

KEYWORD: Guideline F

DIGEST: While Applicant filed his 2016 Federal income tax return on time, he did so after the issuance of the SOR. This record falls short of establishing that Applicant has reformed and rehabilitated himself so that he will voluntarily comply with the tax filing requirements. The Judge’s favorable decision is relying on Applicant’s promise to comply the tax filing requirements in the future. A promise to change one’s conduct in the future does not constitute evidence of reform and rehabilitation that requires a favorable security clearance decision. Given the lack of evidence of reform and rehabilitation, questions remain about whether Applicant has demonstrated the judgment, reliability, and willingness to abide by well-established rules and regulations that is required for granting a security clearance. Favorable decision reversed.

CASENO: 17-01256.a1

DATE: 08/03/2018

DATE: August 3, 2018

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In Re:)	
)	
-----)	ISCR Case No. 17-01256
)	
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 May 11, 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 decision on the written record. On February 23, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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 decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant has been working for his current employer since 2012 and is seeking a security clearance in connection with that employment. The sole SOR allegation asserts that Applicant failed to file, as required, his Federal income tax returns for 2012 through 2015. He admitted the SOR allegation. He acknowledges his mistake in not filing his tax returns in a timely manner and is remorseful. He was not sure how to include information about the sale of a house on his tax return and put off filing his tax returns. In early 2016, he hired a tax accountant to prepare his tax returns. He learned his 2012 Federal tax return was actually filed on time. The other tax returns in question have been filed. Due to the filing delays, he is not eligible to receive some of the refunds that he otherwise would have been entitled. He understands that he must file his tax returns on time in the future.

The Judge’s Analysis

“By not fulfilling his legal obligation to file his income tax returns, Applicant has not demonstrated the high degree of judgment and reliability required to hold a security clearance.” Decision at 5. “He also understands that going forward he must always comply with the annual tax filing obligation . . . and that his chronic history of not filing in the past, must never occur again.” *Id.*

Discussion

Department Counsel argues that the record in this case does not support the Judge’s favorable mitigation and whole-person analysis. More specifically, he contends that the Judge did not consider important aspects of the case and her analysis runs contrary to the weight of the record evidence. Department Counsel’s arguments have merit.

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choice made.’”

Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371, U.S. 156, 168 (1962)). “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). “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). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

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). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the Judge’s 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. *Id.*

Security requirements include consideration of a person’s judgment, reliability, and willingness to comply with legal obligations. *Cafeteria & 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 comply with Federal tax laws suggests that an applicant has a problem with abiding by well-established government rules and regulations. Voluntary compliance with rules and regulations is essential for protecting classified information. *See, e.g.*, ISCR Case No. 17-01213 at 3 (App. Bd. Jun. 29, 2018). In this case, Applicant failed to file his Federal income tax returns in a timely manner for three years.¹ As the Judge noted in her decision, these failures to comply with Federal tax laws raise questions about whether Applicant has demonstrated the high degree of judgment and reliability that is required for granting an individual access to classified information. *Id.* The burden was on Applicant to mitigate such security concerns arising from his admitted tax filing deficiencies. Directive E3.1.15.

¹ In the appeal brief, Department Counsel points out the Applicant also filed his 2012 Federal income tax return a month late, but does not specifically claim the Judge erred in her findings regarding the filing of that tax return. Appeal Brief at 4-5.

Department Counsel argues that the Judge did not explain how any of the mitigating conditions applied. In the decision, the Judge noted that five mitigating conditions (Adjudicative Guidelines (AG) 20(a), 20(b), 20(c), 20(d), and 20(g))² were potentially applicable, but did not identify any of those mitigating conditions as actually applying in her analysis. Department Counsel argues that the Judge apparently relied mostly upon mitigating condition 20(g) because much of the her mitigation analysis is predicated upon Applicant having filed his delinquent tax returns.³

Applicant admits that he failed to file his 2013 through 2015 Federal income tax returns as required. Department Counsel points out that, in his security clearance application, Applicant estimated that he owed \$3,000 in past-due taxes for 2013 and 2014 and explained the tax filing delinquencies by stating, “I got distracted with work and a bit lazy with life and forgot to file my federal taxes.” Item 3 of the File of Relevant Material (FORM). While the Judge found that Applicant hired a tax accountant in early 2016, the record evidence does not support the Judge’s finding about that date. Applicant’s background interview of December 2016-January 2017 reflects that he stated he intended to hire a tax professional once he received his 2016 W-2 statement in January or February 2017. FORM Item 4. The tax accountant’s bill reflects that Applicant put down a deposit for his services in March 2017. FORM Item 2. Consequently, more than a year expired after Applicant submitted his security clearance application and underwent his background interview before he hired the tax consultant to prepare the delinquent tax returns. FORM Items 2-4. His delinquent tax returns were filed in July 2017, after the SOR was issued. Department Counsel notes that Applicant’s 2015 Federal income tax return was filed 15 months late, his 2016 tax return was 27 months late, and his 2013 tax return was 39 months late. He submitted an extension for

² Directive Encl. 2, App. A ¶¶ 20(a)-(d) and (g), set forth these mitigating conditions as follows:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) 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;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; [and]

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

³ 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 some of 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.

filing his 2016 Federal income tax return and that return was filed during the extension period. FORM Response.

In ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018), we observed that

[t]he mere filing of delinquent tax returns or the existence of a payment arrangement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. The timing of corrective action is an appropriate factor for the Judge to consider in the application of [pertinent mitigating conditions].

In this case, Applicant attributed his tax filing deficiencies, in part, to laziness and forgetfulness for which the Judge made no findings of fact.⁴ Applicant did not resolve his tax filing deficiencies until after his security clearance was in jeopardy. As we have previously noted, an applicant who resolves financial problems after being placed on notice his or her security clearance may be 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 own interests. *See, e.g.*, ISCR Case No. 17-01213, *supra*, 5. While Applicant filed his 2016 Federal income tax return on time, he did so after the issuance of the SOR. This record falls short of establishing that Applicant has reformed and rehabilitated himself so that he will voluntarily comply with the tax filing requirements. In essence, the Judge's favorable decision is relying on Applicant's promise to comply the tax filing requirements in the future. As we have previously noted, a promise to change one's conduct in the future does not constitute evidence of reform and rehabilitation that requires a favorable security clearance decision. *Id.* Given the lack of evidence of reform and rehabilitation in this case, questions remain about whether Applicant has demonstrated the judgment, reliability, and willingness to abide by well-established rules and regulations that is required for granting a security clearance.

We conclude that the Judge's decision failed 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.

⁴ The Judge found, "Applicant explained his failure to file his Federal income tax returns was not due to a lack of means, but rather a failure to complete the required process and paperwork. (Government Exhibit 2)." Decision at 2.

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