. She also claims to have experienced a significant income reduction that materially impacted her finances and was the victim of a hurricane that resulted in the loss of her tax records for 2005 and caused her to relocate. She was forced to use substitute records to prepare her 2005 Federal income tax return.

From the evidence, it is unclear when Applicant filed her Federal tax returns for 2005-2013. Her most recent tax preparer confirmed that she filed her Federal tax returns for 2005-2016, but did not report the dates those returns were filed. It is also unknown whether the IRS imposed penalties or interest for the late filings or whether Applicant’s tax returns for 2005-2014 were filed before or after she completed her security clearance application in 2015. She furnished IRS documents showing that she made past-due tax payments totaling \$7,922 between February 2016 and July 2017. In late 2015, she established an installment agreement with the IRS that provided she make monthly payments of \$500 beginning in February 2016 and increasing to \$3,090 in February 2017. In May 2017, she completed a revised agreement that provided for monthly payments of \$1,311 from June

to September 2017 and thereafter increasing to \$2,414. It is unclear whether Applicant is in compliance with her installment agreements.

In July 2017, Applicant reported that she had an annual salary of \$116,000 with a projected net monthly remainder of \$347. With a projected jump in her monthly IRS payments in September 2017, she faces a shortfall in her available income. How she plans to address the shortfall is unclear.

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

The timing of the resolution of tax filing and paying delinquencies is critical to an assessment of an applicant's security clearance eligibility. Given Applicant's failure to corroborate her tax filing claims or establish she has the ability to stay current on her revised IRS installment agreement, she has not established that she acted responsibly under the circumstances. Whether she is entitled to the benefits of mitigating condition 20(g) is unclear because she has not provided documentation showing sustained compliance with her revised IRS installment agreement.<sup>1</sup>

### **Discussion**

Applicant notes the Judge cited Appeal Board decisions applying a previous version of the adjudicative guidelines that did not include mitigating condition 20(g), a provision that was added in a 2017 revision of the guidelines.<sup>2</sup> He argues that the Judge's reliance on those prior decisions "makes his entire analysis regarding Applicant's tax allegations erroneous." Appeal Brief at 4. The Appeal Board has previously stated that the precedential value of our decisions may be affected by later changes or revisions of the Directive.<sup>3</sup> However, in this case, Applicant has failed to identify any particular quote or proposition in the cited cases that no longer has any precedential value due to 2017 revision of the guidelines. We are unaware of what concepts in those prior decisions that Applicant is now challenging. Accordingly, this particular assignment of error fails for lack of specificity. *See, e.g.*, ISCR Case No. 17-01807, *supra*, at 3. To the extent that Applicant is arguing that all prior Appeal Board decisions involving tax cases are no longer of any precedential value solely due to the recent addition of mitigating condition 20(g), we do not find such an overbroad argument persuasive. *Compare id.* with ISCR Case No. 17-01213 at 4, n.2 (App. Bd. Jun. 29, 2018). In her appeal brief, Applicant cites to a Hearing Office decision to support her argument that she mitigated the alleged security concerns. However, this Hearing Office case, which pre-dates the 2017 revision of the adjudicative guidelines, is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *See, e.g.*, ISCR Case No. 17-01807, *supra*, at 4.

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<sup>1</sup> Directive, Encl., App. A. ¶ 20(g) 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."

<sup>2</sup> Mitigating condition 20(g) first appears in Security Executive Agent Directive 4, *National Security Guidelines*, that became effective on June 8, 2017.

<sup>3</sup> *See, e.g.*, ISCR Case No. 17-01807 at 2-3 (App. Bd. Mar. 7, 2018), citing ISCR Case No. 06-23453 at 3-4 (App. Bd. Nov 14, 2007) that contains a more detailed discussion of the potential impact of Directive changes to the precedential value of prior Board decision.

Applicant contends that the Judge erred in concluding that Applicant has not provided documentation demonstrating her ability to comply with the IRS installment agreements. She claims that she provided documentation showing “she is in full compliance with the IRS.” Appeal Brief at 11. We do not find Applicant’s argument persuasive. Applicant’s Exhibit CC contains an IRS document dated August 14, 2017, reflecting the past-due tax payments that Applicant made during the previous 18 months. This document reflects she made two payments totaling \$500 in February 2016; payments of \$500 in March, April, May, and June 2016; two payments of \$500 in September 2016 (which covers a two-month period); a payment of \$1,500 in November 2016 (which covers a three-month period); a payment of \$500 in February 2017; two payments totaling \$1,311 in June 2017; and a payment of \$1,311 in July 2017. The IRS document reveals that she did not make payments on a consistent monthly basis as she agreed, that she missed two monthly payments between July 2016 and January 2017; that she did not make the monthly payments of \$3,090 between February 2016 and May 2017 (when the agreement was revised); and that she did not make the June and July 2017 payments of \$1,311 on time (payments were due on the 15<sup>th</sup> of each month). Furthermore, Applicant’s post-hearing submission, which was submitted after her August 2017 payment was due, does not contain proof of that payment. Applicant has not established that she is in full compliance with the installment agreements. Moreover, from our review of the record, the Judge reached a sustainable conclusion that Applicant has not shown how she will be able to comply with the revised IRS installment agreement when the monthly payments were set to increase in September 2017.

Applicant also argues that the Judge did not consider or mis-weighed the evidence. She cites to such matters as her medical problems, her loss of tax documents in a hurricane, her filing of the delinquent tax returns, and her efforts to resolve the past-due tax debt. The Judge, however, made findings about those matters. Applicant’s arguments are not sufficient either to rebut the presumption that the Judge considered all of the record evidence or show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *Id.* at 4. Additionally, Applicant argues that mitigating condition 20(g) “has no reference to when and how long an [applicant] needs to establish an arrangement with the appropriate tax authority.” Appeal Brief at 5. The Appeal Board, however, has previously stated that timing of corrective action is an appropriate factor for the Judge to consider in the application of mitigating condition 20(g). *Id.* at 3-4.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. A person who fails repeatedly to fulfill his or her legal obligations, such as filing tax returns and paying taxes when due, does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *Id.* at 4. The decision is sustainable on this record. “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). *See also* Directive, Encl. 2, App A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

## Order

The Decision is **AFFIRMED**.

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