

KEYWORD: Guideline F

DIGEST: Applicant had been aware of this security concern for at least ten years prior to the issuance of the SOR but did not take reasonable steps to address it. Indeed, Applicant states that the debt was about \$13,000 when she first became aware of it. It has grown through the application of interest and penalties and will continue to do so until it is resolved. Her failure to file her tax returns on time is a problem of long-standing duration, one of which she has been aware for many years. Applicant only recently began to address her tax problems, filing her returns late and only two weeks before the hearing acquiring the assistance of an accountant. Favorable decision reversed.

CASENO: 16-03595.a1

DATE: 08/27/2018

DATE: August 27, 2018

In Re:	)	
	)	
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	)	
Applicant for Public Trust Position	)	

**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 trustworthiness designation. On January 10, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness 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 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuider granted Applicant’s request for a trustworthiness designation. 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 has been employed by a Defense contractor since 2015. She has a master’s degree. Applicant separated from her husband in 2013 and has filed for divorce. She has custody of her 10-year-old child, but her husband is not paying child support. The divorce is not final. In addition to her marital problems, Applicant has experienced medical problems, as has her son, and she was unemployed in 2012.

Applicant’s SOR alleged numerous delinquent debts, including a nearly \$16,000 student loan, medical debts, a Federal tax lien, and other collection accounts. The SOR alleged that Applicant failed to file and pay her state tax return for 2012 and that she did not file her Federal returns for 2012 through 2014. It also alleged that Applicant had a Federal tax lien entered against her in 2010 for an amount in excess of \$19,200. Concerning the student loan, Applicant states that it is her husband’s responsibility and will be allocated to him in the divorce decree. The Judge found that Applicant has paid or resolved a number of her smaller debts.

Concerning Applicant’s tax problems, the Judge found that Applicant’s income was low until she found her current job, and she could not file married filing jointly until she received copies of her spouse’s income information. Before establishing a payment plan, Applicant will need to file her and her husband’s overdue tax returns. As of the date of the hearing, Applicant had not filed her 2012 state tax return. Applicant gave three reasons for having failed to file her Federal returns: (1) her income was below the threshold for filing income taxes; (2) she did not have all the necessary W-2s; and (3) she was worried that she would owe more taxes. Two weeks before the hearing, Applicant began working with her brother, an accountant, to resolve her tax issues. The Judge found that the income threshold for married filing separately was \$3,800 for 2012 and increased by relatively small amounts in the following years. He found that, by subtracting Applicant’s W-2 information from her adjusted gross income for the years in question, Applicant was not required to file her returns. She filed the returns, however, and believes that her refunds will significantly reduce her tax lien.

## The Judge's Analysis

Noting Applicant's marital separation, unemployment, and medical problems, the Judge concluded that she had demonstrated responsible action in regard to her delinquent debts. He stated that she had paid as many debts as possible and has a plan for resolving all of her debts. Based on her track record of debt resolution, the Judge concluded that future delinquent debt is not likely to arise and that there are clear indications that Applicant's financial problems are under control. He stated that it is unclear whether Applicant has any responsibility for the student loan and she will need to establish a payment plan in the future to resolve the Federal tax lien. He also observed that "there is limited evidence of record that [Applicant] established and maintained contact with her creditors." Decision at 8. He concluded, however, that Applicant understands what she needs to do to establish and maintain her financial stability.

## Discussion

Department Counsel argues that the Judge's favorable decision fails to address important aspects of the case, such as the age of her debts, the recency of her efforts to resolve her tax problems, and an absence of nexus between what he terms Applicant's limited evidence in mitigation and her multi-year failure to comply with her tax obligations. 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 (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* ADP Case No. 14-03077 at 3 (App. Bd. Oct. 22, 2015).

Concerning the Federal tax lien, we note Applicant's Answer to the SOR, in which she acknowledges that she first learned of the underlying tax debt in 2006. She attributed this debt to unfiled tax returns, along with bad financial decisions that she did not know about. Accordingly, Applicant had been aware of this security concern for at least ten years prior to the issuance of the SOR but did not take reasonable steps to address it. Indeed, Applicant states that the amount of the debt was about \$13,000 when she first became aware of it, permitting a reasonable inference that it has grown through the application of interest and penalties and will continue to do so until it is resolved. Applicant's Answer also underscores that her failure to file her tax returns on time is a problem of long-standing duration, one of which she has been aware for many years. However, as Department Counsel argues, Applicant only recently began to address her tax problems, filing her returns late and only two weeks before the hearing acquiring the assistance of an accountant.

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 sensitive or protected 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). Failure to file tax returns suggests that an applicant has a problem with complying with well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for guarding sensitive or protected information. *See, e.g.*, ADP Case No. 15-00198 at 3 (App. Bd. Jan. 30, 2017). In this case, although giving due consideration to evidence of Applicant's many difficult and challenging life events—illness, marital separation, and unemployment—there is little in the record to explain Applicant's multi-year failure to have made even an attempt at resolving her tax problems. Indeed, her last communication from the IRS was in 2009 and, as the Judge noted, there is little evidence of ongoing efforts to contact her creditors, resulting in a record that is lacking in mitigating information.

In a DOHA proceeding it is the applicant's duty to present evidence in mitigation of the concerns raised by his or her SOR. Directive ¶ E3.1.15. A paucity of mitigating evidence can, and often does, result in an adverse decision. *See, e.g.*, ADP Case No. 11-11592 at 2 (App. Bd. Aug. 23, 2012). In the case before us, we are persuaded by Department Counsel's argument that Applicant has not established a reasonable connection between her difficult circumstances and her failure to file and pay taxes, including her state tax return which she did not file until after the hearing. Moreover, the timing of an applicant's effort at debt payment is a relevant consideration, one which

the Judge did not address in his analysis. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017). Examining Applicant’s tax problems in light of the Judge’s finding that the status of her other large debt, the student loan, is not clear, we conclude that the Judge’s analysis failed to take into account significant factors that worked against his favorable decision.

We also note Department Counsel’s argument that the Judge erred finding that Applicant did not have to file Federal tax returns for the years in question due to insufficient income. We are persuaded that the record does not support such a finding, in light of Hearing Exhibit II, an IRS document, to the effect that it is gross income that governs this matter rather than adjusted gross income, which the Judge employed. Be that as it may, we note Department Counsel’s argument that Applicant’s various explanations for her security-significant conduct were not totally consistent, which, again, impairs the overall quality of her effort to establish mitigation. Given the above, we conclude that the Judge’s decision failed to consider important aspects of the case and ran contrary to the weight of the evidence. Accordingly, we conclude that the Judge’s 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