

Date: August 24, 2023

In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 20-03485

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 30, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline F (Financial Considerations) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective Jun. 8, 2017) and Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 15, 2023, after considering the record, Administrative Judge Philip J. Katauskas granted Applicant security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Government does not challenge the Judge’s favorable Guideline B findings. Those findings are not addressed below. On appeal, the Government raises the following issues: whether the Judge’s application of the Guideline F mitigating conditions and his whole-person analysis was arbitrary, capricious, or contrary to law. For reasons stated below, we reverse the Judge’s decision.

The Judge's Findings of Fact and Analysis

Under Guideline F, the SOR alleged that Applicant had three judgements entered against her totaling about \$41,700. These were entered in 2009, 2013, and 2014.

Applicant and her husband have seven children. She and her husband now live apart from each other and have almost no contact. In the early 2000s, her husband was doing well financially and providing her support. By the mid-2000s, he encountered financial difficulties. Around that time, she was unemployed. With her children then being between the ages of five and fifteen, she fell behind on paying bills and eventually stopped making payments. At present, she does not have the financial ability to pay the delinquent debts. Her primary financial sources are government assistance for her mother's care, support from her children, and income from two part-time jobs.

Applicant's credit report does not list the three alleged judgments. It lists only four accounts that are reported as current. Applicant disclosed the three judgments in her 2019 security clearance application (SCA), and also disclosed an unalleged state tax delinquency of about \$22,900 for 2016 and 2017 for which she has an agreement to make monthly payments of \$800.

The evidence established that Applicant has an inability to satisfy debts (AG ¶ 19(a)) and a history of not meeting financial obligations (AG ¶19(c)). However, those security concerns are mitigated because they arose from an unforeseen chain of circumstances that happened years ago, and she has acted in a financially responsible manner.

Discussion

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). Having admitted the SOR allegations pertaining to the three judgments, Applicant had the burden of producing evidence to mitigate the security concerns arising from those debts. Directive ¶ E3.1.15. She also had the burden of persuasion in obtaining a favorable decision. *Id.* 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 national security eligibility will be resolved in favor of the national security." AG ¶ 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 3-4 (App. Bd. Aug. 28, 2015).*

In his Guideline F analysis, the Judge applied two mitigating conditions, *i.e.*, AG ¶ 20(a), “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;” and AG ¶ 20(b), “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 contends the Judge misapplied both of those mitigating conditions. These assertions of error are persuasive.

AG ¶ 20(a)

We agree with the Judge that the age of the alleged debts and the fact that the only credit report in the record does not reflect that Applicant has any delinquent debts were important matters to consider. However, the unalleged tax debt was also a significant matter that merited consideration in evaluating the mitigating evidence. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017) (it is well established that a Judge may consider unfavorable non-alleged matters for certain limited purposes, such as in evaluating an applicant’s evidence in mitigation and in applying the whole-person concept).

The evidence regarding the unalleged property tax debt is somewhat unusual. In her 2019 SCA, Applicant disclosed that she has resided at the same location since early 2008. Government’s File of Relevant Material (FORM), Item 2 at 11-12. This is also the location where her mother, five of her children, and one of her sisters reside. *Id.* at 22-28 and 32. She further disclosed that she owed about \$22,954 in delinquent taxes to the county treasurer for 2016 and 2017 and that she pays \$800 each month on that debt. *Id.* at 55. In her FORM Response, Applicant indicated that she had paid \$25,000 towards this property tax debt, and she is still making payments. As supporting evidence, she provided a tax receipt from the county treasurer. FORM Response at 6. This document acknowledges that \$25,000 in taxes was paid on this property for 2019 and 2020. However, the tax receipt is addressed to a third party. The name on that document is neither Applicant’s, her mother’s, any of her children’s, nor her sister’s. The relationship between Applicant and that third party is unknown. Nevertheless, from her SCA and FORM Response, Applicant is clearly accepting responsibility for the delinquent property taxes.

The tax receipt also reflects ongoing property tax delinquencies. It indicates that over \$6,000 is owed for 2018, over \$600 remains outstanding for 2020, and over \$10,000 is due for 2021. This document was created in May 2022 and reflects no payments have been made towards the 2021 property taxes. The Judge failed to address this evidence, which undercuts his analysis under AG ¶ 20(a). This evidence raises concerns about whether Applicant’s financial problems are under control or are unlikely to recur. It also casts doubt on Applicant’s current reliability, trustworthiness, and good judgment.

AG ¶ 20(b)

In applying this mitigating condition, the Judge basically concluded that Applicant acted responsibly under the circumstances. The record, however, contains no evidence of Applicant making any payments towards the alleged judgments or of her taking any action to resolve these debts. The Judge does not explain the basis for his conclusion that Applicant “behaved in a financially responsible manner.” Decision at 8.

Presumably, the Judge reached this conclusion because Applicant could not afford to make any payments on the alleged debts. Only two statements in the record support such a financial inability. These are:

(1) In her 2019 SCA, Applicant stated, “I could not make a payment arrangement [regarding each of the judgments] due to my fallback of payment” or words to that effect. FORM, Item 2 at 55-57.

(2) During her background interview, Applicant reportedly stated that she “does not have the money to pay these creditors at this time.” FORM, Item 3 at 7.

The record, however, does not contain any statements from Applicant about her income, expenses, or net monthly remainder. Furthermore, the record is devoid of any evidence to corroborate her inability to make payments on the alleged debts. It does not contain any income tax transcripts or monthly pay stubs. Nor does it contain a budget or similar information.

Little is known about Applicant’s assets, but what evidence exists regarding her financial means is noteworthy. First, in the Foreign Financial Interests Real Estate Section of her 2019 SCA, Applicant disclosed that she and her husband owned an apartment in a Middle Eastern country. They sold it for about \$200,000 in early 2013. Her husband asked that they give the proceeds of the sale to their daughter. FORM, Item 2 at 42-43 and 55-56. This sale occurred after one of the alleged judgments was entered against her and during the same month in which another judgment was entered. Second, during her background interview, Applicant stated that her “husband was a very successful businessman” in a foreign country. FORM, Item 3 at 5. He is the plaintiff in a pending \$14 million lawsuit. *Id.* She stated, “I am keeping my Bank account open in Belgium in case my husband gets his money it will be transferred to my account only and not to invest the money in Belgium. When this happen (sic), the money will be invested in the US.” FORM Response at 1 and 6. Third, Applicant also indicated that she paid over \$25,000 in property taxes for 2019 and 2020, which tends to show that her residence is substantial. *Id.* Finally, Applicant’s SCA reflects that she traveled to a Middle Eastern country from about March 2010 to January 2011 to visit family or friends and that that she traveled to that same country from about March 2013 to August 2014 for the same reason. She also twice traveled to a country neighboring the United States for shorter periods (1-5 days and 11-20 days) to visit family and friends in 2017 and 2018. FORM, Item 2 at 47-50. Each of these foreign trips occurred while one or more of the alleged debts was delinquent. The Judge, however, did not discuss this significant evidence.

In short, the record contains a paucity of evidence about Applicant's financial situation. The evidence that does exist is less than supportive of the Judge's conclusion that Applicant behaved in a financially responsible manner. The Judge did not adequately address the contradictory evidence. Based on our review, we conclude the record contains insufficient evidence to support the Judge's conclusion that Applicant acted responsibly under the circumstances.

Conclusion

Considering the record in its entirety, we conclude that the Judge's decision is arbitrary and capricious. It is not sustainable because it fails to consider important aspects of the case, fails to articulate a satisfactory explanation for a key conclusion, and runs 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 Guideline F security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board