

KEYWORD: Guideline F

DIGEST: The 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 mitigating conditions. Adverse decision affirmed.

CASENO: 17-01807.a1

DATE: 03/07/2018

DATE: March 07, 2018

In Re:)	
)	
-----)	ISCR Case No. 17-01807
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 17, 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 December 1, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is a 53-year-old employee of a Federal contractor. She began working for her current employer in late 2015. She failed to file tax returns as required. She filed her Federal income tax returns for 2011-2013 in February and April 2015 and those for 2014-2016 in June 2017. Her reasons for those tax filing deficiencies included unemployment, an employer's failure to withhold taxes, and paperwork problems.

The IRS withheld Applicant's 2016 tax refund to resolve her 2010 tax deficiency. She has an installment agreement with the IRS for a 2011 tax deficiency for which she makes payments of \$500 monthly. She also submitted details for an online payment agreement for 2014. The balance for both years was about \$11,700. Although not clear from the record, it appears Applicant also owes taxes for 2012 and 2013.

Applicant has two judgments against her that are not satisfied, but she is working with a debt relief program to settle them. She is current on her student loans and settled parking tickets. She spoke to the creditor about an unresolved collection account, but the creditor could not find the account.

In 2010, Applicant became self-employed and had little to no income from 2010 to 2012. Her home was foreclosed in 2012. Her salary, however, has increased to \$130,000 and she can pay her bill. Her total outstanding debt is about \$24,500. She received financial counseling through the debt relief program. She was aware of her debts since her background interview in 2016 and only recently settled some of them.

The Judge's Analysis

Applicant did not file some of her delinquent tax returns until after issuance of the SOR, which reduces the mitigative value of such remedial action. She did not submit evidence showing her tax filing deficiencies are unlikely to recur. She took corrective action after her job was placed in jeopardy. She partially established mitigating condition 20(g),¹ but did not establish any of the other mitigating conditions. She failed to meet her burden of persuasion.

Discussion

Applicant notes the Judge cited Appeal Board decisions that applied the previous version of the adjudicative guidelines and do not address mitigating condition 20(g), which appears for the first

¹ 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."

time in the guidelines that became effective on June 8, 2017. She argues that the Judge’s reliance on those decisions “makes her analysis [of the] tax allegations erroneous.” Appeal Brief at 4. In principle, Applicant’s argument raises an important concern. The Board has previously noted that the “precedential value of Board decisions is affected to the extent those decisions involve interpretation of a provision of the Directive that is later revised or changed.”² However, in this case, Applicant has failed to identify any particular quote or proposition in the cited cases that no longer has any precedential value due to changes in the guidelines. We are unaware of what concepts in those prior decisions that Applicant is now challenging. Accordingly, this particular assignment of error fails for lack of specificity. *See, e.g.*, ISCR Case No. 09-06691 at 3 (App. Bd. May 16, 2011). To the extent that Applicant is arguing that all prior Appeal Board decisions involving tax cases are no longer of any precedential value solely due to the recent addition of mitigating condition 20(g), we do not find such an overbroad argument persuasive.

Applicant contends that the Judge erred in her analysis of mitigating condition 20(g). In her argument, Applicant notes that she filed her delinquent tax returns and entered into a payment agreement with the IRS. She also points out 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.” Appeal Brief at 5. The 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

² *See*, ISCR Case No. 06-23453 at 3-4 (App. Bd. Nov 14, 2007). The complete paragraph reads as follows:

The validity of Appeal Board precedent issued under earlier editions of the Adjudicative Guidelines is an issue in this case. The Board has previously held “. . . a Judge cannot rely on language from an earlier version of the Directive to justify the Judge’s decision and that an applicant’s security eligibility must be adjudicated under current DoD policies and standards, not past ones. Similarly, the precedential value of Board decisions is affected to the extent those decisions involve the interpretation of a provision of the Directive that is later revised or changed. Statements made by the Board in earlier decisions that are predicated on then-existing language in the Directive cannot be simply assumed—by a Judge or a party—to be applicable in later cases after the pertinent provision(s) of the Directive have been revised or changed.” *See* ISCR Case No. 02-17369 at 3-4 (App. Bd. May 23, 2006); and ISCR Case No. 02-24254 at 7-8 (App. Bd. Jun 29, 2004) (footnotes omitted). Of course, some precedent remains completely valid in the face of changes to the guidelines, because it is not dependent on the language of any specific guideline. Other precedent remains valid where the applicable language of the guideline is unchanged or the changes are not of sufficient magnitude to vitiate or overrule the substance of the precedent. However, Board decisions cannot be relied on or followed to the extent they involve precedent predicated on law or DoD policy that changed after the issuance of those decisions. Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them. *See, e.g., Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 882 (D.C. Cir. 2003) (administrative law judges cannot ignore agency policy in making rulings); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989)(administrative law judge is subordinate to head of agency or department in matters of policy); *Mullen v. Bowen*, 800 F.2d 535, 540 n. 5 (6th Cir. 1986) (decisional independence does not relieve administrative law judge of the obligation to apply agency policy). *See* ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003)(security clearance decisions must be based on current DoD policy and standards). Accordingly, no Board decision should be construed or interpreted without regard to the law and DoD policy applicable at the time the Board decision was issued.

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) as well as in considering aspects of other overlapping mitigating conditions, such as, in determining whether an applicant acted responsibly under the circumstances, whether an applicant's past financial deficiencies are unlikely to recur,³ or whether an applicant initiated good-faith efforts to resolve financial problems.⁴ *See, e.g.*, ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017) for a case decided under the new adjudicative guidelines that addresses the significance of timing in the resolution of tax problems.⁵ In the present case, the Judge concluded that Applicant filed some delinquent tax returns after the SOR was issued, which reduced the mitigative value of such remedial action. From our review of the record, we conclude that Applicant failed to establish that the Judge's weighing of the evidence in general or, more specifically, her analysis under mitigating condition 20(g) was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 16-00276 at 5 (App. Bd. Oct 30, 2017).

Applicant also argues that the Judge did not consider all relevant evidence. She cites to such matters as her unemployment, her payment arrangement with the IRS, and her efforts to resolve other debts, which included obtaining assistance from a debt relief company. The Judge, however, made findings about those matters. Applicant's arguments are not sufficient to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 17-00257 at 3 (App. Bd. Dec. 7, 2017). We gave due consideration to the Hearing Office case that Applicant cited, 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. *See, e.g.*, ISCR Case No. 15-08782 at 3 (App. Bd. Apr. 5, 2017). 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."

³ In this case, the Judge also noted that Applicant had yet to file a Federal income tax return in a timely manner since 2010, which supported her conclusion that Applicant has not established that her tax filing deficiencies are unlikely to recur.

⁴ We note that mitigating condition 20(d) (the individual initiated and is adhering to a good-faith effort to repay overdue creditor or otherwise resolve debts) also has no specified time element. Yet, the Appeal Board has long held that the timing of the resolution of debts is an important factor for the Judge to consider. *See, e.g.*, ISCR Case No. 03-12862 at 4 (App. Bd. Apr. 5, 2005) and ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013).

⁵ *See*, ISCR Case No. 14-01894 at 4-5 (App. Bd. Apr. 18, 2015) for a general discussion of the significance of timing in resolving tax problems.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board