

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 2, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 31, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (1) whether the Judge erred in the application of Guideline F Mitigating Conditions 20(a), 20(c) and 20 (f); (2) whether the Judge’s whole-person analysis is unsustainable because it is unsupported by the record evidence; and (3) whether the Judge erred in concluding that the Government failed to establish a case under Guideline E. Finding error, we remand the Judge’s decision.¹

Whether the Record Supports the Administrative Judge’s Factual Findings

A. The Judge made the following pertinent findings of fact:

(a) Applicant failed to file income tax returns for tax years 2000, 2001, 2002, and 2003; (b) in 2004, he filed late returns for those years, owing the IRS about \$65,000.00; (c) he has reduced the amount owed to the IRS to about \$34,000.00; (d) the tax debt was reduced by Applicant’s wife borrowing \$30,000.00, by the interception of \$7,870 worth of income tax refunds by the IRS and by Applicant and his wife charging \$6,200.00 to credit cards; (e) the IRS established an installment payment plan with Applicant wherein he is to pay \$550.00 per month; (f) this arrangement commenced in August 2007; (g) based on previous tax refund intercepts, and his monthly payments, Applicant should have his tax arrearage paid in approximately five years; (h) he had his tax returns for 2000 through 2003 prepared by a professional tax preparer, but he did not file them because for those years he owed additional tax in excess of withholdings, and he did not have the money to pay the additional tax when due; (i) the problem resulted from his failure to adjust his income tax withholding to account for income from both him and his wife; (j) also, Applicant and his wife purchased a home in 2001, and he thought, incorrectly, that the interest deductions would be sufficient to reduce his taxes to the amounts withheld; and (k) Applicant did not file automatic extensions for the filing of returns, and he did not seek advice from a credit counseling service.

B. Discussion

The Appeal Board’s review of the Administrative Judge’s findings of fact is limited to determining if they are supported by substantial record evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary

¹Applicant filed a reply brief which included documentary submissions not contained in the record below. The Board will not consider these documents as it may not consider new evidence on appeal. Directive ¶ E3.1.29.

evidence in the record. Directive ¶ E3. 1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge’s findings, we are required to give deference to the Administrative Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Regarding the Judge’s factual findings, Department Counsel on appeal does not assert that the Judge made erroneous factual findings. Rather, Department Counsel challenges the Judge’s analysis of his factual findings and the record evidence in the Judge’s “Conclusions” section. Therefore, Department Counsel’s appeal arguments will be discussed in detail with reference to the Judge’s conclusions.

Whether the Record Supports the Administrative Judge’s Ultimate Conclusions

The Judge reached the following conclusions in the case: (i) the Government established its case under Guideline F, as Applicant has a history of not meeting debts by failing to file and pay taxes owed in excess of withheld taxes in 2000 through 2003; (ii) however, Financial Considerations Mitigating Guidelines ¶ 20(a),² (c),³ and (d)⁴ apply; (iii) it has been four and one half years since his last failure to file tax returns and this is unlikely to recur and does not cast doubt on the individual’s current reliability; (iv) although Applicant did not seek financial counseling, there are clear indications that his tax indebtedness is being resolved and is under control; (v) he has paid over half of his delinquent taxes, and it appears that he should have his taxes paid in about five years; (vi) while he still has over \$30,000.00 of taxes to pay, he has taken sufficient steps and initiated a good-faith effort to repay the IRS; (vii) this is a very close case; (viii) Applicant’s failure to file his tax returns is irresponsible but was not done with the intent to defraud the government, as he intended to pay as he obtained adequate funds; (ix) the new adjudicative guidelines for Personal Conduct has more limited language than the old adjudicative guidelines; (x) none of the evidence raises separate security concerns under the Personal Conduct guideline; (xi) the government failed to establish a case under Guideline E; and (xii) Applicant has had his share of problems, but his military service trained him to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests.

²“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.”

³“the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.”

⁴“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”

An Administrative 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 Appeal Board may reverse the Administrative 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. We review matters of law *de novo*.

Department Counsel asserts on appeal that the Judge erred in applying certain Guideline F mitigating factors (specifically identified in a preceding paragraph). The facts of this case are such that the Board cannot say that, as a matter of law, the Judge could not apply Guideline F Mitigating Conditions 20(a), 20(c) and 20 (d) to Applicant’s benefit. However, as argued additionally by Department Counsel on appeal, the Judge has significantly undercut the validity of his analysis of matters in mitigation in this case by focusing only on the current status of the debt owed the IRS and by not considering Applicant’s overall debt picture. While it is true that the outstanding debt to the IRS has been substantially reduced through refund intercepts and payments made by Applicant and his wife, Applicant and his wife have made most of this progress by incurring new debt in the form of a \$30,000.00 loan and \$6,200 worth of credit card charges. The record evidence clearly indicates that Applicant has, in effect, done little more than transfer a large part of his outstanding IRS debt to new, apparently current, debts with private lenders. Any comprehensive evaluation of Applicant’s current financial status (which includes a determination of just how mitigating Applicant’s partial satisfaction of his IRS debt is in the context of the totality of the record evidence) must contain an acknowledgment of this fact along with some analysis of how it affects Applicant’s security worthiness. Yet the “Conclusions” section of the Judge’s decision contains no such analysis, and the Judge instead restricts his comments solely to the reduction of the IRS debt and the plan to retire the debt in the future. By failing to discuss the significance of the debts incurred to reduce the IRS debt, including some evaluation of Applicant’s future ability to repay the private debts in addition to the remaining IRS debt, the Judge ignored an important aspect of the case. This was error.

Additionally, Department Counsel asserts that the Judge’s conclusion that the government failed to establish a case under Guideline E is error. Department Counsel’s contention is persuasive.

The Judge begins his analysis of the case under Guideline E by contrasting the language between the old (pre-September 1, 2006) adjudicative guidelines and the new adjudicative Guidelines. The Judge asserted that the new adjudicative guidelines for Personal Conduct have more

limited language and focused on Guidelines ¶ 16 (c)⁵ and (d)⁶ in support of the proposition. The Judge went on to conclude that because Applicant's failure to file income tax returns between 2000 and 2003 could support a basis for disqualification under Guideline F⁷, none of the evidence raises separate security concerns under Guideline E, relying on the "not sufficient for an adverse determination under any other single guideline" language in ¶ 16 (c) and the "not explicitly covered under any other guideline" language in ¶ 16(d).

In this instance, the mere fact that failure to file income taxes is available as a disqualifying factor under Guideline F does not undercut the vitality of Guideline E as a separate avenue of inquiry regarding Applicant's security clearance. The SOR allegation brought under Guideline F is not based on Applicant's failure to file income tax returns, as the Judge's analysis under Guideline E suggests. Rather, the SOR allegation under Guideline F is based explicitly on the debt owed the IRS and says nothing about Applicant's failure to file returns.⁸ Indeed, the Judge concluded that the government had established its case under Guideline F by referencing three disqualifying conditions,

⁵"credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information."

⁶"credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations;
- (4) evidence of significant misuse of Government or other employer's time or resources;"

⁷The Judge relies on the language of Guideline F, ¶ 19(g), which states: "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;"

⁸The SOR allegation in question (allegation 1.a.) reads as follows: "You are indebted to the Internal Revenue Service in the amount of approximately \$ 65,000, in taxes, penalties and interest for the tax years 2000,2001, 2002 and 2003. As of March 17, 2007, this debt had not been satisfied."

only one of which was disqualifying condition ¶ 19 (g).⁹ The other two disqualifying conditions were based upon what is the gravamen of the government’s concerns in a Guideline F case– failure to live within ones means and failure to satisfy debts and financial obligations. Given the explicit language of the SOR allegation in this case, and given the basic nature of the government’s concerns under Guideline F, the Judge had no rational basis to conclude that no separate security concerns were raised by Applicant’s failure to file income tax returns as required by law. Obviously, the failure to file tax returns in an of itself, apart from any considerations of financial indebtedness, is a matter that is appropriately addressed under Guideline E, which by its own terms deals with conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

The Board is not convinced that the new language in Guideline E creates the limitations the Judge suggests, nor does the language fundamentally alter the historic scope and purpose of Guideline E. In evaluating the new language in Guideline E, the Board will not read the portions cited by the Judge in isolation, nor will it construe or interpret provisions of the Directive in a manner that renders other portions of the Directive meaningless or superfluous, nor in a manner that conflicts with the underlying policies and goals of the Industrial Security Clearance program. *See, e.g.*, ISCR Case No. 02-11454 at 4 (App. Bd. Jun. 7, 2004); ISCR Case No. 02-02195 at 5 (App. Bd. Apr. 9, 2004). Instead, the Board will construe this language with reference to the Directive as a whole, the overall purposes of the Industrial Security Program, and longstanding precedents.

The list of potential disqualifying conditions under Guideline E follow ¶ 15, which reads in pertinent part, “*The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” Paragraph 15 sets forth the context in which the Judge should have considered Applicant’s personal conduct, as set forth in the SOR. Paragraph 16 then opens with: “Conditions that could raise a security concern and may be disqualifying *include:*” (emphasis added). This language strongly undercuts the Judge’s interpretation that Guideline E disqualifying conditions ¶¶ 16(c) and 16(d) are exclusive in scope and operate to restrict general trustworthiness and judgment assessments under Guideline E to a relatively narrow range of cases. The Judge’s analysis is further undercut by the following language in the Directive (Enclosure 2, ¶ 2(d)): “although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.” The identical language appeared in the earlier version of the Directive (Enclosure 2, Item E2.2.4) and therefore predates the adoption of the language that the Judge relied upon for his narrow interpretation, which he used to dismiss the government’s case under Guideline E without considering the substantive issues raised. The quoted language clearly contradicts the Judge’s notion that certain behavior, even if only potentially disqualifying under

⁹The others were ¶ 19(a) (inability or unwillingness to satisfy debts) and ¶ 19 (c) (a history of not meeting financial obligations).

another Guideline, cannot serve as an independent basis for consideration under Guideline E. The perpetuation of the language in Enclosure 2, ¶ 2(d) does two things: (1) it continues the longstanding tenet that specific behavior can have security significance under more than one guideline and (2) by focusing on the concepts of questionable judgment and irresponsibility, it contemplates that behavior will have independent security significance under Guideline E in a broad range of cases.

The Judge specifically commented on Applicant's failure to file income tax returns when analyzing the case under Guideline F. The Judge noted that: "His failure to file is irresponsible but was not done with the intent to defraud the government, because he intended to pay as he obtained adequate funds." While the Judge's comments could be construed as the product of an analysis of Applicant's judgment akin to the type of analysis that would have taken place under Guideline E, it is not clear from the Judge's decision that he took into consideration the full range of factors described under Guideline E and that he engaged in such analysis independent of the financial considerations analysis in the case. For these reasons, an analysis under Guideline E of Applicant's failure to file his income tax returns is needed.

Order

Department Counsel has met its burden of demonstrating harmful error that warrants remand. Pursuant to ¶ E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the DOHA Hearing Office with instructions to assign a Judge to issue a new decision after correcting the errors identified in this Decision, consistent with the Judge's obligations under Directive, Additional Procedural Guidance, ¶¶ E3.1.35 and E3.1.25.¹⁰

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

¹⁰The Board notes that the Administrative Judge who decided this case is no longer employed with the Defense Office of Hearings and Appeals.

Signed; Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed; Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board