

KEYWORD: Guideline F

DIGEST: Judge’s statements that Applicant’s financial problems arose from circumstances outside his control and that Applicant had done all he could to resolve them were not consistent with the Judge’s ultimate adverse decision. Best result is to remand for a new decision that addresses the mitigating conditions and whole-person factors as they apply to each of the SOR allegations. Adverse decision remanded.

CASE NO: 10-04405.a1

DATE: 09/19/2011

DATE: September 19, 2011

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| In Re: |) | |
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| ----- |) | ISCR Case No. 10-04405 |
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| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Darin Groteboer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 28, 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 June 29, 2011, after the hearing, Administrative Judge Henry Lazzaro denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's application of the pertinent mitigating conditions and of the whole-person factors was erroneous. Consistent with the following, we remand the case to the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is seeking a security clearance in connection with his employment by a Defense contractor. He previously worked for this same contractor from 1999 until 2007. He has held a top secret clearance without incident.

Applicant served as an enlisted member of the Army from 1971 until 1974. He obtained a commission in 1982, after having completed a bachelor's degree. He served as an Army officer from 1982 until his retirement in 1999, in the rank of major. While on active duty, he obtained a master's degree. Applicant is currently married to his second wife. His wife was forced to stop working in 2008 for medical reasons. She receives monthly disability pay.

In 2004, Applicant began purchasing rental properties as a source of income. He has acquired a total of 11 properties. His total amounts owed on the properties exceed their value by about \$500,000. He also owes more on his personal residence than it's worth. However, he is current on the mortgages.

In 2007, Applicant left the employ of the Defense contractor and started up a business devoted to disaster recovery. His business engages in repair and restoration after hurricanes, fires, floods, etc. He has also expanded his business to include other profitable services, such as duct cleaning. He financed the startup costs by means of a bank loan. He defaulted on at least one payment, and he has entered into a forbearance agreement, whereby he will repay the loan at a specified amount for a period of 180 months. As of the date of hearing, he has made his payments under the forbearance agreement in a timely fashion.

In addition, Applicant has two accounts owed to banks. These accounts have been charged off. Applicant has contacted the creditors to work out repayment plans, but he has been unable to afford any of the options that the creditors have presented to him.

Applicant's financial problems were affected by his wife's loss of employment and by the recession. His disaster recovery business has also been affected by rising fuel prices. Because he must charge for his services in accord with insurance company fee schedules, he is unable to increase the price for his services to meet his increased fuel costs. Additionally, his brother-in-law suffered a terminal illness without health insurance. Applicant and other relatives provided him with financial support, medical care, and funeral expenses.

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 analyzing the record, the Judge concluded that Applicant’s circumstances raised Financial Considerations Disqualifying Condition 19(a): “inability or unwillingness to satisfy debts[.]” Accordingly, he proceeded to consider whether Applicant had met his burden of persuasion as to mitigation.

The Judge stated that Applicant’s financial problems resulted from several things—his wife’s loss of employment, his brother-in-law’s illness, and the national recession. As the Judge acknowledged, these were circumstances that were outside Applicant’s control. The Judge went on to state that Applicant “has done all within his means to resolve his financial problems, including entering into a forbearance agreement with his largest creditor on which he has made all required payments, and applying income from his business to stay current on his mortgages.” Decision at 6. The Judge concluded that Financial Consideration Mitigating Conditions (FCMC) 20(b)¹ and 20(d)² apply. In the whole-person analysis, the Judge stated that, “[d]espite his best efforts, Applicant remains in a precarious financial position that is unlikely to improve in the foreseeable future.” Decision at 7.

Applicant contends that the Judge failed properly to apply the mitigating conditions and the whole-person factors. For one thing, Applicant contends that the Judge failed to apply FCMC 20(a).³ We are not persuaded by this argument, in light of evidence that Applicant’s debts, and the

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[.]”

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

³Directive, 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[.]”

conduct from which the debts arose, are ongoing. However, Applicant also contends that the Judge erred in his treatment of FCMC 20(d). We find this argument persuasive, in view of the statement in the Judge's decision in which he appears to extend favorable application to this condition. In light of this, and in light of other statements in the Decision in which the Judge opines that Applicant's financial problems arose from circumstances beyond his control and that Applicant has done all that he can to resolve them, the Judge's overall adverse conclusion is problematic. He has not articulated a satisfactory explanation for his decision. *See, e.g.*, ISCR Case No. 08-06567 (App. Bd. Oct. 29, 2009).

We conclude that the best result is to remand the case to the Judge for a new decision in which he addresses more specifically how the Guideline F mitigating conditions and whole-person factors apply to each of the three allegations in the SOR.

Order

The Judge's adverse security clearance decision is REMANDED.

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