

KEYWORD: Guideline F

DIGEST: In his Answer to the SOR, Applicant admitted that he was late in filing his 2010-2012 Federal and state income tax returns. By failing to file those tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. Favorable decision reversed.

CASE NO: 14-00221.a1

DATE: 06/29/2016

DATE: June 29, 2016

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 March 4, 2014, 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 March 9, 2016, 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 is a 47-year-old employee of a federal contractor. He began working for that employer in September 2013. He is divorced and holds an associate's degree. He failed to file his Federal and state income tax returns for 2010, 2011, and 2012. He primarily attributed that failure to procrastination. For his 2010 tax returns, Applicant explained that he misplaced tax documents concerning the sale of a home. Because he wanted to file his tax return in chronological order, he decided to file the 2010 tax returns first. In the spring of 2013, he located the missing documents and filed his 2010 tax returns before he received the SOR. In his Response to Department Counsel's File of Relevant Material (FORM), he provided copies of his 2010, 2011, and 2012 Federal and state income tax returns. For each year in question, he received a refund from both the Internal Revenue Service and the state taxing authority.

Applicant also stated that working overseas increased the difficulty of getting documents to his accountant in a timely fashion. He acknowledged that it was his legal obligation to file his income taxes on an annual basis, but it was also within his legal right to receive refunds within three years of the date when the tax returns are due.

### **The Judge's Analysis**

The Judge found that, due to Applicant's failure to file his 2010, 2011, and 2012 Federal and state income tax returns in a timely manner, disqualifying condition 19(g)<sup>1</sup> was established. The Judge noted that Applicant found it can be difficult in getting documentation to his accountant in a timely basis due to working overseas, that he filed the income tax returns in question, and that he understands his obligation to continue to file them on a timely basis in the future. The Judge concluded that mitigating conditions 20(a)<sup>2</sup> and 20(c)<sup>3</sup> applied, and the record evidence mitigated the security concerns arising from his history of failing to file his tax returns in a timely manner.

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<sup>1</sup> Directive, Enclosure 2 ¶ 19(g) states, "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

<sup>2</sup> Directive, Enclosure 2 ¶ 20(a) states, "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, and good judgment."

<sup>3</sup> Directive, Enclosure 2 ¶ 20(c) states, "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."

## Discussion

Department Counsel argues that the limited record in this case does not support the Judge's favorable mitigation analysis. He notes that Applicant did not satisfy his 2010 tax filing obligation until after submission of his security clearance application and did not file his 2011 and 2012 tax returns until after issuance of the SOR. He contends that the Judge, in focusing her analysis on Applicant's resolution of his tax filing obligations, failed to assess adequately the overriding issues of Applicant's lack of judgment and his history of failing to abide by rules and regulations. He asserts that Judge took the position of "no harm, no foul," which the Appeal Board has discounted in the past.<sup>4</sup> 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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 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 (9<sup>th</sup> 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. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

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. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

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<sup>4</sup> ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). ("The fact that Applicant has purportedly corrected his federal tax problem, and the fact that he is now motivated to prevent such problems in the future, does not preclude careful consideration of Applicant's security worthiness in light of his longstanding prior behavior evidencing irresponsibility. . . . Department Counsel argues that the Judge took a "no harm, no foul" approach to Applicant's course of conduct and employed an "all's well that ends well" analysis that did not give appropriate weight to Applicant's multi-year inaction regarding his income tax filing and payment duties. The Board concludes that these are fair characterizations of the Judge's resolution of the case. . . . By failing to analyze and discuss these matters in any depth, the Judge has failed to consider an important aspect of the case.") (Citations omitted).

Security requirements include consideration of a person's judgment, reliability, and a sense of his or her 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 and/or state 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 his security clearance application, Applicant stated that he was expecting refunds and had not submitted the tax returns "yet as there is a three year limitation on filing for a refund." In his Answer to the SOR, Applicant admitted that he was late in filing his 2010-2012 Federal and state income tax returns. By failing to file those tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014).

Much of the Judge's mitigation analysis is predicated upon her conclusion that Applicant has resolved his tax filing problems. Applicant acknowledged that, with the exception of misplacing important documents for this 2010 tax returns, the main reason for his tax filing delays was procrastination. Department Counsel argues the timing of the resolution of Applicant's tax filing problems is relevant in determining the extent to which he has demonstrated mitigation. *See* ISCR Case No. 09-07551 at 4 (App. Bd. Mar. 1, 2011). Department Counsel noted Applicant stated in his security clearance application that he expected to file his 2010-2012 tax returns by the end of 2013. In his Answer to the SOR, he later stated that he expected to file his 2011 tax returns before Thanksgiving 2014 and expected to file his 2012 and 2013 tax returns by the end of 2014. His 2010 Federal and state income tax returns were apparently filed in October 2013 (30 months late); his 2011 tax returns were apparently filed in October 2014 (30 months late and after receipt of the SOR), and his 2012 tax returns were apparently filed in June 2015 (26 months late and after receipt of the FORM).<sup>5</sup> The record does not reflect if he filed his 2013 tax returns. Such actions to resolve his tax filing problems were apparently motivated either to obtain particular tax refunds or because his security clearance was in jeopardy and do not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets. Overall, the Judge's favorable mitigation determination runs contrary to the weight of the limited record evidence and is not sustainable.

Department Counsel also challenges the Judge's determination that Applicant understands his obligation to file his tax returns in a timely manner in the future. Department Counsel points out that the Judge cited no evidence in the record in support of that conclusion and notes that, in responding to the FORM, Applicant stated, "While it is an obligation of mine to file taxes on an annual basis, it is also within my legal right to file and receive my tax refunds within 3 years of the date the tax returns are due." This statement does not support a finding that Applicant understands the filing requirements and undercuts the Judge's determination that Applicant has reformed himself and will comply with those requirements in the future.

We conclude that the Judge's decision failed to consider important aspects of the case and

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<sup>5</sup> None of Applicant's state income tax returns for 2010-2012 in the record were signed or dated by him or his tax preparer. Applicant did not sign or date his 2010 Federal income tax return, but it was signed and dated by his tax preparer. He signed his 2011 and 2012 Federal income tax returns by using a number.

improperly relied on a credibility assessment in place of record evidence. The decision ran 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.

**Order**

The Decision is **REVERSED**.

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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