

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 25, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On July 15, 2008, after considering the record, Administrative Judge Mary E. Henry 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 concluding that the Government had not met its burden of production regarding one of Applicant’s debts; whether the Judge erred in her application of the Guideline F mitigating conditions; and whether the Judge’s whole-person analysis is supported by record evidence. 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 composition specialist for a federal contractor. Twice—in 1992 and again in 2000—Applicant was discharged in Chapter 7 bankruptcy. The record contains no evidence of reasons for these bankruptcy actions.

Applicant and her husband have experienced problems that have affected their financial situation. Her husband was injured in a motorcycle accident in 2001 and was unable to work for six months. Later, in 2006, he was diagnosed with muscular dystrophy. He is currently receiving social security disability benefits. In addition to her husband’s medical problems, Applicant was laid off from her job in 2004. She received unemployment benefits and attended college, receiving an associates degree in 2006.

Applicant has unpaid delinquent debts which have arisen since her second discharge in bankruptcy. These debts are for medical bills, home repairs, an auto repossession, and other debts owed to banks, to a power company, etc. Additionally, Applicant’s home was foreclosed in 2001 and in the same year she pled guilty to issuing a bad check. Applicant has not sought credit counseling for her financial problems.

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 (1966). In evaluating the Judge’s findings, we are required to give

deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

One of the allegations in the SOR refers to a charged-off debt to a bank in the amount of \$674. Applicant admitted this debt in her response to the SOR. Item 2. Applicant also acknowledged this debt in her response to interrogatories submitted to her by DOHA. Item 6. However, the Judge stated in her decision that, despite Applicant's admissions, "given the lack of evidence as to the existence of this debt, this allegation is found in Applicant's favor." Decision at 3. Department Counsel persuasively argues that this finding is erroneous. The Government's burden of producing evidence arises only in regard to SOR facts that the Applicant has controverted. Directive ¶ E3.1.14. The Government has no such burden when an applicant admits the facts. In this case, Applicant has not controverted the debt in question. It was error, therefore, for the Judge to conclude that the Government had failed to meet a burden which the Directive does not impose upon it.

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 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). 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 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 properly concluded that Applicant's case raised security concerns under Guideline F.¹ She went on to conclude that Applicant had met her burden of persuasion as to mitigation, specifically under Financial Considerations Mitigating Condition (FCMC) 20(b).² Department Counsel persuasively argues that this conclusion was error, in light of contrary of record evidence. For example, Department Counsel points to record evidence that Applicant and her husband took a vacation to Aruba in 2005. This vacation appears to have coincided with a period of time in which both were unemployed. This raises serious questions about Applicant's judgment in regard to her debts, in that she appears to have used funds on the vacation that could better have been expended on debt reduction. The Board notes that Applicant chose to have the case decided upon the written record, with the result that her credibility could not be evaluated in the context of a hearing. *See* ISCR Case No. 08-00899 at 3 (App. Bd. Jul. 29, 2008). Furthermore, Applicant did not reply to the File of Relevant Material, nor did she submit a reply brief on appeal. As a consequence, there is nothing in the record to address questions arising out of the trip. Indeed, the record contains a paucity of evidence demonstrating that Applicant has acted responsibly in regard to her delinquent debts. In light of that, the Judge's favorable application of FCMC 20(b) is not sustainable. For similar reasons the record will not sustain the Judge's partial application of FCMC 20(e),³ in that there is insufficient evidence to demonstrate that Applicant's past due debts are not legitimate. Neither is there documentary evidence of positive steps Applicant has taken to resolve any alleged dispute.⁴ Accordingly, the Judge's favorable application of the mitigating conditions is erroneous.

Likewise, the Judge's whole-person analysis also cannot be sustained, due to lack of evidence. As stated above, it is an applicant's responsibility to demonstrate that he or she should have a security clearance. Under the facts of this case, the security concerns implicit in Applicant's bankruptcies in 1992 and 2000, her conviction for bouncing a check, her home foreclosure in 2001, and her numerous delinquent debts have not been mitigated simply by Applicant's admissions in her response to the SOR or her answers to interrogatories. There is little in the record to demonstrate that Applicant has made a reasonable effort to pay off her debts or that she has otherwise acted responsibly in regard to them. The Board takes special note of the Judge's finding that there is no

¹Directive ¶ E2.19(a): "inability or unwillingness to satisfy debts;" Directive ¶ E2.19 c): "a history of not meeting financial obligations[.]"

²Directive ¶ E2.20(b): "the 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(e): "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions taken to resolve the issue."

⁴*See* ISCR Case No. 06-18900 at 5 (App. Bd. Jun. 6, 2008) (Applicant offered no independent witnesses and provided no documented proof which would substantiate her claim that her debts were not legitimate or that she had taken reasonable steps to resolve them).

evidence in the record explaining Applicant's two bankruptcy actions. Taken together, and viewed in light of her subsequent financial history, they raise serious questions about Applicant's judgement and reliability. The record as a whole does not support a conclusion that Applicant has met her burden of persuasion under the *Egan* standard. Accordingly, the Board concludes that the record will not sustain the Judge's favorable decision.

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; William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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