

KEYWORD: Guideline F

DIGEST: Applicant’s unemployment was a result of his discharge from the Navy for misconduct. Accordingly, his financial difficulties could not be attributed to causes outside his control. His efforts to pay his debts were unreasonably dilatory. Favorable decision reversed.

CASE NO: 09-05700.a1

DATE: 02/24/2011

DATE: February 24, 2011

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 19, 2010, 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). DOHA subsequently amended the SOR, raising security concerns under Guideline E (Personal Conduct). Applicant requested a hearing. On October 19, 2010, after the hearing, Administrative Judge Darlene D. Lokey Anderson 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 issue on appeal: whether the Judge’s application

of the mitigating conditions was unsupported by the record evidence. Consistent with the following discussion, we reverse the decision of the Judge.

### **Facts**

The Judge found that Applicant is an Electronics Technician for a Defense contractor. He has a GED and two years of college. Applicant purchased two rental properties with money he inherited from his grandmother. Subsequently, in 2001, he joined the U.S. Navy. He served in the Navy from 2001 until 2005. During this time, he bought another piece of real property, a personal residence.

In 2004, Applicant experienced emotional problems while assigned to a ship. He also found it difficult to sleep because of his height, which was greater than the length of the beds. On two occasions, when the ship set out to sea for training exercises, Applicant stayed home. After the first occasion he was given non-judicial punishment (NJP)<sup>1</sup> under the Uniform Code of Military Justice (UCMJ), for the offense of Missing a Movement.<sup>2</sup> The punishment consisted of restriction to the ship. Following the second offense, he received NJP once again. The punishment consisted in a reduction in rank and bread and water for three days.

After the second offense, Applicant was discharged from the Navy. His service was characterized as Under Other Than Honorable Conditions (OTH). After his discharge, he had a difficult time finding employment. He was not able to keep up with the mortgage payments on the three properties. He tried to sell them, but was not able to do so. The three properties went into foreclosure during 2008 and 2009. Applicant was unemployed following his discharge from the Navy. He found work in 2006 but was again unemployed later that year. He had another period of unemployment from September 2008 until February 2009. He did not make payments on his debts during his periods of unemployment.

Applicant has several delinquent debts which are alleged in the SOR. Applicant had failed to file federal and state taxes for tax years 2005, 2006, and 2007. The SOR alleged a debt of \$19,432 owed to the state. This debt has been satisfied through a wage garnishment action. Applicant has filed his income tax returns for the years in question. Applicant owed \$4,582 on a credit card that he had used for paying living expenses. By the close of the record, this debt had been satisfied. He owed \$8,096 on another credit card. He has entered into an agreement to make a down payment after the hearing and then pay the debt off in monthly increments. Finally, he owed \$1,884 to a creditor, which he paid in full in March 2010. He and his fiancée are living with her parents in order to save money to purchase a house. He is paying both his and his fiancée's monthly expenses.

Applicant enjoys a good reputation for work performance, trustworthiness, and integrity. While in the Navy he received the Navy and Marine Corps Achievement Medal.

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<sup>1</sup>10 U.S.C. § 815.

<sup>2</sup>10 U.S.C. § 887: "Any person subject to this chapter . . . who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished[.]"

## Discussion

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 (9<sup>th</sup> 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 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’s favorable decision is not supported by the record evidence, viewed as a whole. This argument is persuasive. We note the Judge’s findings and record evidence of the following, which are not consistent with the Judge’s favorable decision:

Applicant was involuntarily discharged from the Navy for misconduct, *i.e.*, two incidents of missing his ship’s movement. The voyages were each of two weeks’ duration.<sup>3</sup> Concerning the reason for his actions, Applicant testified, “I just didn’t want to be there. I didn’t have anything to do there . . . I felt so incredibly trapped and anxious and I went to Medical and . . . tried to see what

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<sup>3</sup>An OTH is the most severe administrative service characterization, imposed for “one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Naval Service.” Naval Military Personnel Manual 1910-304. AE I, Applicant’s Certificate of Discharge, shows his re-enlistment code to be R-4. Such a code means that the member is not eligible to re-enlist and waivers are not authorized. Navy Recruiting Manual Enlisted COMNAVCRUITCOMINST 1130.8F.

they could do for me . . . I just felt very anxious, like I couldn't breathe. I was extremely agitated all the time." Tr. at 49-50. The record raises a real possibility that, "if faced with a work situation in which he is unhappy, [Applicant] would, again, act in a manner that best suits his self interests and is detrimental to the Government's interests." Department Counsel Brief at 8. The testimony quoted above is not consistent with the Judge's conclusion that "it is unlikely that . . . Applicant's misconduct . . . would recur." Decision at 8. It undermines the Judge's favorable application of Personal Conduct Mitigating Condition (PCMC) 17(c).<sup>4</sup>

The record supports a conclusion that Applicant's financial problems originated from his own conduct, *i.e.*, his purchase of multiple properties and his Navy discharge for misconduct, rather than from circumstances outside his control. As Department Counsel notes in his brief, Applicant was actually overextended prior to joining the Navy.

Applicant's significant tax debt was resolved through a wage garnishment rather than a voluntary effort at debt repayment. *See* ISCR Case No. 08-06058 at 6 (App. Bd. Sep. 21, 2009) ("[S]atisfaction of a debt through the involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor.") His other significant debt remains substantially unresolved at the close of the record.

Applicant has devoted funds to paying off his fiancée's debts rather than his own and to saving money for purchasing another house. Department Counsel persuasively argues that a house is a discretionary purchase and that, under the facts of this case, Applicant's relative neglect of his outstanding credit card debt reflects poorly upon his judgment.

Department Counsel notes that Applicant's security clearance application (Government Exhibit 1) demonstrates that he was aware of his financial problems at the time he submitted it, in February 2009. However, he did not begin paying on his delinquent debts until late 2009. Department Counsel persuasively argues that this was an unreasonably dilatory response to Applicant's financial problems, which undercuts Applicant's efforts to demonstrate mitigation.

The record as a whole does not support a conclusion that Applicant has met his burden of persuasion under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security'"). The Judge's favorable decision under Guideline E and Guideline F is not sustainable.

## Order

The Judge's favorable security clearance decision is REVERSED.

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<sup>4</sup>Directive, Enclosure 2 ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]"

Signed: Jean E. Smallin  
Jean E. Smallin  
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