

KEYWORD: Guideline E; Guideline F

DIGEST: Applicant contends the Judge erred by relying on Appeal Board decisions decided under the previous version of the adjudicative guidelines that do not include mitigating condition 20(g). Applicant’s argument is based on an incorrect premise (*i.e.*, the Appeal Board decision in question applied the previous guidelines) and lacks merit. To the extent Applicant is arguing that the timing of resolution of tax filing deficiencies is not an important factor to consider under mitigating condition 20(g), we find that argument unpersuasive and note it runs counter to Appeal Board precedent. Adverse decision affirmed.

CASENO: 17-00294.a1

DATE: 08/08/2018

DATE: August 8, 2018

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| In Re:                           | ) |                        |
| -----                            | ) |                        |
| Applicant for Security Clearance | ) | ISCR Case No. 17-00294 |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 6, 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). On May 31, 2017, Department Counsel amended the SOR by adding a Guideline E allegation. Applicant requested a hearing. On April 12, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer Goldstein 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. The Judge’s favorable finding on the Guideline E allegation is not an issue on appeal. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact and Analysis**

Applicant failed to file, as required, his Federal income tax returns for 2010-2014 and his state income tax returns for 2011 and 2012. All of those tax returns have been filed. Some were filed about a month late, while others were filed years late. He attributed his tax filing delinquencies to stress arising from health issues of his parents and brother and from the death of his grandmother. In his background interviews, he stated that he forgot to complete his taxes due to demands at work and also admitted to being lazy. He timely filed his Federal and state tax returns for 2015 and 2016. Between about 2011 and 2013, he incurred approximately \$94,000 in gambling losses. He has not gambled at the casino where he incurred the large losses since 2014 and last gambled on a trip with friends in July 2016. He signed statements promising to file his tax returns on time and to never gamble again.

“Applicant documented that he participated in financial counseling, and provided documentation to show he filed 2015 and 2016 Federal and state income tax returns in a timely manner. However, he has not fully established that his problem is being resolved or is under control because insufficient time has passed to demonstrate a track record of timely filing tax returns, as required by law. He only chose to file his 2011 and 2012 returns after receiving the SOR on March 2017.” Decision at 6.

### **Discussion**

Applicant contends the Judge erred by relying on Appeal Board decisions decided under the previous version of the adjudicative guidelines that do not include mitigating condition 20(g).<sup>1</sup> In making his argument, he does not reference any specific cases cited in the Decision, but just refers in a footnote to pages 6-7 of the Decision. On those pages, the Judge only cites one Appeal Board decision, *i.e.*, ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) for the proposition that timing

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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.” Mitigating condition 20(g) first appeared in Security Executive Agent Directive 4, *National Security Guidelines*, that became effective on June 8, 2017.

of the resolution of financial problems is an important factor to consider in evaluating an applicant's case in mitigation.<sup>2</sup> This cited case was decided under the latest revision of the adjudicative guidelines and discusses the application of mitigating condition 20(g). Applicant's argument is based on an incorrect premise (*i.e.*, the Appeal Board decision in question applied the previous guidelines) and lacks merit.

As a related issue, Applicant appears to argue that the timing of the resolution of tax filing deficiencies is not an important consideration under mitigating condition 20(g). He notes that mitigating condition 20(g) "has no reference to when or how long an [applicant] needs to establish an arrangement with the appropriate tax authority and referenced sufficient time when the tax returns were filed" (Appeal Brief at 5-6), and he also uses phrases such as "regardless of the method or time frame" and "regardless of when compliance actually occurred" in making arguments about his corrective action or mitigative evidence (Appeal Brief at 10 and 11). To the extent Applicant is arguing that the timing of resolution of tax filing deficiencies is not an important factor to consider under mitigating condition 20(g), we find that argument unpersuasive and note it runs counter to Appeal Board precedent. *Id.* See also, ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018).

Applicant also argues that the Judge did not consider all of the record evidence and misweighed the evidence. For example, he claims that the Judge failed to consider the circumstances surrounding his tax filing delinquencies, that he filed the delinquent tax returns, and that he filed his 2015 and 2016 tax returns on time. The Judge, however, made findings about those matters. His arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. See, *e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017). We give due consideration to the Hearing Office case that Applicant has cited in his brief, which predates the 2017 revision of the adjudication guideline, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.*

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. ISCR Case No. 15-06440 at 3. 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."

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<sup>2</sup> In the Decision, the Judge cited only one other Appeal Board decision, *i.e.*, ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) for the proposition that failure to comply with Federal tax laws suggests an applicant has a problem with abiding by well-established governmental rules and regulations and that voluntary compliance with rules and regulation is essential for protecting classified information. The Appeal Board has cited this precedent in cases, including ISCR Case No. 15-06440, decided under the recently revised adjudicative guidelines.

**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