

KEYWORD: Guideline F

DIGEST: The Judge erred in categorizing Applicant's poor financial choices as circumstances outside his control. Favorable decision reversed.

CASENO: 09-01015.a1

DATE: 07/16/2010

DATE: July 16, 2010

In Re:)
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 -----) ISCR Case No. 09-01015
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 4, 2009, 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 March 19, 2010, after the hearing, Administrative Judge Paul J. Mason granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether certain of the Judge's findings of fact were based upon substantial record evidence; whether the Judge erred in his application of the pertinent mitigating conditions; and whether the Judge's whole-person analysis was erroneous. Finding error, we reverse.

Facts

The Judge made the following pertinent findings of fact: Applicant is a former U.S. Marine who, while on active duty, served as a drill instructor and as a guard for nuclear weapons. Divorced, he pays child support on behalf of his two daughters. He is engaged to be married.

Applicant's financial problems began during his first marriage, during which his former wife handled their finances.¹ The problems were exacerbated when Applicant's wife decided that she did not want to live in a mobile home. In 2006, the couple moved out of the mobile home and into a rented house, surrendering the home to the dealer. The dealer treated this transaction as a repossession, selling the home at an auction. This resulted in a \$33,173 deficiency.

Applicant stopped paying the other SOR debts due to lack of funds. Additionally, he moved several times during the divorce and did not keep his creditors apprised of his address. Although it was not listed in the SOR, Applicant also had a debt to the IRS which had been satisfied through a wage garnishment.

On September 9, 2009, Applicant applied for a \$7,000 loan from his 401(k) plan.² He intended to use the money to pay off six of the seven SOR debts. After the hearing, but before the close of the record, Applicant completed necessary paperwork for the loan. He also provided an uncorroborated statement that four of the debts had been paid off.

Applicant enjoys an excellent reputation for the high quality of his work performance, as well as for his reliability.

Discussion

Factual Sufficiency

¹"I would bring the money home and she would go pay all the bills. And mainly some of the bills are from phone companies, which is cell phones. It was easy for her to just, okay, they cut this phone off. Let me go get another one." Tr. at 28.

²The hearing began on September 15, 2009. Tr. at 3.

Department Counsel argues that the Judge erred in a finding of fact. Specifically, he argues that a particular statement, contained in the Analysis portion of the decision, is in error. The Judge stated, “I conclude that Applicant received his loan as planned.” Decision at 6. Department Counsel argues that the evidence merely demonstrates that Applicant had applied for a loan, not that he had actually received the money.

The Appeal Board’s review of the Judge’s findings of fact 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 defer to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

We have examined the challenged statement in light of the record evidence. This evidence shows that Applicant applied for the loan a few days before the hearing in his case. The insurance company processing the request advised Applicant that he needed to provide further information, either a signed concurrence by his wife or a certification that he was no longer married. After the hearing, Applicant submitted a document he had sent to the insurance company certifying that he was no longer married to his former wife. There is nothing in the evidence to suggest that the approval of the loan was uncertain or that Applicant’s 401(k) was insufficient to serve as collateral. Rather, the evidence suggests that approval would be forthcoming once Applicant submitted all the required documentation. Given the totality of the facts and circumstances surrounding the loan application, the Judge’s inference that Applicant had been paid at some point after the hearing is sustainable.

Judge’s Favorable Conclusions as to Mitigation

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).

Department Counsel argues that the Judge erred in extending favorable application to three Guideline F mitigating conditions. He contends that the record evidence does not support the Judge's treatment of them.

The first mitigating condition that the Judge addressed is found at Directive, Enclosure 2 ¶ 20(b).³ The Judge extended partial application to this provision. However, Department Counsel cites to record evidence that Applicant's financial problems were aggravated by his decision to leave his mobile home and move into a rented house due to his wife's preferences. Arguing that this was a voluntary decision by Applicant, Department Counsel contends that this decision by Applicant does not justify a conclusion that Applicant's problems arose from matters outside his control. “[H]e chose to take on a new financial responsibility (rent) and abandoned his existing obligation. While being a loyal husband trying to hold together a failing marriage is an admirable personal quality, this is not a *carte blanche* invitation to make irresponsible financial decisions.” DC Brief at 11.

We note other record evidence which supports the point advanced by Department Counsel. For example, Applicant testified, and the Judge found, that he had neglected to keep his creditors informed of his whereabouts. It is not surprising that, as a consequence, he would have problems with his creditors. This is a contributing factor which Applicant could have avoided through the exercise of ordinary prudence. We also note Applicant's testimony that, when he gave back his mobile home, he did not understand the legal implications of repossession. Again, this illustrates a failure to exercise ordinary care in the management of his personal affairs rather than a cause over which Applicant had no control. Accordingly, we conclude that the record as a whole does not support a conclusion that Applicant's problems were caused by circumstances outside his control, *i.e.*, his marital difficulties. Rather, the evidence most reasonably supports a conclusion that Applicant's problems originated through his own actions or neglect.

³ “[T]he conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances[.]”

Additionally, Department Counsel contends that Applicant failed to demonstrate that he took responsible action in regard to his financial difficulties. For example, he notes Applicant's testimony that he had taken no action to address his debts until September 2009, leaving them unpaid for three years. This extends even to relatively minor debts, such as an \$81 medical bill. Tr. at 40. The Judge himself stated that Applicant did not act responsibly under the circumstances. Department Counsel's argument that Mitigating Condition 20(b) does not support a favorable decision for Applicant is persuasive.

The Judge also extended favorable consideration to Directive, Enclosure 2 ¶ 20(c).⁴ He cited to "some evidence" that Applicant was trying to gain control over his finances. Decision at 6. However, Department Counsel persuasively argues that the evidence is not sufficient to support a favorable conclusion under this mitigating condition. Applicant has demonstrated that he expected to pay off certain debts with the proceeds from his loan. However, even if that were to occur, his major debt of the \$33,000 deficiency resulting from repossession of his mobile home would remain unsatisfied. Applicant's stated intention to hire an attorney sometime after the hearing and seek a reduction of this debt is at best speculative. There is no basis in the record to support a conclusion that such a plan has a reasonable chance of success. As such, it merely suggests a "potential for eventual debt resolution" rather than for a track record of actual repayment. *See* ISCR Case No. 01-03695 at 4 (App. Bd. Oct. 16, 2002). The record evidence, viewed as a whole, does not support a favorable conclusion under Mitigating Condition 20(c).

Finally, the Judge concluded that Applicant had established limited mitigation under Directive, Enclosure 2 ¶ 20(d)⁵ and that he was confident that Applicant would pay all of his delinquent debts. This mitigating condition requires a showing of good-faith efforts at debt repayment. To receive the benefit of this mitigating condition, an applicant must show that he has acted in a way evidencing "reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007). Department Counsel persuasively argues that Applicant's having apparently obtained a \$7,000 loan is not sufficient to demonstrate a good-faith effort to pay off debts totaling over \$36,000. Even if he repays all SOR debts but the deficiency, he is left with a delinquent debt of over \$33,000, for which he has demonstrated nothing more than a promise for future payment. *See* ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner.) We conclude that the circumstances of Applicant's financial problems do not demonstrate a good-faith effort to resolve his outstanding debts. As Department Counsel argues, even a limited favorable application of this mitigating condition is not supported by the record evidence.

In summary, both the record and the Judge's decision demonstrate that (1) Applicant has substantial delinquent debts; (2) these debts were caused in large measure by circumstances that were

⁴ "[T]he 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[.]"

⁵ "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

within his control, such as his permitting his former wife to handle the family budget, the voluntary repossession of his mobile home, his failure to keep his creditors apprised of his place of residence, and his failure to inquire into the legal implications of his decisions; (3) he did not address his debts for three years and only began to do so immediately before the hearing;⁶ and (4) he provided no corroboration of any debt repayment by the close of the record. In light of this, Applicant's having obtained approval of a loan in the amount of \$7,000 is not sufficient to demonstrate mitigation, either through the mitigating conditions or the whole-person analysis, in light of the *Egan* standard. Accordingly, we conclude that the Judge's favorable decision is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

⁶See ISCR Case No. 08-06056 at 6 (App. Bd. Sep 21, 2009), in which the Board held that it was error for the Judge not to have considered "the fact that any efforts on the part of Applicant to resolve these debts came very late in the process."