

KEYWORD: Guideline F

DIGEST: Applicant failed to pay withholding taxes for his employees. The Judge reasonably explained that he could not favorably apply mitigating conditions because of Applicant's eight year delay in attempting to resolve the debts and failure to pay the monthly payments. Adverse decision affirmed.

CASENO: 09-07064.a1

DATE: 11/18/2011

DATE: November 18, 2011

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In Re: )  
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 ----- ) ISCR Case No. 09-07064  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 6, 2010, DOHA 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 29, 2011, after the hearing, Administrative Judge James F. Duffy 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 failed properly to apply the Guideline F mitigating conditions. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor, for whom he has worked since April 2009. A high school graduate, he is divorced, with two minor children.

From 1997 to 2002, Applicant and his brother operated a business. The business experienced a downturn in 2000, and customers delayed paying. Although their business declined, Applicant and his brother did not lay off employees. However, they failed to pay their employees’ payroll taxes. This resulted in a substantial tax deficiency. Since closure of this business, Applicant has started two others, which also failed.

These business failures resulted in Applicant acquiring numerous delinquent debts, for such things as telephone services, a credit card, vehicle loans, etc. The Judge found in Applicant’s favor for all the SOR debts except for two: a state tax lien of \$344 and an IRS tax lien of \$128,000. The Judge ruled in Applicant’s favor on a separate IRS lien of \$10,000. In addition, Applicant filed for Chapter 7 bankruptcy protection, but the court dismissed the petition. In 2010, he filed a second petition for Chapter 7 bankruptcy protection that resulted in discharge of his debts.

Applicant incurred the \$128,000 IRS lien in 2002. In April 2011, he offered the IRS a repayment plan, which the agency accepted the following June. Under that plan Applicant is to pay \$200 a month until the debt is paid off. Applicant lives with his ex-spouse and shares expenses with her.

The Judge noted his answer to DOHA interrogatories, dated December 2009, to the effect that he has a net monthly income remainder of \$385. However, the Judge also cited Applicant’s 2010 bankruptcy petition, which showed a net monthly remainder of \$20.

Applicant enjoys an excellent reputation for the quality of his job performance and for his honesty, trustworthiness, and responsibility.

In the Analysis, the Judge addressed the security significance of the state and IRS tax liens. Characterizing the state tax debt as “minor,” the Judge devoted his attention principally to the IRS

debt. He acknowledged that Applicant's financial situation was affected by events outside his control, his business failures, divorce, and unemployment.

However, the Judge also concluded that Applicant's decision not to pay withholding tax for his employees was a matter within his control. Moreover, the Judge stated that the record did not establish that Applicant will necessarily be able to make his payments under his agreement with the IRS. The Judge stated that Applicant's

eight-year delay in attempting to resolve this tax deficiency casts doubt on his current reliability, trustworthiness, and good judgment. These last-minute efforts fail to mitigate the security concerns that arise from the remaining federal tax lien. Given the doubtful nature of his current plan for resolving this tax lien and his lengthy period of inaction in addressing it, I cannot find that he acted "responsibly given his circumstances and develop[ed] a reasonable plan for repayment, accompanied by 'concomitant conduct,' that is, actions which evidence a serious intent to effectuate the plan." Decision at 10.<sup>1</sup>

Applicant's brief challenges the Judge's application of the mitigating conditions to the state and IRS tax debts described above. As noted above, the Judge reasonably explained that the mitigating conditions could not be favorably applied to the delinquent tax debts cited in SOR paragraphs 1(b) and 1(c) for two reasons: Applicant's failure to make monthly payments to reduce the debts and his eight year delay in attempting to resolve the tax debts. The Judge's explanation is sustainable. The brief also challenges the Judge's treatment of a tax debt alleged in SOR ¶ 1(d). However, the Judge resolved this debt in Applicant's favor.

The record supports a conclusion that the Judge examined the relevant data and articulated 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 Judge's adverse 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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

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<sup>1</sup>See Directive, 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[.]" The Judge quoted ISCR Case No. 09-08462 at 3 (App. Bd. May 31, 2011) in his discussion of responsible action.

**Order**

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

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

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board