KEYWORD: Guideline F; Guideline E

DIGEST: Applicant did not corroborate her claim to have paid off a significant debt. many of her debts were paid off only after having been reduced to judgment. The consent judgment against her was not consistent with her claim that she did not owe the debt in question. The record did not support the Judge's conclusion that Applicant honestly forgot information concerning her financial situation in answering the questions on the application. Favorable decision reversed.

CASE NO: 09-07551.a1

DATE: 03/01/2011

DATE: March 1, 2011

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 17, 2010, 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 November 26, 2010, after the hearing, Administrative Judge Erin C. Hogan 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 issues on appeal: whether the Judge erred by failing to apply Financial Considerations Disqualifying Condition (FCDC) 19(b); whether the Judge erred in her application of the Financial Considerations Mitigating Conditions (FCMC); whether the Judge erred in her conclusion that Applicant's omissions to the security clearance application (SCA) were not deliberate; and whether the Judge's whole-person analysis was in error. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a computer system administrator employed by a Defense contractor. She is close to finishing a college degree.

The SOR alleged several delinquent debts, for such things as an automobile repossession, medical bills, court judgments for nonpayment of rent, etc. She incurred many of these debts as a college student. She also experienced several periods of unemployment. The total amount of her debts alleged in the SOR is $35,710.

Concerning the repossession, Applicant testified that the event occurred in 2006, when she lost her job. The amount alleged in the SOR is $17,061. The debt had apparently been purchased by a collection agency, which agreed to settle the debt for $3,500. Applicant is saving money in order to pay this settlement. She had nothing in writing pertaining to this settlement offer.

Four of her medical debts are held by a collection agency, and she is making payments on them. She provided a statement from the collection agency, dated October 2009, showing a balance of $457.47. She did not make another payment until October 2010, when she paid $100. Two other medical debts have been resolved.

Applicant had a judgment in the amount of $10,467 entered against her. The basis for the debt was back-rent owed to an apartment complex. Applicant denies this debt, claiming that it has been paid. The court database where the judgment was entered lists this as being a judgment by admission. The database states that the judgment has not been satisfied.

The SOR alleged five lawsuits against Applicant by the same landlord. These were for unpaid rent. Four of the cases were satisfied before judgement. The fifth was a non-suit.

The SOR alleged several lawsuits by another landlord, also for unpaid rent. One of the filings was withdrawn. One resulted in a judgment against Applicant. Two resulted in default judgments. The judgment had been satisfied.

Applicant had another judgment against her in February 2006. The court entered a default judgment, which was satisfied through wage garnishment.

Two creditors attempted to sue Applicant, but they were not able to effect service of process. Accordingly, both suits were withdrawn.

Applicant has not received financial counseling. She considered a debt consolidation plan,

but she made no mention of it at the hearing.

When completing her SCA, Applicant omitted information concerning her financial condition. She answered "no" to questions inquiring whether: (1) she had ever had property repossessed or foreclosed; (2) she had ever had judgements against her; (3) she had ever had debts turned over to a collection agency; (4) she had been over 180 days delinquent on any debts; (5) she was currently over 90 days delinquent on any debts; and (6) whether she had ever been a party to a non-criminal court action.

Applicant stated that she did not have her credit report in hand when she completed the SCA. She stated that she forgot about some of the debts. She initially stated that she did not recall the $10,467 judgment, but later stated that she had disputed the judgement and had it removed from her credit reports. Although she remembered the garnishment action, she stated that she had forgotten about it at the time she completed the SCA.

Applicant was arrested in June 2005 and charged with Maintaining a Dwelling for Drugs and Possession of Marijuana with intent to sell. She disclosed the arrest on her SCA. When they searched the house, the police found marijuana in the kitchen cabinet of Applicant's apartment. They also found a book bag with a scale on it. Applicant's boyfriend admitted that the drugs belonged to him. The charges were eventually *nolle prossed*.

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, 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). 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. In rendering a final decision, an "agency must 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 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).

In deciding whether the Judge's rulings or conclusions are erroneous, the Board 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* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge erred in her favorable application of the Guideline F mitigating conditions, in that she failed to take into account significant contrary record evidence. This argument is persuasive. He notes, for example, that two substantial debts–the $17,061 car

repossession and the $10,467 judgment–were unresolved at the close of the record. Applicant denied owing the latter and stated that she had no intent to pay it, claiming that she had already done so. She provided no corroboration for this claim, however, and Government Exhibit (GE) 5, Judicial Case Database, reflects that it has not been satisfied.[1] Furthermore, as the Judge herself found, Applicant provided no corroboration for her claim that she had an agreement to settle the repossession debt. Though some of her debts had been satisfied by the close of the record, many of them were paid off only after the hearing, which the Judge did not address. *See, e.g.*, ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) (Timing of debt repayment is relevant in determining the extent to which an applicant has demonstrated mitigation). Furthermore, some of her debts were satisfied only after having been reduced to judgment, at least two of them default judgments. One of the default judgments was paid off by a garnishment rather than by a voluntary repayment. The Judge's favorable conclusion under Guideline F runs contrary to the weight of the record evidence and is not sustainable.

Department Counsel argues that the Judge's decision under Guideline E fails to take into account significant contrary record evidence. This argument is also persuasive. Of course, proof of a false statement, standing alone, does not establish that it is deliberate. ISCR Case No. 07-00196 at 2 (App. Bd. Feb. 20, 2009). In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the Judge must examine the statement or omission in light of the record as a whole. When an applicant claims that a false answer to a SCA question is not deliberate, the Judge should address explicitly any contrary evidence in the record. ISCR Case No. 07-03307 at 5 (App. Bd. Sep. 26, 2008).

In this case Applicant answered "no" to six questions which, in light of her actual circumstances, required an affirmative response. Concerning her denial of any judgments against her, the record contains evidence of several such judgments.[2] The Judge did not explain why she found it reasonable that Applicant would not have remembered at least some of them in completing her SCA. Neither did the Judge explain her conclusion that Applicant had forgotten about her car repossession, an event which a reasonable person would most likely recall without the assistance of a credit report. Indeed, Applicant gave detailed testimony as to the circumstances of the repossession, which undercuts her claims of poor memory. Tr. at 64-67. Similarly, the extensive evidence of lawsuits filed against Applicant, during the course of which she was served with process, provides a substantial reason to doubt her claim that, in denying that she had ever been a

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[1]GE 5 shows that, in February 2004, the landlord sued Applicant and her mother as co-signers of the lease. Applicant received service of process three days after the plaintiff filed suit. GE 5 states that, in March 2004, the court entered a "judgment by admission" against Applicant. A judgment by admission is a consent judgment. *Maddox v. Justice of Peace Ct. #19*, 1991 WL 215650. "A consent judgment is one that is entered by stipulation of both the party against whom judgment is entered and the party in whose favor judgment is entered." 46 Am. Jur. 2d Judgments § 183. "A consent judgment is basically an agreement which the Court turns into a judgment. It is similar to a contract between the parties." *Keystone Fuel Oil Co. v. Del-Way Petroleum*, 364 A.2d 826 at 829 (1976). Evidence that Applicant consented to the judgment against her is not consistent with her denial of liability for this debt and undercuts her claims that the debt had previously been satisfied.

[2]Judgment by admission entered against Applicant on March 24, 2004. GE 5. Default judgments entered against Applicant on November 16, 2005, September 25, 2006, and May 9, 2007. GE 7, Judicial Case Database. Default judgment entered against Applicant on April 13, 2006. GE 8, Judicial Case Database.

party to a non-criminal court case, she was honestly mistaken.[3]

Furthermore, the record contains evidence of inconsistent statements by Applicant, which the Judge did not explain in the Analysis portion of the Decision. For example, the Judge's own finding above, that Applicant initially claimed not to recall the $10,467 judgment, is not consistent with the finding immediately thereafter that Applicant stated that she had actually disputed this debt and had it removed from her credit report. While memories can improve, the Judge did not discuss the extent to which the evidence underlying her findings impugns Applicant's credibility. Again, Applicant's Answer to the SOR states that, when she completed her SCA, she did not have her credit report before her and, therefore, her false answers were due to an honest mistake. The Judge's findings suggest that she found Applicant's explanation credible. However, GE 2, Interrogatories, contains a summary of Applicant's security clearance interview, which occurred in August 2009. In this document she states that, during the previous two years, she had pulled her credit reports in order to dispute debts she claimed were not hers. This is a substantial reason to believe that, when she completed her SCA in June 2009, she was generally aware of the extent of her financial circumstances. This undercuts her claim of ignorance regarding the contents of her credit reports.

Department Counsel points to other inconsistencies in Applicant's presentation:

> Applicant initially stated in her Answer that she was not aware of being sued by her former landlord [on the $10,467 judgment]. At hearing, Applicant initially claimed that she was not even aware that a judgment had been issued by the state court of [State] in 2004 for non-payment of rent. Applicant then admitted, under cross-examination, that she had gone to court in 2004 and been informed that her former landlord had secured a judgment against her . . . Yet, when further questioned as to why she then failed to reveal this adverse financial information . . . Applicant maintained her position that she needed a credit report to confirm the existence of the validity of the 2004 judgment. Department Counsel Brief at 25-26.

Department Counsel quotes liberally from the transcript, highlighting testimony that undercuts Applicant's credibility.[4] Accordingly, his argument that the Judge's decision did not take into account significant evidence contrary to her favorable credibility determination is persuasive.

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[3]The record contains evidence that Applicant was sued ten times during the early 2000s, during the course of which she was served with process. GE 6, 7, 8. The record contains evidence that suit was filed against her on three occasions in which service was returned unclaimed. GE 8, 9. The Judge's decision does not explain why it is reasonable to believe that a person who had been served with process in ten different lawsuits would fail to remember that fact.

[4]"Q: You just testified that you had no idea about the judgments, but then . . . you were contesting them with the credit agencies. How would you be contesting something you don't know about? A: Because, when you say that, I went to court. When I went to court, they told me that, okay, you owe XYZ. When they told me that I went to court and owe XYZ, then when I came back, I moved and I disputed it with the credit reports . . . Q: So did you go to court and have a 10 thousand plus judgment entered against you? A: Okay, yes. Q: You did? A: Yes. Q: Okay. Back in '04? A: Back in '04, yes, they said I owed $10,000.00, the $10,000.00 that's right here, yes." Department Counsel Brief at 26, *quoting* Tr. at 83-84. The portion quoted by Department Counsel is illustrative of much of Applicant's testimony, which is vague and often argumentative and internally inconsistent.

Regarding the remaining issues, we find no error in the Judge's failure to apply FCDC 19(b). We agree with Department Counsel that the Judge's whole-person analysis does not provide an independent basis for affirming her favorable decision. The record evidence, viewed as a whole, does not support the Judge's favorable decision under Guidelines F and E. The decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. *See* ISCR Case No. 03-22861 at 2-3, *supra*. The Judge's favorable decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

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

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

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