

KEYWORD: Guideline F

DIGEST: Record evidence demonstrated that Applicant acquired mortgage debts under circumstances that undermined his trustworthiness, reliability, and good judgment. Record evidence was not sufficient to show that Applicant’s deficiency judgements were uncollectable and/or that the creditors had cancelled the debts. In any event, such evidence, even if available, would, under the facts of this case, be entitled to limited weight, in light of the circumstances under which Applicant’s financial problems originated. Favorable decision reversed.

CASE NO: 10-01978.a1

DATE: 08/24/2011

DATE: August 24, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-01978
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. 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).¹ Applicant requested a hearing. On May 20, 2011, after the hearing, Administrative Judge Claude R. Heiny granted Applicant’s

¹The SOR is undated. Department Counsel’s Appeal Brief states that DOHA issued the SOR on September 14, 2010.

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 the Judge erred in his application of pertinent mitigating conditions and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we reverse the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant is a 31-year-old senior engineer for a Defense contractor. He has worked at this job since 2009.

Applicant owned three houses, in two different states. These houses all went into foreclosure. He bought the first one, which was located in State A, in 2003, when he was 24 years old. He lived in the house until 2005, at which time he moved to State B due to requirements of his job. He refinanced the house with a \$175,000 adjustable rate mortgage (ARM) and rented it out. He used the equity to pay off a vehicle, make payments on credit cards, and for property maintenance. His monthly payments increased at the same time that his tenants moved out without prior notification. He was not able either to make his mortgage payments or to sell the house. The house went into foreclosure. The mortgage company forgave the debt, and issued Applicant a Form 1099-A. The lender's customer service web site lists the unpaid balance of this loan as zero.

In September 2005, Applicant purchased a home in State B to serve as his residence. He financed the purchase with first and second mortgages of \$308,000 and \$76,000 respectively, both ARMs. His salary at the time was \$75,000 and his monthly mortgage payment was \$3,500. In 2006, this payment increased to \$4,500. Because he had no renter in his house in State A, and because of another real estate purchase, he was unable to make his mortgage payments. Living on credit cards, he attempted to persuade the lender to freeze his ARM. He tried to sell the property, but the lender would not agree to a short sale. The property went into foreclosure.

Also in September 2005, Applicant and a friend purchased another home together. Applicant co-signed the loan, with the agreement that they would split any profit when the house sold. They financed this purchase with two ARMs, totaling \$550,000. The house was to be rented out, and, at one point, Applicant himself moved in, renting out the house referenced in the preceding paragraph. However, when the tenants moved out, Applicant had to leave the co-owned home, stop paying his share of the rent, and move back to his other home. This house eventually went into foreclosure. It sold for \$299,000.

As the housing market declined, the co-owned house declined in value by 30 % and the ARM increased by 25%. Due to a glut of rental properties, Applicant and his friend had a difficult time finding renters. In June of 2007, he left the state and moved in with his parents. He has returned neither to State A nor State B.

In State B, the law precludes lenders from recovering deficiency judgments from the sale of personal dwellings. Neither he nor his friend have received communications from the lenders demanding payment.

Applicant has experienced some periods of unemployment—June through August 2007; April through September 2008; and January through April 2009. At the time the three mortgages were incurred, Applicant was single and his annual salary was between \$58,000 and \$75,000. His wife’s annual salary is \$37,000 and her credit is excellent.² He has received financial counseling, does online financial research, and has an emergency fund for contingencies.

When Applicant purchased these properties, he was in his mid-twenties and had no experience as a landlord. He failed to understand the real estate market. He realizes now that he needs guidance before making investments.

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)). The standard applicable in security clearance decisions “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). “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

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).

In his analysis of the case, the Judge stated that Applicant’s three foreclosures raised Financial Considerations Disqualifying Conditions 19(a)³ and (c).⁴ Department Counsel concurs with this assessment. However, she also asserts that the Judge’s favorable findings as to mitigation are not sustainable.

²The Judge noted Applicant’s testimony that “he was married in the church so there are no legal documents regarding his marriage.” Decision at 4, note 7. It is not clear from the record why a marriage valid under the law of the state where it was solemnized would not be evidenced by a license or certificate.

³Directive, Enclosure 2 ¶ 19(a): “inability or unwillingness to satisfy debts[.]”

⁴Directive, Enclosure 2 ¶ 19(c): “a history of not meeting financial obligations[.]”

The security concern under Guideline F views financial problems as possible indicia of habits or traits inconsistent with holding a security clearance:

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 questions about an individual's reliability, trustworthiness, and ability to protect classified information. Directive, Enclosure 2 ¶ 18.

Department Counsel's appeal argument relies in large measure upon the Judge's findings and record evidence that Applicant obtained three ARMs in the mid-2000s, of a total amount in excess of \$1,000,000 and with total mortgage payments that exceeded his annual salary of \$75,000. Department Counsel persuasively argues that Applicant's having done so significantly impugns his self-control and judgment. Even given his relatively young age, at the time he bought the houses Applicant was a university graduate, having received a degree in electrical engineering *cum laude*. Applicant Exhibit 8, Undergraduate Transcript. There is no basis in the record to conclude that Applicant lacked the ability to appreciate the nature of his transactions or to foresee their consequences.

Department Counsel persuasively argues that Applicant's circumstances are similar to those of an earlier case, ISCR Case No. 08-11940 (App. Bd. Dec. 2, 2010). There the applicant, who earned under \$100,000 annually, purchased two homes with ARMs, the total amount of the loans exceeding \$1,000,000. We concluded that the fact of acquiring debt of such magnitude, with such a relatively limited income, undermined the applicant's contention that he had demonstrated the trustworthiness, reliability, and good judgment essential for access to classified information. Even if the applicant's claim that his deficiency judgments were uncollectable as a matter of law were correct, that would not, under the facts of his case, have been sufficient to mitigate security concerns arising from significantly profligate conduct.

In the case under consideration here, Applicant has also asserted that state law precludes the lenders from collecting the deficiency judgments (which may not necessarily be the same as extinguishing the debt). We note Department Counsel's argument that the record does not provide clear evidence that the state law has actually been favorably applied to Applicant. The lenders have not issued 1099-Cs.⁵ However, even assuming that Applicant's debts had been extinguished, such evidence would be entitled to limited weight in light of the circumstances under which he acquired

⁵The Judge stated "If the creditor issued an IRS Form 1099-A, the creditor does not intend to pursue further collection of the debt." However, this form shows only that a creditor has acquired an interest in the property that secured the debt. The 1099-A is used by a taxpayer to determine gain or loss. If a lender cancels part of the debt, he must file a Form 1099-C, Cancellation of Debt. IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*, April 20, 2011. As Department Counsel notes, none of Applicant's creditors issued him a 1099-C. Department Counsel argues that DOHA is "not in a position to resolve the factual and legal issues surrounding the applicability of state anti-deficiency laws as they relate to an applicant's particular situation, nor are DOHA security clearance hearings well-suited to this. Absent evidence that an anti-deficiency statute actually was applied to the specific facts of an applicant's indebtedness, an Administrative Judge cannot speculate on the applicability of such a statute." Department Counsel Brief at 9.

them.⁶ *See, e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003) (“Even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant’s conduct in incurring and failing to satisfy the debt in a timely manner”). We also note Department Counsel’s argument that there is a paucity of record evidence corroborating Applicant’s claims to have engaged in discussions with his creditors in an effort to resolve his problems, and we find the argument to be persuasive.

Accordingly, we conclude that the Judge’s favorable application of Mitigating Conditions 20(a),⁷ (b),⁸ and (c)⁹ is not sustainable. As we stated in a previous similar case:

In the first place, the fact of incurring this debt under the circumstances of this case is not consistent with responsible behavior. Second, there is no evidence, other than the fact that the property is subject to foreclosure, to demonstrate what action Applicant proposes to discharge a facially valid debt to the mortgagee. ISCR Case No. 08-08435 at 5 (App. Bd. Jul. 16, 2009).

The record does not support a conclusion that Applicant’s circumstances do not cast doubt on his reliability, trustworthiness or good judgment, or that his decision to walk away from the debts demonstrates the responsible action contemplated by the Directive. As Department Counsel argues, Applicant’s financial problems do not appear to have resulted from circumstances beyond his control. Rather, that his interest rates under an ARM would rise and that he might have a hard time keeping tenants were foreseeable *ab initio*. Moreover, the record does not support a conclusion that Applicant has actually secured the services of a financial counselor or has otherwise received financial advice tailored to his specific circumstances.¹⁰ Favorable application *per se* of Mitigating Condition 20(c) is not sustainable on this record.

⁶“Simply because a debt is extinguished through bankruptcy or other means not involving actual payment, this does not lead to the conclusion that the concerns are mitigated . . . It is well-established that while elimination of a debt may reduce vulnerability to coercion, it does not mitigate concerns over an applicant’s poor judgment as evidenced by the manner in which an applicant accumulated and addressed their debt.” Department Counsel Brief at 17.

⁷Directive, Enclosure 2 ¶ 20(a): “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment[.]”

⁸Directive, Enclosure 2 ¶ 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[.]”

⁹Directive, Enclosure 2 ¶ 20(c): “the 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[.]”

¹⁰Applicant testified that he listened to a radio program devoted to financial matters. He also stated, “I do a lot of online research . . . Web sites like Yahoo Finance, Google Finance are excellent sources for me. We have internal, within the company, resources . . . so I’ve looked at those, used those. And just a lot of--just reading from online resources and articles that I find throughout the Internet.” Tr. at 114.

The Judge extended favorable application to Mitigating Condition 20(e).¹¹ This provision mitigates security concerns when “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 to resolve the issue.” In applying this mitigating condition, the Judge relied upon Applicant’s testimony that he owed no deficiency judgements resulting from his foreclosures. However, in this case, the security significant conduct, as the Judge himself found, was the acquisition of the three mortgages themselves, not simply any resulting deficiency judgements. There is no evidence at all that these mortgage debts were not legitimate or that the lenders were failing to demonstrate acceptable business practices in insisting that they be repaid under the terms to which Applicant had agreed.

We have examined the Judge’s whole-person analysis. In that portion of the Decision, he stated Applicant’s debts “were not the type that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Money was not spent frivolously.” Decision at 9. In light of record evidence and the Judge’s findings that Applicant obligated himself to repay loans totaling over \$1,000,000 with a \$75,000 annual salary, this statement is not supportable, nor is it even consistent with the Judge’s earlier conclusion that the evidence raised Guideline F disqualifying conditions. While there is evidence that Applicant’s current circumstances are more stable than they were in the mid-2000s, it is not clear how these circumstances mitigate a history of significant financial poor judgment. For example, we note the Judge’s observation that Applicant is not on the mortgage note for the current house, only the wife. Decision at 10; Applicant Exhibit 7, Financing Documents. However, Applicant testified that the couple bought the home after the marriage.¹² Assuming the marriage satisfied the legal requirements of the state in which it occurred, a reasonable person could believe that Applicant had an enforceable right in real estate purchased during the marriage and that he could have some liability in the event of default. The whole-person analysis does not provide an independent basis for the Judge’s favorable decision.

In summary, the record and the Judge’s findings demonstrate that Applicant acquired three adjustable rate mortgages under circumstances which raise concerns about his reliability and trustworthiness and that he walked away from them when, as he reasonably should have foreseen, he became unable to make his payments. Under the facts of this case, the Judge’s conclusion that Applicant had demonstrated mitigation under the *Egan* standard is not supportable. The Judge cannot reasonably have concluded that the Applicant has resolved doubts about his fitness to hold a security clearance. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

Order

The Judge’s favorable security clearance decision is REVERSED.

¹¹Directive, Enclosure 2 ¶ 20(e).

¹²“Actually, we bought the home after the marriage . . . We’re not legally married. We’re only married through church and so there are no legal documents.” Tr. at 130.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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