KEYWORD: Guideline F

DIGEST: Department Counsel emphasized the lack of supporting documentation for the payments reflected in the spreadsheet and stated that FRE 1006 "requires" the proponent to make the original writings/documents available to the opposing party for examination. As reflected above, FRE 1006 is clear that "[t]he originals . . . shall be made available for examination . . . ." [Emphasis added.] Contrary to the Judge's conclusion, we interpret Department Counsel's emails as a demand to examine the original documentation if the spreadsheet was to be used as a substitute form of proof of payments. Based on the foregoing, we conclude the Judge erred by failing to reopen the record to provide Department Counsel the opportunity to examine the original documentation and, thereafter, make appropriate objections and submissions. Favorable decision remanded.

CASENO: 17-03462.a1

DATE: 12/18/2018

DATE: December 18, 2018

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT
David B. Hanley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 2, 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 hearing. On September 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip J. Katauskas 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 issues on appeal: whether the Judge's findings of fact are not supported by record evidence and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

The Judge's Findings of Fact

Applicant and his wife own and operate a company that performs defense contracts. The SOR alleges that Applicant has two Federal tax liens totaling about $118,000 and a state tax lien for about $5,500. He admitted the SOR allegations. His wife was initially responsible for the company's administrative matters, including payment of its taxes. They operated the company successfully for over five years before his wife experienced health issues. She fell behind on her responsibilities, including the payment of taxes. Some of the company's prime contractors were also late in paying invoices. When he did not receive payments on time, Applicant was forced to decide between paying back taxes or paying his employees. Applicant and his wife chose the latter course of action. These circumstances caused the tax liens.

Applicant testified that he paid about $155,000 towards the back Federal taxes but still owes over $100,000. At the time of the hearing, he was waiting for a revised installment plan to address his Federal taxes that would be based on revenue projections. The IRS told him to stop paying under the old installment agreement and to keep his taxes current until a new plan was approved. He has also been making payments on a state installment plan. From 2014 through 2016, he and his wife have remained current in paying their quarterly taxes.

As of about five months before the hearing, Applicant's wife no longer performed the administrative duties for the company. In mid-2017, Applicant hired an executive assistant and put his customers under 30-day payment terms. While the company has been paying its bills and taxes on time for the last couple of years, the state filed a $13,000 lien weeks ago for back unemployment compensation taxes because he and his wife missed a quarterly payment. He has an installment agreement to pay that non-alleged lien.

Applicant has been under a payment plan for the alleged state tax lien since 2014, has paid $2,550 towards it, and has a balance remaining of about $3,600. His Federal tax liens are under a payment plan from December 2017, and he documented payments from January through September

2018. This plan supplemented an earlier installment plan under which he paid over $151,000 from 2010 to 2015.

Applicant submitted numerous character reference letters that attest to his honesty, integrity, professionalism, and loyalty.

The Judge's Analysis

Applicant is current on his state installment agreement that he entered into well before the SOR was issued. He experienced conditions beyond his control that caused the tax deficiencies, and he gradually became aware that his wife was not fulfilling her administrative duties. From 2010 to 2015, he adhered to a repayment plan under which he paid over $151,000. Due to revised revenue projections, the IRS told him to stop payments under the initial plan, keep up with his current taxes, and await approval of a new plan.[1] In December 2017, the IRS approved a new plan to which he has adhered. He has also taken other steps to avoid recurrence of the tax delinquency. He has mitigated the state tax lien under Mitigating Condition 20(g)[2] and the Federal tax liens under Mitigating Condition 20(b).[3]

Discussion

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

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[1] In her appeal brief, Department Counsel does not challenge the Judge's conclusion that the IRS told Applicant to stop making payments on the initial installment plan.

[2] Directive, Encl. 2, 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."

[3] Directive, Encl. 2, App. A ¶ 20(b) states, "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[.]"

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.*

Department Counsel contends that some of the Judge's findings of fact are not supported by record evidence. First, Department Counsel argues the Judge erred in finding that Applicant has been in a repayment plan for the alleged state tax lien since 2014. We agree the Judge erred in that finding. The alleged state tax lien was not filed until September 2017, which was more than three years after the Judge found that payments on that lien began. Government Exhibit (GE) 2. Applicant testified that he only began that installment agreement "about a year ago" (Tr. at 54), which would have been about June 2017. That said, we do not disagree with the Judge's conclusion that this debt was mitigated under Mitigating Condition 20(g). In her brief, Department Counsel notes that documentary evidence confirms Applicant's consistent payments on this lien from December 2017 (about two months after it was filed) to September 2018 (when the record closed). Appeal Brief at 12. There is not much more Applicant could have done to resolve this debt short of paying it in full.

While the Judge's error regarding the state tax lien appears harmless, the same cannot be said about his erroneous findings pertaining to the Federal tax liens.[4] Department Counsel challenges the Judge's finding that Applicant and his wife remained current on their quarterly Federal business taxes from 2014 through 2016. Department Counsel argues this finding is based solely on Applicant's testimony and implies that he and his wife changed their behavior after the first Federal tax lien was filed. Department Counsel also asserts that this finding is contradicted by record evidence. This argument has merit. Department Counsel correctly points out that Applicant's Federal installment agreement of December 2017 lists past-due business taxes for one quarter in 2015 and each of the four quarters of 2016. Applicant's Exhibit (AE) D, Item 2, page 3.[5] As a

[4] An error is harmless if it does not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013).

[5] The Federal installment agreement reflected that Applicant owed $109,230 as of December 2017 and that he agreed to make monthly payments of $1,000 until the full amount was paid. The agreement states that taxes were owed on the following forms: IRS Form 941 (Employer's Quarterly Federal Tax Return), IRS Form 940 (Employer's Annual Federal Unemployment (FUTA) Tax Return), and possibly either IRS Form 1120 (U.S. Corporate Income Tax Return)

related matter, the Judge's conclusion in the Analysis section that Applicant complied with the IRS's guidance to "keep up with current taxes" between when he contacted the IRS for a new payment plan after 2015 and the institution of a new plan in December 2017 is also flawed. Besides the delinquent business taxes for each quarter in 2016, Applicant's installment agreement also reflects he was twice delinquent on his quarterly business taxes in 2017.

Department Counsel next challenges the Judge's finding that Applicant paid over $151,000 in back Federal taxes under an installment agreement between March 2010 and December 2015.[6] The Judge based that finding on Applicant's testimony and an Excel spreadsheet (AE H) covering the period from 2010 to 2015 that Applicant indicated was prepared by a certified public accountant (CPA). Department Counsel persuasively argues that the spreadsheet is not a summary of the payments on the initial IRS installment agreement, but instead a summary of the payments on quarterly business taxes from 2010 through 2015. She points out that Applicant testified that he became aware of his tax problem in 2010 and did not appreciate the gravity of the situation until 2013 when he reached out to the IRS. Tr. at 26-27 and 37-38. Applicant, his wife, and the IRS established an installment agreement in January 2014. Tr. at 28. Applicant, of course, could not have been making payments under the agreement before it came into existence. Additionally, he testified that he made $7,000 in payments under the agreement until he stopped in late 2014. Tr. at 28 and 39. The spreadsheet contains no entries reflecting payments of $7,000 for 2014 and no other documentary proof of those payments is contained in the record. The Judge erred in concluding that Applicant paid $151,000 under an installment agreement between 2010 and 2015.

Department Counsel further challenges the Judge's determination that the spreadsheet was proof of back tax payments and notes that no documentation (*e.g.*, cancelled checks, IRS transcripts, etc.) was provided to corroborate the payments reflected in the spreadsheet.[7] In a footnote, the Judge indicated that Department Counsel did not object to admission of the spreadsheet into evidence, cited Federal Rule of Evidence (FRE) 1006 for authority to admit "summaries in place of voluminous documentation (such as six years of tax payments)[,]" and stated the Government did not request back-up documentation. Decision at 7, n. 25. FRE 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination

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or IRS Form 1120S (U.S. Income Tax Return for an S Corporation), and lists the dates associated with each of those delinquencies.

[6] Decision at 4.

[7] We have said in the past, it is reasonable for a Judge to expect applicants to present documentation about the satisfaction of their debts. *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008). This implies something that independently substantiates the resolution of debts. *See also* ISCR Case No. 15-03363 at 2 (App. Bd. Oct. 19, 2016). Applicant testified that the information in the spreadsheet was based on IRS transcripts (Tr. at 40-41), but did not corroborate that statement.

or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

In her appeal brief, Department Counsel provided email exchanges between herself and the Judge (cc: Applicant) regarding the spreadsheet and other matters that were submitted as post-hearing exhibits.[8] In those emails, Department Counsel emphasized the lack of supporting documentation for the payments reflected in the spreadsheet and stated that FRE 1006 "requires" the proponent to make the original writings/documents available to the opposing party for examination. Department Counsel's email of September 21, 2018. As reflected above, FRE 1006 is clear that "[t]he originals . . . **shall** be made available for examination . . . ." [Emphasis added.] Contrary to the Judge's conclusion, we interpret Department Counsel's emails as a demand to examine the original documentation if the spreadsheet was to be used as a substitute form of proof of payments.[9] Based on the foregoing, we conclude the Judge erred by failing to reopen the record to provide Department Counsel the opportunity to examine the original documentation and, thereafter, make appropriate objections and submissions.

Finally, we note that AE H contains information that we do not understand. It includes a forwarding email from the CPA to Applicant that states:

> I am attaching a spreadsheet that I prepared from the data you gave me. Based on that data I came up with an amount for unpaid taxes of $145,987. The penalties and interest totaled $74,560.55. I also determined that as of this report you have paid $151,755.66 which is still more than the original monies owed. As of the date of the report you appear to not have filed 941s for 6/30 and 9/30 2015. That is why the negatives. With the negatives I show that you still owe $51,288.96. However, without them you owe $92,871.09.

We do not understand the last two sentences of that email. Specifically, how does including the missed tax payments for June and September 2015 in the calculations on the spreadsheet reduce the amount owed and, conversely, excluding those missed payments increase the amount owed? The spreadsheet also includes columns for Initial Amount, Tax Deposit, Unpaid Balances, Payment, Credit Transfer In, Penalty for Late Filing, Tax Deposit Penalty, Late Payment Penalty, Interest, and

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[8] In an email, Department Counsel requested their email exchanges be included in the record and the Judge responded that they would be included. However, they were not included. Based on that exchange, we do not consider the emails new evidence (*see* Directive ¶ E3.1.29), but material that was mistakenly omitted from the record.

[9] We recognize the Directive provides that the Federal Rules of Evidence shall be used as a guide. Directive ¶ E3.1.19. In this case, the record does not reflect the amount of original documents (*e.g.*, tax transcripts, quarterly tax returns, etc) that pertain to the six tax years in question. Consequently, it is unknown whether those documents were so voluminous to warrant substitution of the summary for the originals. Nonetheless, we conclude that it is not appropriate for a Judge to rely on FRE 1006 as a basis for using a summary to prove debt payments while at the same time not providing the opposing party the opportunity to examine the original documents as provided in that rule to corroborate the actual payments, especially, given the line of cases cited in note 7 above. Furthermore, the email forwarding the summary from the CPA to Applicant says "I am attaching a spreadsheet that I prepared from the data you gave me." That statement alone would be sufficient to question the reliability of the summary. AE H.

Amount Due. In context, we do not understand what the figures in each of those columns represent or the calculations based on them. Considering the CPA's representations in the forwarding email and Applicant's testimony, we recognize the spreadsheet *may* reflect that payments were made toward the back Federal business taxes between 2010 and 2015, but we are unable to determine the amount and frequency of those payments. In other words, Applicant may have provided evidence of significant payments, but we are unable to decipher it.[10] Given the Judge's errors identified above and the lack of clarity of the information in the spreadsheet, we believe that best course of action is to remand the case to the Judge (1) to correct the identified errors, (2) to reopen the record to provide the parties the opportunity to present additional evidence and arguments regarding the payments that Applicant made towards the back taxes (we draw the Judge's attention to the fact that Applicant is now represented by an attorney in the DOHA proceeding),[11] and (3) to issue a new decision in accordance with the Directive.

[10] On occasion summaries may be a useful tool. Certainly not all summaries are flawed. Still, this case highlights the potential for confusion or limitations which may be a function of summaries.

[11] Applicant's Counsel appears to be the same individual who was cited in the record as the CPA.

Order

The Decision is **REMANDED**.

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