

KEYWORD: Guideline F

DIGEST: The Judge made sustainable findings that Applicant's financial problems were due to cause beyond his control and that Applicant had responded reasonably. The Judge's adverse conclusions did follow from those findings. Adverse decision reversed.

CASENO: 06-25584.a1

DATE: 04/04/2008

DATE: April 4, 2008

_____)	
In Re:)	
)	
-----)	ISCR Case No. 06-25584
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Nan Cohan Jacobs, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 20, 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 December 13, 2007, after the hearing, Administrative Judge Martin H. Mogul denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s adverse security clearance decision was arbitrary, capricious, or 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 is a 41-year-old employee of a Defense contractor. Applicant has numerous unresolved debts, two of which exceed \$8,000.00 each. Applicant’s wife suffers from a debilitating disease, resulting in 12 medical procedures. As a consequence, Applicant’s wife experienced unemployment, as did Applicant while he took care of her. Applicant’s wife was a contract employee. Because of her inability to work during her medical treatment, her medical insurance was retroactively cancelled, resulting in unindemnified medical expenses of approximately \$250,000.00.¹

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 same 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.

Applicant has not challenged the Judge’s findings. Therefore, they are not at issue in this 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

¹Applicant testified that he had paid down this debt to under \$2,000.00. Tr. at 53.

(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 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).

In this case the Judge properly found that Applicant’s financial situation raised security concerns under Guideline F. As a consequence, he went on to examine possible mitigating conditions. He stated, “I find that MC 20. (b)² applies because the conditions that resulted in the financial problem of Applicant were largely beyond his control . . . and Applicant has acted responsibly under the circumstances. MC 20. (e)³ could be argued to also apply, as Applicant has initiated a good-faith effort to repay the creditors.”⁴ The Judge went on to conclude, however, that Applicant had failed to meet his burden of persuasion as to mitigation, in view of the amount of overdue debt he still carries and the length of time it will take to pay it off.

²Directive ¶ E2.20(b). “[T]he 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances . . .”

³Directive ¶ E2.20(d). “[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts . . .” The Judge’s identification of this as subparagraph (e) is error.

⁴Decision at 6.

Applicant's challenge to the legal sufficiency of the Judge's decision is persuasive. The Judge found that Applicant's case satisfied the criteria of MC 20(b), in that Applicant's financial problems were due to causes largely beyond his control and that his response to those problems had been reasonable. That finding is sustainable. Having so found, it is inconsistent for the Judge then to conclude that Applicant had nevertheless failed in meeting his burden of persuasion as to mitigation. The decision does not explain why, under the facts of this case, if Applicant had been reasonable in addressing problems rooted in causes beyond his control, the mere fact that it might take him a long time to complete the process was a reason to deny him a clearance. Applicant reasonably argues that the Judge's decision does not take into account substantial contrary record evidence. For example, Applicant had paid down his wife's \$250,000.00 in medical debts. Applicant's discharge of that enormous debt underscores the reasonableness of his actions with regard to the debt and undermines the Judge's rationale for denying him a clearance under Guideline F by demonstrating that Applicant is not lacking in self-control or good judgment. Under the facts of this case, the Judge's decision fails to draw a rational connection between his finding that MC 20(b) has been established and his conclusion that Applicant has failed to demonstrate that his security concerns have been mitigated. The Judge's decision runs contrary to the record evidence. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). Accordingly, the Judge's decision is not sustainable.

Order

The Judge's adverse security clearance decision is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board