

KEYWORD: Guideline F

DIGEST: Applicant’s failure to comply with the tax laws for several years, his various explanations for his failures, and the unreasonableness of his stated belief about the statute of limitations raise significant concerns that Applicant may be lacking in the judgment expected of those who enter into a fiduciary duty with the U.S. for the protection of national secrets. We have noted in the past that 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. Favorable decision reversed.

CASENO: 17-01382.a1

DATE: 05/16/2018

DATE: May 16, 2018

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In Re:)	
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-----)	ISCR Case No. 17-01382
)	
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 30, 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 favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant is seeking a clearance in connection with his employment at a Defense contractor, a job he has held since 2005. Applicant’s SOR alleges that he failed to file as required his Federal and state income tax returns for most years between 2009 and 2015. Applicant admitted these allegations in his answer to the SOR. Applicant attributed his problems to various causes, including “shortsightedness.” Decision at 2. He also stated that he underwent a period of stress, due to a house fire, his daughter’s automobile accident, and his father’s illness and death. He has also devoted attention to administering his father’s estate. Applicant stated that he believed that he had three years in which to submit tax returns in exchange for a refund.

Applicant has now filed his tax returns and has a “good grasp” on the filing deadlines. He will have his future returns filed by a professional. Applicant contends that the problems expressed herein are situational and out of the ordinary for him. He enjoys a good reputation for judgment, conscientiousness, and for trustworthiness. He is hardworking and is viewed as reliable.

The Judge found that, even if Applicant truly believed that he could file his returns late without a penalty so long as he was entitled to refunds, he presented no evidence of a request for an extension. Neither has he shown how he knew that he would be entitled to refunds for the years in question. A three-year statute of limitations for claiming a refund does not mean that an individual is exempt from filing their returns on time.

The Judge’s Analysis

The Judge cited to Applicant’s misunderstanding of the time-lines for filing tax returns and to evidence of the various misfortunes that he suffered that affected his conduct. She concluded that Applicant had made a good-faith effort to resolve the problem and understands that he must always comply with Federal and state law.

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 does not challenge the Judge’s finding that Applicant has filed his tax returns. He argues, however, that the totality of the evidence, especially as it bears upon the circumstances underlying Applicant’s problems, does not support the Judge’s favorable decision. We find this argument persuasive. Even if an applicant has actually paid his debts or otherwise addressed his financial delinquencies, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant’s eligibility for a clearance. *See, e.g., ISCR Case No. 16-02246 at 2 (App. Bd. Dec. 8, 2017).* In evaluating a case under Guideline F, a Judge should consider the extent to which an applicant’s circumstances cast doubt upon his judgment, self control, and other characteristics essential to protecting national security information. This obligation is rooted in the language of the Directive, which states that failure to meet financial obligations may indicate unwillingness to abide by rules and regulations, thereby raising questions about an applicant’s ability to protect classified information. Directive, Encl. 2, App. A ¶ 18. *See ISCR Case No. 15-01737 at 3 (App. Bd. Feb. 14, 2017).*

In this case, as Department Counsel notes, Applicant failed to comply with Federal and state tax laws for many years. Without question, Applicant has faced some daunting circumstances during the time in question. However, neither the record nor the Judge’s decision establish a nexus between those circumstances and the delinquencies alleged in the SOR and admitted by Applicant. That is, the Judge does not draw a rational connection between those circumstances and Applicant’s failure to file his income tax returns. For example, the Judge does not find, nor does the record demonstrate, that Applicant’s house fire destroyed vital documents without which he could not file his returns. It was only a terribly disturbing event, along with the medical problems of Applicant’s daughter and father, which was coextensive with his failure to comply with the tax laws but which cannot plausibly be said to have been the cause.

Moreover, the Judge does not explain why Applicant's mistaken belief that he had three years in which to file returns if he was entitled to refunds mitigates the concerns in this case. In the first place, as Department Counsel notes, a belief that one has three years in which to file returns does not address tax delinquencies that are more than three years old. Even for those within the statute of limitations, however, Applicant's belief is not reasonable on its face, as the Judge appeared to recognize in her findings that Applicant had not presented evidence of a filing extension and that he did not explain how he knew he was entitled to refunds in the first place. These findings do not support the Judge's favorable decision. Rather, they underscore Department Counsel's own argument that Applicant's conduct, viewed as a whole, shows a marked deficiency in judgment.

Department Counsel's brief cites to a recent case in which we addressed similar issues to those at issue here. In ISCR Case No. 17-01807 (App. Bd. Mar. 7, 2018), the applicant failed to file tax returns for several years, which she attributed to unemployment, her employer's failure to withhold taxes, and paperwork problems. Applicant filed her returns after the SOR had been issued. In upholding the Judge's unfavorable decision, we stated at pp. 3-4

The mere filing of delinquent tax returns . . . 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 mitigating condition 20(g)¹ as well as in considering aspects of other overlapping mitigating conditions[.]

This language is apt in addressing the case before us. As Department Counsel argues, the fact that Applicant has now filed his returns should be entitled to limited weight, insofar as he began addressing his problems only after having been placed on notice that his clearance might be in jeopardy. Appeal Brief at 13. Such a circumstance does not support a conclusion that Applicant will necessarily comply with laws, rules, and regulations, including those governing the handling of classified information, when his immediate interests are not at stake.

Moreover, Applicant's failure to comply with the tax laws for several years, his various explanations for his failures, and the unreasonableness of his stated belief about the statute of limitations raise significant concerns that Applicant may be lacking in the judgment expected of those who enter into a fiduciary duty with the U.S. for the protection of national secrets. We have noted in the past that 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. *See, e.g.*, ISCR Case No. 15-06707 at 3 (App. Bd. Aug. 15, 2017).

¹Directive, Encl. 2, App. A ¶ 20(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."

As we stated above, in a DOHA proceeding, the applicant bears the burden of persuasion as to mitigation. In the case under consideration here, we conclude that Applicant's evidence is not sufficient to mitigate his security concerns, viewed in light of the *Egan* standard. The Judge's decision fails to consider important aspects of the case and, as Department Counsel argues, runs contrary to the weight of the record evidence. The 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