

KEYWORD: Guideline F

DIGEST: The Judge found that Applicant has been diligent, and has paid off or otherwise resolved several debts. The Judge does not explain how applicant's conduct was not responsible. Adverse decision reversed.

CASENO: 09-08462.a1

DATE: 05/31/2011

DATE: May 31, 2011

In Re:)
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 ----) ISCR Case No. 09-08462
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)
 Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Archibald J. Thomas, III, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 7, 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). Applicant requested a hearing. On March 9, 2011, after the hearing, Administrative Judge Arthur E. Marshall, Jr. denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge found that Applicant is a senior test engineer for a Government contractor. He served on active duty in the Navy from 1978 until 1989 and as a reservist thereafter until 2003. He is married and has three minor children. Applicant holds a Master’s degree in management.

Applicant has accumulated several rental properties since 1997. He and his wife were familiar with the area in which the properties were located. They managed their properties competently, and Applicant was a “diligent” landlord. Decision at 2. They purchased three properties in the early to mid-2000s, after which the housing market declined. Additionally, it became harder to rent the properties. Applicant began having to make mortgage payments out of his own personal funds. He acquired about \$80,000 in personal debt to keep his mortgage loans in good order.

He sold one of his delinquent properties and paid off the debt on another through a foreclosure action. However, three of the properties are still the subject of delinquent debts. Although they are in foreclosure, the debts had not been resolved as of the closure of the record.

In addition to his mortgage debts, the SOR listed three others, for medical expenses and utility bills. These debts have been satisfied.

In the Analysis portion of the decision, the Judge noted that Applicant was succeeding in paying down the \$80,000 debt he acquired in attempting to keep his mortgage payments current. He stated that the circumstances underlying Applicant’s debts were outside Applicant’s control and that “he is actively and successfully working to satisfy” them.¹ He also concluded that Applicant’s “diligence, his strategies, and his demonstrated commitment to honor his debts” merit favorable

¹Directive, Enclosure 2 ¶ 20(b): “the conditions that resulted in the financial problem were largely beyond the person’s control . . . and the individual acted responsibly under the circumstances[.]”

application of Mitigating Condition 20(d).² Decision at 10. Once the remaining properties have been sold through foreclosure, “Applicant credibly states that he is prepared to satisfy any resultant balances that may be owed, using the same methods he is currently using to satisfy the debt incurred in trying to save the properties.” Decision at 11.

In the whole-person analysis, the Judge stated:

Applicant is a highly credible and honorable man with a track record for industry and diligence. He is responsibly addressing the debt incurred in trying to save his real estate investments from foreclosure. Through no fault of his own, however, Applicant’s ultimate liability on the three properties has yet to be calculated because the properties have yet to be auctioned for resale . . . Lacking finite terms regarding his ultimate debt, whether he has exhibited responsible behavior . . . cannot be discerned. Given these considerations, there is presently insufficient evidence to mitigate Guideline F security concerns. Decision at 12.

Discussion

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. In rendering a final decision, an “agency must 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)).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Applicant contends that neither the record viewed as a whole nor the Judge’s findings support the Judge’s adverse decision. He points to record evidence of Applicant’s diligence and good business judgment, that Applicant is current on his bills, and that Applicant has acted responsibly in regard to his debts. “[T]here is no reason to believe that the Applicant would not

²Directive, Enclosure 2 ¶ 20(d): “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

continue his diligence and applied proven methods to ameliorate his situation in the event the three remaining properties result in a deficiency judgment against him.” Applicant Brief at 6.

We find Applicant’s arguments persuasive. As a general rule, an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. Depending on the facts of a given case, the fact that an applicant’s debts will not be paid off for a long time, in and of itself, may be of limited security concern. *See, e.g.*, ISCR Case No. 08-06567 at 3 (App. Bd. Oct 29, 2009).

In the case before us here, the Judge found and the record demonstrates that Applicant has paid off or otherwise resolved several of his debts. While three remain, Applicant’s case for mitigation does not consist simply of promises for future action. The gist of Applicant’s argument on appeal is that he has demonstrated a track record of debt repayment. *See, e.g.*, ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008). The Judge does not explain what he believes that Applicant could have done that he has not already done to resolve his problems, or why Applicant has not demonstrated responsible behavior in regard to his debts or satisfactory resolution. *See, e.g.*, ISCR Case No. 08-06567, *supra*, at 3. Moreover, the record, and the Judge’s unchallenged findings, support a conclusion that Applicant has “initiated a good-faith effort” to resolve his financial difficulties.

The unchallenged facts of this case support Applicant’s argument that he has been diligent in addressing his financial difficulties, that he has a reasonable plan for paying off his debts, and that he has demonstrated a serious intent to effectuate that plan. The Judge’s ultimate adverse decision runs contrary to the weight of the record evidence. Accordingly, the Judge’s adverse decision is not sustainable on this record.

Order

The Judge’s adverse 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