

KEYWORD: Guideline F; Guideline E

DIGEST: The possibility that an applicant has been defrauded by others is not a sufficient basis for favorable application of the Guideline F mitigating conditions. While actual fraud may be mitigating, the evidence in this case does not support such a finding. Applicant’s service to the U.S. was evidence the Judge was required to consider. However, in this case, such evidence was not sufficient to mitigate security concerns arising from acts of poor judgment. Favorable decision reversed.

CASE NO: 10-02803.a1

DATE: 03/19/2012

DATE: March 19, 2012

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In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 2, 2011, 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 30, 2011, after the hearing, Administrative Judge Robert E. Coacher 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's application of the Guideline F Mitigating Conditions was contrary to the record evidence; whether the Judge erred in concluding that the Government failed to meet its burden under Guideline E; and whether the Judge's whole-person analysis was supported by the weight of the record evidence. Consistent with the following, we reverse the decision of the Judge.

## **Facts**

The Judge made the following findings of fact:

Applicant admitted all the Guideline F allegations, but denied deliberately falsifying his financial information in his security clearance application. Applicant is 47 years old. He is married and has four children, including one stepchild. He has worked as a station chief for a defense contractor since August 2009. He holds a master's degree. He is a retired Air Force fighter pilot. He served in both Desert Storm and Operation Iraqi Freedom (OIF) flying combat sorties. He was awarded three Distinguished Flying Cross (DFC) decorations for his aerial actions during OIF. He also received the Purple Heart as a result of receiving wounds during the Khobar Towers bombing in 1996. He currently holds a clearance and has held a security clearance for 20 years.

The allegations in the SOR include: a delinquent mortgage loan of over \$1,608,000, a charged-off account for \$96,181, a collection account for \$104,000; and making false statements in response to security clearance application questions in December 2009 concerning his financial record. The debts are reflected in credit reports dated December 2009, and February 2011.

In 2006, Applicant retired from the Air Force and moved to a new location. He bought a 56 foot sailboat to live on. He paid about \$155,000 for it and his monthly payments were about \$1,200. He financed the boat with Bank K. He decided to purchase a shopping center (SC) and be its property manager. SC had 12 businesses in it, which produced the revenue for the shopping center. He purchased the property in 2007 for over \$14 million. The purchase agreement (which is only signed by seller) refers to a \$2.8 million down payment by Applicant, but he states he did not make any down payment. He did secure a loan from a Bank B to finance the purchase. This loan is not documented in the record and does not appear on any credit reports. He and his wife formed a limited partnership as the owners of SC. He also purchased a home from the same businessman who owned SC. The financing of the home was tied into the financing for SC. The home had mortgages in the amount of about \$1.8 million. These are the debts reflected in SOR ¶¶ 1.a and 1.c. These loans were also received from Bank B.

In early 2008, after purchasing SC, Applicant began to feel like something was wrong with the transaction. He worked at filling the empty locations in SC and was using the rental income to meet all of his obligations. However, the recession significantly affected SC. Also, it appeared that several of the leases had been fabricated. He believed that the seller and the appraiser colluded to arrive at an unreasonable value for SC. He did not have his own attorney for the purchase. The

seller's attorney acted for both parties. In 2009, he received an accountant's review of SC's books which showed that its assets were overvalued and its liabilities were undervalued.

Applicant continued to make his payments through the summer of 2009. Shortly thereafter, he received a letter from Bank B indicating that all future tenant payments would be made directly to Bank B. He hired an attorney in September or October of 2009 who has been negotiating with Bank B since then to arrive at a settlement whereby Applicant would execute deeds in lieu of foreclosure and consent to confession of judgment on both SC and his residence. In return, Bank B would not hold him responsible for any deficiency judgments. This settlement has yet to be executed. The most recent correspondence from his attorney in August 2011, indicated that he planned to meet with the new bank manager after Labor Day. That meeting confirmed that, as of November 2011, the bank was still willing to have Applicant execute a deed in lieu of foreclosure on the residence and the bank would dismiss the foreclosure action and waive any deficiency judgment. Applicant also contacted the FBI about possible fraud by the sellers.

In August 2009, Applicant sought a moratorium from Bank K. He was about to start a new job overseas where he would be out of the United States for weeks at a time. He believed he reached a verbal agreement with Bank K whereby it would place a 90-day moratorium on his payments. While he was overseas, the boat was repossessed for nonpayment and taken over by a collection company. He began making regular payments to the collection company in August 2010 and has continued through September 2011. Most payments were \$250, but two were for \$5,000 and \$3,642. He intends to continue paying this debt until it is resolved. In December 2009, Applicant completed his security clearance application. He answered "no" to the questions asking if he had defaulted on any loans or was currently 90 days delinquent on any loans. He did not intend to deceive the government about his finances. His August 2009 credit report shows no delinquent accounts. He believed the boat loan was under a moratorium and not past due. He was told by Bank B that while they negotiated the outcome for SC and his residence, the bank would not report these delinquencies. He filled out the application after just coming back from his overseas job and without the benefit of a recent credit report. He knew based upon his past experience in the Air Force that a credit check would be conducted. Based upon this knowledge, it would be foolish for him to attempt to deceive the government about his financial condition. He stated "no" to the questions because he believed those were the correct responses at the time. Applicant's testimony was credible.

Applicant is current on all his other debts. He owes money to his father, but there is no deadline for repayment. He owns a home in another state that is currently being rented. He rents a home in his state of residence. His current position requires him to be working overseas for six weeks, and then return home for six weeks on a continuous cycle. He recently received an advance from a publisher for a book about his combat missions in the Air Force.

## **Discussion**

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.

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 (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 arbitrary or capricious, 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge analyzed the Guideline F portion of the case as follows:

Applicant was unable to pay his two home mortgages and had a sailboat repossessed for nonpayment. The evidence is sufficient to raise the disqualifying conditions. Applicant’s financial difficulties were caused when he decided to purchase SC. Evidence supports his belief that this transaction may have involved fraud by the sellers. Nevertheless, Applicant purchased a residence with two mortgages that were tied to the SC transaction. Because of the recession and possible fraudulent leases, SC failed in August 2009. Applicant was unable to pay his mortgages or a loan for a sailboat he purchased in 2007. Although the debts are on-going, it is unlikely Applicant will be involved in a similar type of business in the future. His achievements as an Air Force fighter pilot support his reliability, trustworthiness and good judgment. Adjudicative Guideline (AG) ¶ 20(a)<sup>1</sup> partially applies. The business downturn and the possible fraud by the sellers concerning the tenant

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<sup>1</sup>[T]he 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[.]

leases for SC were conditions beyond Applicant's control. He acted responsibly when he hired an accountant to examine the initial transaction, he hired an attorney to represent his interests in the foreclosure action, and he sought employment soon after the business collapse to take care of his family and pay his bills. AG ¶ 20(b)<sup>2</sup> applies. There is recent correspondence indicating Bank B is willing to accept a settlement on the home mortgages, relieving Applicant of all liability. He has also established a 14-month track record of repayment on the sailboat debt. He has not received financial counseling. AG ¶ 20(c)<sup>3</sup> partially applies. Applicant's efforts to reach a settlement with Bank B over the home mortgages and his repayment plan for the sailboat qualify as good-faith efforts to resolve the debts. AG ¶ 20(d)<sup>4</sup> applies.

The Judge also found for Applicant under Guideline E. Concluding that the Government had failed to present substantial evidence of a deliberate falsification, the Judge stated that AG ¶ 16(a)<sup>5</sup> did not apply to Applicant's circumstances.

The Judge's whole-person analysis was consistent with his favorable analysis under Guidelines F and E.

Department Counsel challenges the Judge's application of the mitigating conditions under Guideline F. Department Counsel stresses that Applicant failed to exercise due diligence in making unusually large financial transactions, the nature of which were beyond his training and expertise. The Judge found that: (1) Applicant purchased a 14 million dollar property without benefit of his own legal representation; (2) that he made a purchase which recited that he was making 2.8 million dollar down payment, even though he was not; (3) that he purchased his home and his business property from the same individual in related transactions; and (4) that he only hired an independent professional to review the business transaction after it was completed and was not meeting expectations. In light of those findings the Judge's conclusions that Applicant acted reasonably and that AG ¶ 20(a) and AG ¶ 20(b) applied to Applicant's benefit are not supported by the record evidence and are, in fact, strongly contradicted by that evidence. Furthermore, as Department Counsel points out, Applicant's service history bears no relevance to the content of AG ¶ 20(a) (although the Judge had to consider it in the context of the whole-person analysis). Applicant has not received counseling and there are not clear indications that the problem is being resolved or is under control (the Judge's findings indicate that settlement negotiations have dragged on for more

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<sup>2</sup>[T]he conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted reasonably under the circumstances[.]

<sup>3</sup>[T]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control[.]

<sup>4</sup>[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]

<sup>5</sup>[D]eliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities[.]

than two years and are not yet resolved). The Judge had no basis to apply AG ¶ 20(c). Applicant has made some effort to repay the indebtedness alleged in the SOR and the Judge did not err by applying AG ¶ 20(d). However, the applicability or non-applicability of an Adjudicative Guidelines Disqualifying or Mitigating Condition is not solely dispositive in a case. *See, e.g.,* ISCR Case 02-11810 at 5 (App. Bd. Jun. 5, 2003). As Department Counsel points out, after making no payments on his delinquent debts for over a year, Applicant began making \$250 per month payments on a sailboat loan, along with a larger payment of \$9,000.<sup>6</sup> However, the record indicates that the sailboat debt may still be as high as \$147,000. At Applicant's rate of payment, this debt will not be retired for decades. These facts, along with the fact that Applicant's attempts to satisfy his other creditors have failed to resolve indebtedness, limit the applicability of AG ¶ 20(d).

Similarly, these matters, support a whole-person assessment of questionable judgment. Applicant's choices, taken together, demonstrate that Applicant's judgment and reliability do not comport with the requirements set forth in the Directive. As the Board has previously noted in the context of Guideline B, Applicant's documented service to the country was record evidence which the Judge had to consider. *Compare* ISCR Case No. 05-03846 at 6 (App. Bd. Nov 14, 2006). Nonetheless, on this record, Applicant's disqualifying conduct was not completely offset by that service. *Compare* ISCR Case No. 10-05329 at 2-3 (App Bd. Oct 17, 2011). Several of the disqualifying considerations at issue involve Applicant's failure to exercise good judgment. Those failures are at the foundation of the security concerns in this case. In the Guideline B cases where service to country was sufficient to overcome pertinent disqualifying conditions, the applicants had done nothing wrong and the issues of security concern had to do with their circumstances (*e.g.* family members in hostile countries or precarious situations). In this case, however, Applicant's conduct (predicated on his failure to exercise good judgment) is at the foundation of his security disqualifying conditions.

A review of the Judge's decision indicates that his ultimate favorable security clearance determination was influenced, in part, upon his finding that there was the possibility that Applicant had been defrauded when entering into his purchase of SC. To the extent that the Judge's conclusions supporting mitigation and his favorable conclusions under the whole person analysis were based on such a finding, they are unsustainable. "Possible fraud" is not a sufficient basis for finding mitigation under the portion of AG ¶ 20(b) that addresses circumstances beyond Applicant's control. Actual fraud, established by substantial evidence, could provide mitigation in appropriate circumstances, but that level of proof does not exist here. The record evidence consists primarily of Applicant's belief that he had been defrauded. There is a paucity of objective evidence to support that belief. A letter from Applicant's accountant prepared in 2009 indicated that there were some inaccuracies in some earlier financial statements, but goes no further.<sup>7</sup> The purchase agreement contains no representations from the sellers of SC as to the accuracy of any financial accounts. Instead, the purchase agreement gave Applicant the right to fully inspect the seller's books and

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<sup>6</sup>The record indicates that a \$20,000 payment on this debt was nullified because of insufficient funds to support it. Applicant indicated that the payment was contingent upon the sale of his residence, which did not occur.

<sup>7</sup>Applicant's Exhibit B.

records prior to closing.<sup>8</sup> There is record evidence that neither Applicant nor anyone representing him made an inspection of the seller's records prior to the sale.<sup>9</sup>

In light of our resolution of the Guideline F and whole-person issues, the Board need not address the remaining issues raised by Department Counsel.

Applicant's reply brief contains numerous assertions that go beyond the evidence contained in the record. The Board cannot consider new evidence on appeal. *See*, Directive ¶E.3.1.29. Also, in his reply brief Applicant cites apparently favorable language from the Report of Investigation in his case. As the Board has previously noted, language such as that cited by Applicant is not an evaluation of Applicant's trustworthiness. It is a summary of what Applicant stated to the interviewer. *See, e.g.*, ISCR Case No. 10-09595 at 2 (App. Bd. Feb. 3, 2012) and ISCR Case No. 09-03760 at 2 (App. Bd. Sep. 21, 2010).

Applicant cites the recession as a contributing factor in his financial difficulties. Although the recession may have exacerbated the situation, given the paucity of independent record evidence on the subject and the significance of Applicant's decisions cited above, the Board cannot conclude that the recession was a primary cause of his financial problems.

Applicant references an administrative mishap that occurred during the appeal process. The Board notes that Applicant was cooperative in helping to correct the mishap.

The Judge's application of the mitigating conditions and the whole-person factors did not consider the totality of Applicant's judgment and conduct and was erroneous. *See, e.g.*, ISCR Case No. 06-23384 at 3 (App. Bd. Nov. 23, 2007) (The Directive requires a Judge to evaluate the totality of an individual's conduct and circumstances in determining the individual's security eligibility). Accordingly, we conclude that the Judge's decision failed to consider important aspects of the case and 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 security concerns raised by Applicant's financial history under the *Egan* standard.

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<sup>8</sup>Applicant's Exhibit M.

<sup>9</sup>Tr. at 52. In ISCR Case No. 08-08435 (App. Bd. Jul. 16, 2009) the Board concluded that, even assuming the applicant had been the victim of fraud, the record did not support the Judge's application of AG ¶ 20(b) where the applicant did not behave prudently when faced with certain facts prior to participating in a business venture, and did not take reasonable steps to protect himself in the transaction.

**Order**

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. 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