

KEYWORD: Guideline F

DIGEST: Despite Applicant having been employed for well over a year prior to the close of the record, Applicant had not secured a payment plan or otherwise established a track record regarding payment of her tax obligation. As it stands, Applicant's case for mitigation of this particular concern is no more than a promise to resolve the debt in the future, which is not sufficient to establish mitigation within the meaning of the Directive. Department Counsel states that there is a paucity of evidence to establish mitigation of the two mortgage debts. Favorable decision reversed.

CASENO: 16-03889.a1

DATE: 08/09/2018

DATE: August 9, 2018

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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 January 18, 2017, 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 Arthur E. Marshall, Jr. 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 ran contrary to the weight of the record evidence, rendering it arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant began working for her current employer in December 2016, following a period of unemployment that began in November 2015. She holds a master’s degree and was first awarded a security clearance in 2006. Applicant has never had financial counseling. Over the past decade, Applicant acquired four properties, each of which was purchased as a new residence. As Applicant moved into her next property, the previous one was rented out. Applicant now has only one house, which is her residence.

Applicant’s SOR alleged several delinquent debts. One of them was a Federal tax lien entered against Applicant in September 2015. The amount of the lien was over \$92,000, a debt that arose from capital gains as result of the sale of a house.<sup>1</sup> Due to her unemployment in 2015, the IRS suspended collection of this debt. Now that Applicant is employed, she has, through her accountant, contacted the IRS to discuss a payment plan. Other debts are a state tax lien and a past due mortgage, both of which have been satisfied, the latter as result of a short sale.

Applicant’s SOR includes obligations arising from first and second mortgages on one of her properties. When she bought this house in 2006, the price was \$500,000. However, when she tried to sell it in 2011, the value had dropped to about \$128,000. The house went into foreclosure, selling in 2013 for \$128,000. Applicant claimed that she received a cancellation notice for the deficiency, but she did not corroborate this assertion. The Judge found that the status of this debt is “unclear.” Decision at 3. He made a similar finding about an allegation regarding the second mortgage, observing that it is not clear what the status of this debt might be.

Applicant is currently financially stable. She has over \$2,200 in bank accounts and about \$225,000 in her retirement account. All of Applicant’s debts have been settled, and she has no desire to invest in real estate again. She attributed her financial problems to serious illness that she experienced in 2010 and 2011. Her CPA is assisting her in resolving her unpaid debt, along with

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<sup>1</sup>Applicant testified that she purchased the house in 1999 for \$125,000 and sold it 2013 for \$580,000. Tr. at 45-46.

her tax lien and ongoing mortgage situation. Applicant is willing and able to pay off her remaining debt through payment plans.

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

The Judge noted that Applicant's financial problems were the result of her illness and her unemployment. He cited to evidence that Applicant had attempted to work with her lenders, attempted a short sale, hired a CPA, and was willing to get rid of properties that she could no longer afford. He also cited to her effort to get a payment plan with the IRS. In the whole person analysis, the Judge noted that Applicant had moved from house to house, "balancing payments on three properties." *Id.* at 6. When she became ill, she was not able to work at full capacity and could not make her payments. She now has the ability to make payments on her tax lien, and believes that lingering obligations from her two mortgage accounts have been cancelled. "It is her aim to find sufficient documentary evidence to determine the status of those two debts." *Id.* She has the motivation, intention, and financial ability to address her remaining debts and has articulated a reasonable strategy for resolving her financial problems.

### **Discussion**

Department Counsel argues that the Judge's decision fails to consider important aspects of the case that are not consistent with his favorable findings. He argues that the Judge did not consider the underlying circumstances of Applicant's debts, that he did not seriously analyze the paucity of corroborating evidence for some of Applicant's claims, and that he failed to evaluate the evidence as a cumulative whole. We find Department Counsel's argument 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 (9<sup>th</sup> 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).*

The significance of delinquent debts to the security clearance process is explained in the Directive:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Directive, Encl. 2, App. A ¶ 18.

Accordingly, in evaluating a case under Guideline F, a Judge should consider the extent to which an applicant's poor financial circumstances cast doubt upon his or her judgment, self control, and other characteristics essential to protecting national security information. *See* ISCR Case No. 15-01737 at 3 (App. Bd. Feb. 14, 2017).

Regarding the tax lien, Applicant sold a rental house for a substantial gain of over \$350,000. As Department Counsel notes, it is not clear what she did with all of the proceeds. She testified she owed "four something" (\$400,000 plus) on the property that was sold. No documents in the record corroborate that testimony. Apparently, she paid none of the tax on her capital gain. As we have previously stated, someone who fails to fulfill his or her legal obligations, such as paying taxes when due, 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. 15-02884 at 3 (App. Bd. Apr. 26, 2018). *See Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

The Judge found the tax lien to have been mitigated because Applicant had made an overture to the IRS seeking a payment plan. However, despite her having been employed for well over a year prior to the close of the record, Applicant had not secured a payment plan or otherwise established a track record regarding payment of her tax obligation. As it stands, Applicant's case for mitigation of this particular concern is no more than a promise to resolve the debt in the future, which is not sufficient to establish mitigation within the meaning of the Directive. *See, e.g.*, ISCR Case No. 14-04565 at 2 (App. Bd. Sep. 18, 2015) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner). Under the facts of this case, the Judge's favorable resolution of this allegation is not sustainable.

Department Counsel also draws our attention to difficulties with the Judge's treatment of the two mortgage debts described above. In effect, Department Counsel states that there is a paucity of evidence to establish mitigation of these two allegations. We note first of all that, in a DOHA proceeding, the applicant bears the burden of persuasion that he or she should have a clearance. Directive ¶ E3.1.15. As we stated above, we evaluate an applicant's success in establishing mitigation with reference to the standard in *Egan, supra*. We also note the Judge's finding that the status of these debts is unclear. That alone impugns his favorable conclusion that the debts had been resolved through debt forgiveness, as Applicant contended. After all, if it is not clear whether the debt is still owed, there is no basis to find that in fact it is not owed. Indeed, the Judge gave

Applicant an opportunity to provide a 1099-C or some other evidence that the debt was no longer owed, yet Applicant failed to provide anything regarding the mortgage debts.<sup>2</sup> The Judge stated, in his whole-person analysis, that Applicant was determined to ascertain the status of these debts, although efforts that post-date the Decision itself are of no mitigating significance. Accordingly, we conclude that the Judge erred in finding that Applicant had established resolution of these two debts within the meaning of the Directive.

Moreover, as Department Counsel argues, the Judge's favorable findings are vitiated by his failure seriously to address the circumstances underlying these two mortgage debts. Indeed, even if an applicant has actually paid his or her debts, or they have been removed through a process such as debt forgiveness, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's eligibility for a clearance. By the same token, even if debts have been resolved or discharged, a Judge may consider any paucity of mitigating evidence in determining whether the applicant had met his or her burden of persuasion. *See, e.g.*, ISCR Case No. 16-02246 at 2-3 (App. Bd. Dec. 8, 2017).

As Department Counsel argues, Applicant acquired various rental properties without possessing the experience or training to manage them properly.<sup>3</sup> We note she permitted the properties in question to go into foreclosure in a year in which her overall income—salary plus capital gain from sale of another house—was nearly \$450,000. We also note that she testified that she owed money on the property. However, she provided no corroboration.<sup>4</sup> That she sought foreclosure rather than payment undermines any mitigation that arose from circumstances that were outside her control. The Judge himself noted in the Analysis section of the Decision that Applicant has enough funds to pay off her debts. That she has not been able to demonstrate resolution of her financial delinquencies undermines a conclusion that she has mitigated concerns about her judgment and reliability that arise from them. The Judge's favorable findings regarding these first and second mortgage obligations are not sustainable.

We are persuaded by Department Counsel's argument that the Judge not only failed to address the issues discussed above, but that he also failed to consider the record evidence a whole, thereby impairing his whole-person analysis. Had he done so, he would have addressed in some detail the cumulative interaction of Applicant's ongoing, unresolved tax liability and her failure to

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<sup>2</sup>Applicant testified that she did not receive 1099s, although she expected to. "I just have documentation from the Courts that the house went into foreclosure." Tr. at 63. This undermines whatever favorable significance the Judge appears to have extended to Applicant's claim that she would continue to seek evidence that the mortgage debts had been forgiven.

<sup>3</sup>Department Counsel argues that "[w]ithout proper education and expertise, Applicant . . . thought she could [overextend] her finances, beat the market, and be successful. This was extremely poor judgment." Appeal Brief at 11. The extent of Applicant's formal or experiential expertise in real estate transactions is not explicitly developed in the record. However, given the circumstances, it is a reasonable inference that Applicant lacked the requisite know-how to manage numerous real estate holdings of the value set forth in the record.

<sup>4</sup>Applicant Exhibit E is an Amended U.S. Individual Tax Return. This document, prepared by her CPA, states that Applicant's adjusted gross income for 2013 was \$448,071.

present evidence that the two mortgage debts have been satisfactorily put to rest. Of course, an applicant is not required to be debt-free or to develop a plan for paying off all debts immediately or simultaneously. However, an applicant must act responsibly given his or her circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. *See, e.g.*, ISCR Case No.15-02903 at 3 (App. Bd. Mar. 9, 2017). The record does not support a conclusion that Applicant has satisfied this requirement.

After considering Department Counsel’s arguments in light of the entirety of the record evidence, we conclude that the Judge failed to consider important aspects of the case and that his favorable findings run contrary to the weight of the record evidence. Accordingly, the Judge’s 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