

KEYWORD: Guideline F

DIGEST: Judge’s finding that Applicant probably did not owe the deficiency resulting from the foreclosure sale of her home was not based upon substantial record evidence. Even if a debt is unenforceable under state law, a Judge must still consider the underlying circumstances. Favorable decision remanded.

CASE NO: 10-07393.a1

DATE: 06/12/2012

DATE: June 12, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-07393
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Julian Roberts, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On or about July 12, 2011,¹ 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 February 16, 2012, after the hearing, Administrative Judge Michael H. Leonard granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

¹The file copy of the SOR is undated. The July date comes from the Decision at 2.

Department Counsel raised the following issues on appeal: whether the Judge erred in his findings of fact and whether the Judge's favorable security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

Facts

The Judge made the following pertinent findings of fact: In 2007, Applicant purchased a house in a community about 55 miles from her residence, though in the same state. She purchased it as a future retirement home and, pending retirement, she used it as rental property. She financed the purchase with first and second mortgage loans, both from the same lender. Her rental efforts did not result in a positive cash flow, and she sometimes had no renters at all.

In 2010, both loans were more than 120 days late, and she had past-due balances. She attempted to work out a modification, and hired a lawyer to assist in this effort. The lender placed her in a trial period, during which she was required to make increased payments, but she was not able to continue. By March 2011, the first loan was in foreclosure and the second was past due (the lender subsequently charged off this loan.) The foreclosure sale resulted in a sales price substantially lower than the amount owed on the loan. Applicant has received no notice or paperwork to the effect that she owes the deficiency. The Judge took administrative notice that Applicant's house is in a state with an anti-deficiency statute, meaning that the lender may not seek satisfaction of the deficiency from Applicant's other assets.

The SOR alleged three other debts. Applicant has paid one of them in full, settled another, and has established a repayment plan for the third. Her current financial situation is stable. She provides assistance to an elderly father and to a disabled adult nephew.

In the Analysis, the Judge concluded that Applicant had mitigated the security concerns arising from the three debts that had been resolved or were in the process of resolution. He also stated that "it is most probable that she owes nothing more on the loans under the state's antideficiency statute." Decision at 7. He concluded that, given these circumstances, Applicant's financial problems are either resolved or are under control² and that she has demonstrated a good-faith effort to pay her creditors.³ He concluded Applicant had met her burden of persuasion regarding mitigation.

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

²Directive, 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[.]"

³Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

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). “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, 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 contends that the Judge’s finding that Applicant probably has no further liability on the two mortgages due to the operation of state law is erroneous.⁴ We examine a Judge’s findings to determine if they are supported by substantial record evidence, that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. *See* ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012).

The Judge’s favorable decision was based, in large measure, upon this challenged finding. However, the record contains no evidence to support it. Applicant did not raise the issue of state law, testifying only that she did not believe that she owed the money, “but if [the lender] produce[s] anything that I do, I will pay it.” Tr. at 61. Her response to the SOR asserts that both mortgage debts had been extinguished, but it does not specify her reason for thinking so—antideficiency statute, debt forgiveness by lender, etc. Response to SOR, September 1, 2011, at 4. Neither did Applicant’s attorney raise the issue during the hearing. In any event, the Judge’s having taken notice of an unspecified antideficiency statute, in and of itself, is not sufficient to demonstrate that Applicant’s circumstances are such that the two mortgage debts had been discharged by operation of law. *See, e.g.*, ISCR Case No. 08-09480 at 3 (App. Bd. Mar. 17, 2010). Neither is there any evidence to demonstrate that an anti-deficiency statute has been specifically applied to the mortgages or that the lender had forgiven these debts. The Judge’s finding that Applicant “most probably” does not owe the deficiency is not supported by substantial record evidence.

⁴This statement is located in the Analysis rather than in the Findings section of the Decision. We will treat a finding as such regardless of where it appears in the Decision. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007).

Department Counsel also argues that the Judge's mitigation analysis was flawed. He contends that the Judge's unsustainable finding that Applicant probably did not owe the mortgage debts resulted in an oversimplified decision, one which did not take into account the totality of the record evidence. We find this argument persuasive. The Judge's analysis did not address the circumstances underlying Applicant's mortgage debt, nor the sufficiency of her response to that debt. A security clearance proceeding is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Even if a delinquent debt is unenforceable under state law, a Judge must consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See, e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). As it stands, the Decision fails to articulate a satisfactory explanation for its ultimate holding. *See* ISCR Case No. 03-22861, *supra*. Accordingly, we remand the case to the Judge for a new decision, consistent with the above.

Order

The Judge's favorable security clearance decision is REMANDED.

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

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

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I concur with my colleagues in their analysis of the errors below. I differ only on the matter of disposition. Applicant has failed to meet her burden as to mitigation. Therefore, I conclude that the case should be reversed.

Signed: Michael Y. Ra'an
Michael Y. Ra'an
Administrative Judge
Chairperson, Appeal Board