

KEYWORD: Guideline F

DIGEST: Applicant relied on the statute of limitations as a means of addressing his debt. The Judge's lengthy discussion of societal policy does not explain why, under the facts of this case, Applicants decision not pay his debts demonstrates good judgment, trustworthiness and reliability. Favorable decision reversed

CASENO: 08-01122.a1

DATE: 02/09/2009

DATE: February 9, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-01122
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 27, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 21, 2008, after the hearing, 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’s whole-person analysis is erroneous; whether the Judge’s application of the Guideline F mitigating conditions is erroneous; and whether the Judge’s adverse security clearance decision is arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

Applicant is a business operations manager for a Defense Department Contractor. He began working for the company three years ago, following completion of law school.

In the late 1990s Applicant worked for a credit and financial company. Although he thought he was going to be a financial and investment counselor, he was, in fact, more of an insurance salesman. He received little income from commissions. For six to eight months he attempted to develop a client base from lists of names which the company provided him. This too was insufficiently remunerative, so he resigned. Due to his insufficient income while working for this company, Applicant paid his living expenses with credit cards. He also used credit cards to pay the costs of various licensing examinations he had taken.

Subsequently, Applicant began working for an information technology (IT) company. Although he was able to pay his expenses, the company laid him off. He took a temporary position, which lasted for one month, and another in a different city. Applicant realized that this latest employer “had problems” and that the job would not last. Decision at 3. Therefore, he decided to attend law school. He graduated in 2005.

Following his first job loss, Applicant realized that he would have difficulty paying off his debts. He contacted the credit card companies to develop a repayment plan, but “they refused to work with him.” *Id.* He got in touch with a debt management company, which developed a plan for him to repay his debts. However, his employment was temporary and he lacked a steady salary, so he declined to sign a contract with the company. “He decided not to make his credit card payments until his employment situation stabilized. He made his last payments on the five credit card debts alleged in the SOR around March 2001. He has not sought any additional credit counseling.” *Id.* The Judge noted that the majority of the debts on the SOR are no longer listed on his credit reports. Applicant acknowledges that these debts are his and that they are unpaid.

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.

To the extent that Department Counsel's brief challenges the Judge's findings of fact, such challenges will be included in the discussion below.

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).

In holding in favor of Applicant, the Judge relied in large measure upon her conclusion that enforcement of the credit card debts reflected in the SOR was barred by the statute of limitations. Department Counsel persuasively argues that the record does not contain sufficient information as to the terms of the various credit card contracts so as to permit a reasoned determination as to which state's statute of limitations applies. As a consequence, Department Counsel argues, the Judge's analysis is merely speculative. While this argument has merit, more to the point is the question of whether the Judge erred in concluding that Applicant had met his burden of persuasion as to mitigation.

The security concern raised by Guideline F is as follows: "Failure or inability 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 question about an individual's reliability, trustworthiness and ability to protect classified information." Directive ¶ E2.18. The Board notes the Judge's findings, and record evidence, to the effect that Applicant had a sporadic employment history in the late 1990s and early 2000s, during at least part of which time he paid his living expenses, as well as expenses associated with certain licensing exams, with credit cards. This fact alone could cause a reasonable person to question Applicant's judgment. Of course, the Judge is bound to consider all of the record evidence, including evidence as to the nature, extent, and duration of an applicant's debts. *See, e.g.*, Directive ¶ E3.1.8. (A clearance decision is "based on the hearing record.") Applicant claimed, for example, that some of the debts attributed to him were not legitimately his, although he provided little corroboration for this assertion. However, in this case Applicant appears to have relied upon the statute of limitations as a means of addressing his debt rather than to take affirmative steps such as working with the debt management company, seeking bankruptcy protection, etc.¹ The Judge's lengthy discussion of the societal policy underlying the statute of limitations does not explain why, under the facts of this case, Applicant's decision not to pay his creditors demonstrates good judgment, trustworthiness, or reliability, which is at the heart of the Guideline F security concern.² Viewed in light of the entire record, the evidence which Applicant presented does not support a conclusion that he has met his burden of persuasion as to

¹*See*, for example, Government Exhibit 2, Answers to Interrogatories, which includes a summary of Applicant's personal subject interview. In this document he is reported as saying to the interviewer "Subject does not intend to pay the amount owed on all of the accounts that became late around 2001. The subject is waiting for the seven-year period of owing money to those delinquent accounts to come to a close. The subject . . . has read on the website of the Federal Trade Commission that there is a time limit on the statute of limitations. Once an account is sold to a creditor, the creditor cannot legally charge anyone for the amount in question." The Judge acknowledged that Applicant had not sought bankruptcy protection but characterized the running of the statute of limitations as "another legally acceptable method for eliminating old, unpaid debt." Decision at 11. Neither the authority cited by the Judge, nor the record, support a conclusion that bankruptcy, which entails the possibility of some repayment to creditors, is of the same security significance as a decision not to pay debt.

²*See, e.g.*, Tr. at 44, in which Applicant acknowledges that his actions in response to his debts may not have been responsible.

mitigation.³ The Judge’s conclusion that Applicant has demonstrated that “it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is not supportable. Decision at 13.

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

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

³Department Counsel notes that there is ample precedent to make the Judge aware that her analysis and application of the statute of limitations in a Guideline F case was erroneous. Indeed, this case is the fifth wherein the Board has had to discuss the same error by the same Judge. *See* ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007), ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008), ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008), and ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008). No benefit accrues from persistent disregard of agency policy and a superior tribunal.