

KEYWORD: Guideline F

DIGEST: Given Applicant's repeated failure to file tax returns and timely to pay taxes, the weight of the evidence does not support the Judge's favorable conclusions. Favorable decision reversed.

CASENO: 14-02694.a1

DATE: 12/09/2015

DATE: December 9, 2015

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In Re:)	
)	
-----)	ISCR Case No. 14-02694
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

John Cromwell, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 2, 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 hearing. On August 11, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Claude R. Heiny 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 favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant seeks a security clearance in connection with his job at a Defense contractor. He has worked at this position since 2010. Applicant served in the U.S. military from 1998 to 2003, achieving the grade of E-5. Applicant enjoys an excellent reputation for job performance, dependability, honesty, trustworthiness, and work ethics. He has received commendations for his duty performance both from the military and his civilian employer.

After leaving the military, Applicant experienced two months of unemployment. He held down several civilian jobs followed by another two months of unemployment before going to work for his current employer.

Applicant worked for a while overseas. While doing so, his annual salary was \$160,000, of which a substantial portion was exempt from Federal tax as foreign-earned income. In 2008, upon his return from overseas, Applicant was not able to pay his taxes. He did not pay his Federal income tax from 2008 through 2013. In 2008, Applicant entered into an agreement with the IRS to pay \$75 a month. He stated that he also paid an additional \$2,000 annually on four occasions.

In 2013, Applicant and his wife separated. He provides \$700 a month in child support as well as medical insurance for his family. Applicant is current on his support obligations. In addition to his tax obligations, Applicant had a collection account alleged in the SOR as \$8,380, which was for a credit card that became delinquent due to his having to maintain two households following his marital separation. His debts also include a cell phone debt slightly over \$1,500, and a charged-off automobile debt alleged at over \$800, medical debts, etc. Applicant stated that when his wife left him he owed a \$600 cable bill and a \$500 utility bill.

In 2012, Applicant began making bi-weekly payments of \$75 on his tax liability, and, as of August 2014, he was current on his payments. The Judge noted that Applicant’s 2012 tax return was not part of the record, although a letter from the IRS showed that there was a debt cancellation of \$8,817 during that tax year, which increased Applicant’s tax liability. By September 2014, Applicant’s tax liability for 2008 through 2013 was nearly \$39,500. He had agreed to pay the IRS

\$150 every two weeks and, in February 2015, he entered into a new repayment agreement of \$275 every two weeks. As of February 2015, Applicant's total tax liability was over \$46,000.

In his response to DOHA interrogatories, Applicant disputed two of the debts. Applicant claimed to know nothing about three debts that he had discussed in his clearance interview. He promised to obtain a loan from his retirement account and pay his "valid SOR debts." Decision at 4. Applicant paid or settled four debts, ranging from \$79 to \$450. The creditor of the large credit card debt offered to settle it for half the amount owed. Applicant was going to contact the creditor to see if the offer was still valid. He is also awaiting a response from the owner of the \$1,500 cell phone debt, the amount of which he disputes. He had no information about a \$1,300 charged-off account. Applicant recently took out a \$2,500 loan to pay for repairs to his car. He has about \$6,000 in his retirement plan. Applicant has not had credit counseling. He is concentrating on paying his smaller debts.

The Judge's Analysis

The Judge stated that Applicant had been paying the IRS \$75 every two weeks since 2010. He noted Applicant's contention that he had had a payment agreement since 2008, noting also, however, that Applicant had provided no documentary evidence as to its contents or to show any payments thereunder. The Judge noted that, in February 2015, Applicant upped his payments to \$275 biweekly and that the amount of the IRS debt had increased to \$46,000. He stated that Applicant's tax returns have now been filed. He also cited to evidence that Applicant has paid four of his SOR debts and that a creditor has offered to settle another for half the amount owed. The Judge extended favorable application to Mitigating Conditions 20(c)¹ and 20(d).² Citing to evidence that Applicant had experienced a marital separation, he also concluded that Mitigating Condition 20(b)³ had limited applicability. He stated that he believes Applicant will continue to honor his IRS payment plan until the tax debt is extinguished.

In the whole-person analysis, the Judge concluded that Applicant's debts were not the kind that are associated with poor self control. Rather, his problems resulted from his not withholding a sufficient amount of taxes. He concluded that Applicant had established a track record of debt payment sufficient to mitigate the concerns arising from his financial problems.

Discussion

¹Directive, Enclosure 2 ¶ 20(c): "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[.]"

²Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

³Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances."

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions “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).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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* ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge’s favorable decision was unsupported by the record evidence. He contends that the two Mitigating Conditions that the Judge applied, while having some relevance to individual debts, were not sufficient to mitigate the totality of Applicant’s security concerns. For example, he cites to the Judge’s finding that Applicant had been paying the IRS some amount every month since 2008. However, Department Counsel goes on to point out that, even while he was making these payments, Applicant was still not paying taxes for subsequent years. Given this evidence, and noting other evidence, such as the ballooning of Applicant’s tax debt over the course of time due to interest and penalties,⁴ it is not reasonable to conclude that there are “clear indications” that the tax delinquencies are actually being resolved.⁵

As noted above, Applicant’s SOR alleges not only delinquent back taxes but also Applicant’s failure to file returns from 2010, 2011, and 2012. A person who fails repeatedly to fulfill his or her legal obligations, such as filing income tax returns 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. 14-01894 at 5 (App. Bd. Aug. 18, 2015). “Failure to file income tax returns suggests that an applicant has a problem with complying with well-established government rules and systems.

⁴The Judge found that Applicant’s tax liability for 2008 through 2013 was \$25,000. By September 2014 it had increased to \$39,421 and as of the date of the hearing it stood at \$46,267. Decision at 4.

⁵The Judge’s questioning of Applicant raised the possibility that the size of his tax debt for 2008 may have been attributable to failure to take advantage of the foreign earned income credit. The Judge advised Applicant that he should look at his records for 2007 and 2008 to determine if his tax liability might be overstated. Tr. at 55. Through counsel Applicant advised that he would look into this matter, as it was “very important.” Tr. at 56. Applicant submitted several documents after the hearing but nothing that addressed this issue. It is the applicant’s task to present evidence in mitigation. Directive ¶ E3.1.15.

Voluntary compliance with such rules and systems is essential for protecting classified information.” ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002).

We find persuasive Department Counsel’s argument that there is nothing in the record reasonably to explain Applicant’s failure to have filed his tax returns. Indeed, Applicant’s failure to file returns during a time in which he claims he was making payments for an earlier tax delinquency (and was presumably on notice as to the consequences of failing to pay taxes) cannot be fairly attributed to inadvertence or simple neglect and raises serious questions about his judgment and reliability. Even though he presented returns for 2010 and 2011, both filed in September 2014, as well as an IRS letter that referenced a return for 2012,⁶ there is nothing to explain Applicant’s failure and little from which to infer that he will necessarily comply with tax rules and regulations in the future.⁷ The Judge’s mitigation analysis contains no discussion at all concerning Applicant’s failure to file his returns, other than to note that they have finally been filed, lending plausibility to Department Counsel’s argument that the Judge may well merely have substituted a favorable determination of Applicant’s demeanor for record evidence. *See, e.g.*, ISCR Case No. 11-00193 at 4 (App. Bd. Jan. 24, 2013).

We also note the Judge’s reliance upon the creditor’s offer to settle the \$8,380 credit card debt, an obligation that Applicant incurred between 2001 and 2003. Tr. at 31. The offer was dated August 12, 2014, and included the following: “[Y]ou can settle your account for **\$4189.82**. Simply mail your payment along with the coupon at the bottom of this page. This offer expires thirty (30) days from the date of this letter. Please note, we are not obligated to renew this offer” (emphasis in the original). Settlement Offer, included in Government Exhibit (GE) 2, *Answers to Interrogatories*. There is no evidence that Applicant attempted to contact the creditor, much less that he made any payments. Nor is there any reason necessarily to conclude that the offer still holds. To the contrary, Applicant stated at the hearing “I still have to contact them to see if they’re willing to make the payment arrangement for that.” Tr. at 32. This is simply a promise for future action rather than a step actually taken to address this debt. *See, e.g.*, ISCR Case No. 14-04565 at 2 (App. Bd. Sep. 18, 2015) for the proposition that promises to resolve debts in the future are not a substitute for a track record of repayment. The Judge’s findings, and the record evidence upon which the findings are based, do not support a conclusion that the terms of either Mitigating Condition (c) or (d) have been satisfied in regard to this debt.

There are other aspects of the case that support Department Counsel’s argument on appeal. For example, Applicant has not resolved the \$1,500 cell phone account, which became delinquent in 2008 (Clearance Interview at 8, included in GE 2), nor had he demonstrated satisfaction of a

⁶This letter, Applicant Exhibit D, advised Applicant that he had under-reported his 2012 income by more than \$8,800, due to the cancellation of a debt.

⁷*See, e.g.*, Tr. at 22: “[Judge]: There came a time when the taxes were filed late. What happened? [Applicant]: Taxes were filed late—I believe you’re referring to 2010, 2011. I did not know this till I received my Statement of Reasons, and then that is when I got ahold of . . . [IRS Official], who . . . helped me out greatly.” Applicant filed his 2010 and 2011 tax returns in mid-to- late September 2014. Applicant did not explain why he was unaware that they were late.

number of small debts, one of which is only \$45. Moreover, we note the Judge's finding that, in his answers to DOHA interrogatories, Applicant stated that he knew nothing about debts that he had discussed six months prior in his clearance interview. Decision at 4.

All in all, the record shows that Applicant has resolved only four of thirteen allegations of delinquent debt and failed to file tax returns for three consecutive years. He failed to file returns and pay the taxes at a time in which he was paying an earlier tax delinquency. Indeed, three of the delinquent debts that Applicant has not resolved are for Federal income taxes, and his current payment plan with the IRS was signed the day before the hearing. Tr. at 45. By the close of the record Applicant had not accepted, or even contacted the creditor about, a settlement offer for his \$8,380 credit card debt and, as the Judge found in the Analysis portion of the Decision, Applicant has not received responses or had contact with creditors for five collection accounts totaling about \$4,000. Despite Applicant's having experienced a marital separation, a circumstance not within his control, the record does not support a conclusion that Applicant has shown responsible action in regard to his financial problems, viewed as a totality. The Judge's decision, viewed as a whole, failed to discuss important aspects of the case and ran contrary to the weight of the record evidence. The decision is not sustainable.

Order

The Decision is **REVERSED**.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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