KEYWORD: Guideline F

DIGEST: Applicant attributed his tax filing deficiencies, in part, to laziness. He did not file his 2015-2016 tax returns until after the SOR was issued or file his 2014 Federal income tax return until after he received the FORM. The record does not contain proof that he filed his 2014 state income tax return. 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. Favorable decision reversed.

CASENO: 17-01213.a1

DATE: 06/29/2018

DATE: June 29, 2018

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 May 16, 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 from his current employer since 1994 and has held a security clearance since 2006. The SOR alleges that Applicant failed to file, as required, his Federal and state income tax returns for 2011, 2012, 2013, and 2015. He admitted those allegations in answering the SOR. He attributed his tax filing deficiencies to laziness, his belief he was due tax refunds, and his knowledge that he could delay filing his income tax return for three years without forfeiting the refund. He corrected his tax filing problems and provided documentation showing he filed his Federal and state income tax returns for 2011-2016. He acknowledges his mistake (misunderstanding the tax laws), is remorseful, and states he will never allow this situation to occur again.

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 now correctly understands that application of both Federal and state law concerning his annual tax filing obligation. He also understands that going forward he must file his income tax returns in a timely fashion, 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. 14-04437 at 3 (App. Bd. Apr. 15, 2016). In this case, Applicant failed to file his Federal and state income tax returns in a timely manner for a number of years. As the Judge noted in her decision, these failures to comply with Federal and state 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.

In the decision, the Judge noted that five mitigating conditions (Adjudicative Guidelines (AG) 20(a), 20(b), 20(c), 20(d), and 20(g))[1] were potentially applicable, but did not identify any of

[1] 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

those mitigating conditions as actually applying in her analysis. Department Counsel argues that the Judge apparently relied mostly upon mitigating condition 20(g)[2] because much of the her mitigation analysis is predicated upon Applicant having filed his delinquent tax returns and now understanding such delinquencies must never occur again.

Department Counsel notes that Applicant's Response to the File of Relevant Material (FORM) reflects that he filed his Federal and state income tax returns for 2011-2013 between April and June 2015. In the FORM Response, Applicant also noted that the IRS did not have a record of him filing his 2014 Federal income tax return (which was not alleged in the SOR), and he later submitted a certified mail tracking document showing a package was delivered to an IRS facility in August 2017 that purportedly contained his 2014 Federal income tax return. He filed his 2015 and 2016 Federal and state income tax returns in June and July 2017. There is no evidence in the record

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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.

[2] In the appeal brief, Department Counsel states, "In ISCR Case No. 17-01807 [at 3 (App. Bd. Mar. 18. 2018)], the Appeal Board addressed MC 20(g), explaining that prior Appeal Board decisions involving tax cases remain authoritative precedents. Therefore the proper application of MC 20(g) is analogous to the manner in which MC 20(d) has been applied in the past to all financial cases, including delinquent tax filing cases." Appeal Brief at 7-8 (footnotes omitted). We do not agree with either of those statements. First, in ISCR Case No. 17-01807,we did not state that our prior decisions in tax cases remained authoritative precedents. Instead, we noted that the precedential value of Board decisions may be affected by later changes to the Directive and stated that the applicant in that case failed to identify any particular proposition in our prior decisions that no longer had any precedential value because of the 2017 revision to the adjudicative guidelines. Parties may still challenge the precedential value of our prior decisions in tax or other cases based on the recent revision to the adjudicative guidelines. Second, we have not stated or implied that mitigating condition 20(g) should be treated as duplicative to mitigating condition 20(d). As we have noted in the past, the Directive should not be interpreted or construed in a manner that renders any provision meaningless or superfluous. *See, e.g.*, ISCR Case No. 02-12199 at 5 and 9 (App Bd. Oct. 7, 2004). While some mitigating conditions have overlapping aspects, each is a separate provision and will be interpreted in that manner. Similarly, Department Counsel says "Mitigating Condition 20(g) must be read in concert and harmony with the overall parameters of analysis set forth by the Appeal Board." Appeal Brief at 9. The Appeal Board and Hearing Office Judges are creatures of the Directive. While some analysis and precedents might survive amendments to the Directive or guidelines, it is mistaken to believe that the guidelines are somehow inferior to the Appeal Board decisions. More succinctly, the provisions of the Directive, including the guidelines, are controlling.

that Applicant requested extensions of the deadlines for filing his income tax returns for any of the years in question.

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. He did not file his 2015-2016 tax returns until after the SOR was issued or file his 2014 Federal income tax return until after he received the FORM. The record does not contain proof that he filed his 2014 state income tax return.[3] 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. 14-05476 at 4 (App. Bd. Mar. 25, 2016). Moreover, we note the record in this case contains tax filing information for a seven-year period (2011 to 2016). For each of those years, Applicant failed to file his income tax returns as required. In other words, he has not established any track record of voluntary complying with the tax filing requirements. Consequently, this record is devoid of any evidence that he has reformed and rehabilitated his conduct. 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 noted in another context, 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. *See, e.g.*, ISCR Case No. 01-08410 at 3 (App. Bd. May 8, 2002). Given the absence 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.

[3] Applicant's state tax authorities notified him in August 2017 that they were unable to locate transcripts of his 2014 state income tax return and were unable to provide any copies of it. FORM Response.

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