KEYWORD: Guideline F

DIGEST: The record evidence does not support a conclusion that Applicant's financial problems were largely beyond his control. Applicant's own testimony that he conveyed title to his home to a buyer without getting paid and now pays the buyer rent to live in the same house and continues to pay the mortgage further undercuts any conclusion of reasonableness as his regards his conduct of his finances. Favorable decision reversed.

CASENO: 06-19154.a1

DATE: 04/09/2008

DATE: April 9, 2008

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Candace Le'i, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 11, 2007, 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 November 30, 2007, after the hearing, Administrative Judge Darlene Lokey Anderson granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her application of the Financial Considerations Mitigating Conditions (FCMC); and whether the Judge's favorable security clearance decision was arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant works as a security guard for a defense contractor. He is retired from the United States Air Force and from a subsequent career with the Post Office. He is delinquent in tax payments to the Internal Revenue Service (IRS) in the amount of $41,254 (including interest and penalties) for tax years 1995 and 1997 through 2005. He has entered into an arrangement with the IRS to pay back this debt in monthly installments. A federal tax lien filed in 1995 for back taxes has been paid. Additionally, a debt to the California Franchise Tax Board for $2,721.21 for delinquent taxes, interest, and penalties for 2002, 2004, and 2005 was paid off through wage garnishment.

Applicant had five medical bills which had been placed into collection and which were outstanding at the time of the hearing. He also owed $4,592 following voluntary repossession of a car, regarding which Applicant stated at the hearing that he intended to contact the creditor and resolve the debt. Applicant had two bank debts on his credit report–$1,212 and $32 respectively–which he denied owing. He started working with a credit counselor in the past, but "became leery when the payments he was making to them were not being credited toward his debts and the . . . [counselor's] address kept changing."[1]

"In an effort to pay off his past due debts, the Applicant put his house up for sale. Apparently, the buyer breached the purchase agreement, committing possible fraud against the Applicant. The Applicant explained that he agreed to sell the house to the buyer assuming the buyer would get a new loan in his name. The buyer never got the loan, but the title of the house was transferred to the buyer. The buyer allowed the Applicant to live in the house under the agreement that the Applicant pay him $1,000.00 a month for rent. To prevent foreclosure, the Applicant who still remains responsible for the mortgage, is paying the note and the property taxes on the house,

[1]Decision at 4.

as well as paying the buyer $1,000.00 a month to live there. The buyer, who now has legal title to the house, has not paid the Applicant anything and refuses to comply with the purchase agreement. The Applicant is planning to hire a real estate attorney to pursue the matter further."[2]

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel contends that the Judge failed to consider significant contrary record evidence. The Board will address this in its discussion of the issues raised on appeal.

Whether the Record Supports the Judge's Ultimate Conclusions

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 choices 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). 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 (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 establish any appropriate mitigating conditions. *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

[2]*Id*. at 3.

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).

Financial problems can raise a security concern insofar as "[f]ailure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."[3] In this case the Judge properly found that the delinquent debts alleged in the SOR raised security concerns under Guideline F, thereby placing upon Applicant the burden of persuasion as to mitigation.

Department Counsel argues that the Judge's application of the relevant mitigating conditions was unsupported by the record evidence and did not take into account contrary record evidence. The Board finds Department Counsel's argument persuasive. For example, the Judge concluded that Applicant had established his case under FCMC 20(b), which mitigates Guideline F security concerns when "the conditions that resulted in the financial problem were largely beyond the persons's control . . .and the individual acted responsibly under the circumstances."[4] However, Department Counsel points to evidence that impugns the view that Applicant's problems resulted from causes outside his control, for example that Applicant's tax delinquencies were to a large extent caused by his failure to have sufficient amounts withheld from his pay. Common sense would suggest that such a failure was, by its nature, within Applicant's control, and there is nothing in the record evidence to demonstrate otherwise. Even more to the point, Department Counsel cites to significant record evidence inconsistent with a conclusion that Applicant has demonstrated responsible behavior in relation to his financial problems.[5] For example, as of the hearing he still had not ensured that sufficient taxes were being withheld from his Air Force retired pay.[6] Furthermore, he has other significant debt for which he had not, at the time of the hearing, made

[3]Directive ¶ E2.18.

[4]Directive ¶ E2.20(b).

[5]Applicant asserts that Department Counsel arguments on appeal raise new issues with regard to his delinquent tax debts. A review of the SOR and the Judge's decision indicates that Applicant's assertion is not valid.

[6]"Q: Okay. So are you having taxes withheld from your retirement pay? A: No, ma'am. Not from the Air Force. Q: Why not? A: I should, but I haven't." Tr. at 40.

reasonable efforts to pay off.[7] He entered into an agreement to pay off his debt to the IRS only after the close of the hearing. Additionally, his claim to have a zero balance on two credit card debts is not supported by corroborating evidence.[8] All in all, the record evidence does not support a conclusion that Applicant has demonstrated the reasonable behavior contemplated by this mitigating condition.

Department Counsel also takes issue with the Judge's treatment of FCMC 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."[9] The Judge's own findings raise serious questions about the competence and reliability of the financial counselor whom Applicant testified he had employed. Certainly, to receive credit under this aspect of the mitigating condition, it is not enough merely to speak with a person who claims the title of financial counselor. Rather, an applicant must show that he has in good faith engaged the services of someone who is actually able to provide beneficial advice.[10] In this case the Judge's finding, and the record evidence upon which it is based, suggests that Applicant hired a counselor who had his own difficulties with reliability.[11] In any event, for reasons set forth above, there is little record evidence to show that Applicant has taken control of his financial problems. Neither does the evidence support a conclusion that Applicant has "initiated a good faith effort to repay overdue creditors or otherwise resolve debts . . ."[12] In this context, the term "good faith" means that an applicant's conduct with regard to his financial situation shows, among other things, reasonableness and prudence.[13] Much of the evidence already cited above seriously compromises Applicant's efforts to demonstrate that he has acted in good faith to resolve his delinquent debts. His failure to withhold sufficient taxes, his failure to make timely efforts at entering into an agreement with the IRS, his failure to contact creditors and to supply corroboration for his claims that certain of his debts had been repaid all provide serious grounds to question the reasonableness of Applicant's conduct. In addition, his testimony as to his arrangement

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[7]Applicant was questioned as to his efforts to address the debt arising out of the repossession of his car. "Q: So, what are you going to do? A: I will probably have to contact them and talk to them about it." Tr. at 63. Concerning a debt of $1,881 to a bank, Applicant was asked, "Do you intend to contact the Credit Reporting Agency to figure out the status . . . of that? A: I think probably I have to contact the [bank] first, wouldn't I? Q: Do you intend to do that? A: Yes, ma'am." Tr. at 66. *See* ISCR Case No. 99-0012 at 2 (App. Bd. Dec. 1, 1999.) ("Promises to take action in the future . . . are not a substitute for a documented track record of remedial action.")

[8]Tr. at 56-60. These are the two bank debts referenced in the findings section above.

[9]Directive ¶ E2.20(c).

[10]There is no requirement that financial counseling be formal or paid for. Free and informal advice can supply a basis for mitigating Guideline F security concerns. *See* ISCR Case No. 99-0296 at 2 (App. Bd. Apr. 18, 2000.)

[11]Tr. at 67 - 68.

[12]Directive ¶ E2.20(d).

[13]*See* ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007).

with the buyer of his home further undercuts his efforts to demonstrate sufficient judgment and reliability to be entrusted with classified information.[14]

Giving due consideration to the matters which Applicant has presented in his behalf, the Board nevertheless concludes that Department Counsel has made a persuasive case that the Judge's favorable decision is not sustainable on this record, either under the mitigating conditions which the Judge cited or through the whole-person analysis. Accordingly, the Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge

[14] "Q: . . . When you entered into this agreement with him, were you also a tenant at the house with him at the time? A: No. No. Q: Okay. So, you moved out? A: No, I haven't moved out. Q: You never moved out? A: Never moved out. Q: You never gave him possession of the house? A: Never . . . I still live in the house with my son. Q: You just signed an agreement that said he would get a new loan and that you would sell him the house for $200.000? A: Yes. . . .And he had to get his own mortgage. Q: Right. Now, you said you were giving him $1,000 a month? A: Because I figured – he wouldn't let me out of the – when I signed the paper, it was like the paperwork for . . . the title. And he went and registered it. Q: Okay. So, you signed over the house to him? A: Uh-huh. So, as far as I was concerned, he was the owner of the house. And he was getting his mortgage. So, I was paying him $1,000 a month . . . Q: Why would you sign over a house to someone without getting the money for it? A: Like I said, I thought he knew what he was doing. . . . Q: And you've never given him possession because of the fact that he hasn't paid for it? A: Right. And the mortgage is in my name. I notified [mortgage company] and they said well it's still in your name–the mortgage–so you have to make the payments." Tr. at 70 - 74.

Member, Appeal Board