

KEYWORD: Guideline F

DIGEST: An applicant who begins to resolve his or her 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 own interests. We agree with Department Counsel that such judgment and self-discipline concerns are raised in this case. The Judge did not discuss this important aspect of the case, which impairs his analysis. Moreover, the Judge also did not address Applicant's failure to file his 2015 income tax returns in a timely manner. Favorable decision reversed.

CASENO: 16-03187.a1

DATE: 08/01/2018

DATE: August 1, 2018

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| In Re: ----- Applicant for Security Clearance |))))))) | ISCR Case No. 16-03187 |
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Wayne M. Pecht, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 25, 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 19, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall 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 arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant was self-employed from about 2009 to 2011 because he was unable to find work in his field. During that period, his income was considerably reduced. In his security clearance application (SCA), he refers to that period as “unemployment” and much of his debt was acquired then. He now earns about \$78,000 annually. His wife returned to the workforce shortly before the hearing after a lengthy period of unemployment. With her employment, they will be able to move beyond living paycheck-to-paycheck.

Applicant has 12 delinquent debts totaling about \$27,000. His goal is to satisfy the debts by the end of 2018. Of those debts, he has already satisfied a charged-off student loan for about \$10,160 and two other charged-off accounts for about \$630 and \$290. He has not yet taken action to resolve eight medical debts totaling about \$1,360. He delayed taking action on the medical debts because he was contemplating bankruptcy, but has abandoned that idea. He also has a charged-off account for about \$15,000 that resulted from the voluntary repossession of a recreational vehicle. He has asked the creditor to verify the amount owed on that vehicle.

Applicant failed to file his Federal and state income tax returns for 2012, 2013, and 2014 in a timely manner.¹ He filed those tax returns shortly before the hearing. He attributed this delay to his anxiety and depression, but also noted the need to obtain some of his wife’s missing tax documents. He is now taking medication for his medical condition and is able to prepare his tax returns. He hopes to receive tax refunds for 2012-2016, which he would use to satisfy outstanding debts.

The Judge’s Analysis

¹ The SOR alleged that Applicant failed to file state income tax returns in two states. The Judge noted that Applicant testified that he did not live in one of those states and that Applicant’s attorney will look into the claim by that state. Decision at n.4 and 6.

Mitigating condition 20(b)² applies because of Applicant's and his wife's unemployment, his depression and anxiety, and his actions such as submitting tax filing extension requests, voluntarily returning a vehicle he could not afford, moving to a recreational vehicle to economize, and supplementing his income with a part-time job. He has satisfied a notable percentage of his delinquent debts and his tax filing deficiency. He has a plan to resolve the remaining debts. He has made solid strides towards addressing his financial issues.

Discussion

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 national security eligibility will be resolved in favor of the national security." Directive, Encl. 2 App. A ¶ 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).

Department Counsel contends that the record in this case does not support the Judge's favorable mitigation analysis. He argues that the Judge failed to consider important aspects of the case and that his decision runs counter to the weight of the record evidence. Department Counsel's arguments have merit.

Department Counsel notes that Applicant filed his delinquent tax returns, but argues that the timing of the resolution of those tax filing deficiencies is an important factor to consider in analyzing the extent to which he has mitigated the alleged security concerns. In his SCA of December 2014, Applicant disclosed that he did not file his 2012 and 2013 Federal and state income tax returns, that he filed extension requests and forgot about filing the tax returns, and that he planned to file them with his 2014 tax returns. Government Exhibit (GE) 1. At that point, he was placed on notice of the security significance of failing to file tax returns. In his background interview in January 2015,

² Directive, Encl. 2, App. A ¶ 20(b) states, "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances[.]"

he stated that he intended to file the delinquent tax returns in March 2015, but he failed to do so. GE 2. Two years following that interview, when he responded to the SOR, he stated that he would file them in 2017. By the date originally set for the hearing in April 2017, the delinquent tax returns still were not filed. At the hearing in June 2017, Applicant testified:

[Applicant's Counsel]: Now we have introduced tax returns for 2012, '13, '14, '15, and '16. When did you prepare those tax returns?

[Applicant]: The 2014 though '16 -- '16 I prepared just before the deadline for filing. And then '14 and '15 I did about three weeks ago. And then 2012 and '13 I just did a couple of nights ago. I was waiting on some missing w2's from my wife's ex-employer.³

We have previously noted that an applicant who begins to resolve his or her 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 own interests. *See, e.g.*, ISCR Case No. 14-03358 at 4 (App. Bd. Oct. 9, 2015). We agree with Department Counsel that such judgment and self-discipline concerns are raised in this case. The Judge did not discuss this important aspect of the case, which impairs his analysis. Moreover, the Judge also did not address Applicant's failure to file his 2015 income tax returns in a timely manner as revealed in the above quote.

Department Counsel also challenges the Judge's conclusion that Applicant's tax filing deficiencies were due to depression and anxiety. In doing so, he cites to the Judge's findings and conclusions that "[Applicant] is now on medication for anxiety and depression . . . [and] was able to prepare his own federal tax returns with commercial software[;]" "Now with appropriate medication Applicant is capable of timely filing his federal taxes[;]" and "Further action was deferred only because of his temporary depression and anxiety, not oversight or disregard of IRS rules." Appeal Brief at 3-4, n.7, and 8, quoting from Decision at 3, 4, and n.5. Department Counsel argues the record does not support findings or conclusions that imply Applicant's use of medication was a recent development. Department Counsel notes that Applicant testified that he has been taking medication for medical conditions, including depression and anxiety, for a "good 8 years, maybe 10 years" (*i.e.*, since about 2007 and 2009) and those medications were effective. Tr. at 26-27. Such testimony, which was not addressed in the decision, undercuts the Judge's mitigation analysis that Applicant's depression was a temporary condition that was recently resolved through medication.⁴

³ Tr. at 17.

⁴ While this case was pending before the Board, we issued a decision in another case with some overlapping issues. In both cases, Department Counsel made arguments regarding mitigating condition 20(g). We do not agree with Department Counsel's arguments for reasons we laid out in detail in the prior case. *See* ISCR Case No. 17-01213 at 4, n.2 (App. Bd. Jun. 29, 2018).

Department Counsel further notes that Applicant has resolved only three of the 12 delinquent debts and that he resolved those debts just prior to, or after, the hearing . Tr. 22-23 and Applicant's Exhibits (AE) H, I, and K. Department Counsel also highlights that Applicant has not addressed the largest debt of \$15,000 that became delinquent in 2012 or the eight medical debts ranging in amounts from about \$30 to \$350 even though he had an adjusted gross income that ranged between \$114,000 to \$136,000 from 2014 to 2016. AE B-D. Additionally, Department Counsel points out that Applicant testified he earned about \$5,000 per year in income from 2012 to 2016 that he did not report on his income tax returns and that he needed to amend those tax returns. Tr. 23-24 and 42-43. This additional income will reduce any tax refunds due for those years, which as the Judge noted, Applicant had hoped to use for paying the remaining delinquent debts. Department Counsel's arguments call into question whether Applicant acted responsibly under the circumstances or whether he will follow through on a plan to resolve the remaining debts. *See, e.g.*, ISCR Case No. 07-09304 at 4 (App. Bd. Oct. 6, 2008) for the proposition that promises of future payment are not a substitute for a history of payment of debts. The record does not support the favorable application of mitigating condition 20(d).⁵

We conclude that the Judge's decision fails to consider important aspects of the case and runs 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. The decision is not sustainable.

⁵ Directive, Encl. 2, App. A ¶ 20(d) states, "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

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