

KEYWORD: Guideline F

DIGEST: While unemployment has a bearing on financial condition, twice being terminated for cause was not beyond Applicant's control. Applicant's expenses on his daughter's surgery predate his 1995 bankruptcy, and his divorce was in 1989. Applicant's 2007 credit counseling certificate indicates that no repayment plan was prepared. The record does not support a conclusion that has met his burden of persuasion. Favorable decision reversed.

CASENO: 06-23362.a1

DATE: 04/04/2008

DATE: April 4, 2008

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| In Re: |) | |
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| Applicant for Security Clearance |) | ISCR Case No. 06-23362 |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 26, 2007, 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 October 31, 2007, after the hearing, Administrative Judge Darlene Lokey Anderson granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her application of the Financial Consideration Mitigating Conditions (FCMC); and whether the Judge’s favorable security clearance decision is arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant has a history of financial difficulties, owing between \$60,000 and \$70,000 to twenty different creditors. He has filed for bankruptcy three times, the first in 1995 under Chapter 7 of the Bankruptcy Code. At that time his total liabilities amounted to \$56,900. He was discharged in bankruptcy later that year. He filed again for Chapter 13 bankruptcy in March 2006, but a judge subsequently dismissed it due to Applicant’s having failed to comply with the trustee’s payment plan. Applicant filed a Chapter 13 petition again in January 2007. He began making payments under the plan in March 2007. As of the date of the decision, the plan will take three to five years to complete.

There are a number of incidents in Applicant’s past which have a bearing upon his financial condition. He has lost two jobs, once being discharged Under Other Than Honorable Conditions (UOTHC) from the Air Force in lieu of court-martial. The second, in 2004, was from a civilian employer who fired Applicant for misuse of a company credit card. He had used the card to pay for visits to his mother, who was ill with cancer. He was unemployed for four to five months following this event. He withdrew money from his retirement account in order to cover living expenses. After securing new employment, Applicant again misused a company credit card, for which he was counseled and warned that if he did it again he would be fired. In addition to his lost jobs, in 1996 his employment contract expired, and he was forced to take a 25% pay cut and move to a new state, which also had an impact on his finances.

In addition to his employment difficulties, Applicant’s daughter has had medical problems. In 1994 she had cochlear implant surgery, which cost Applicant \$2,000 out of pocket. Batteries for the implant cost Applicant about \$50.00 a week. In 2006 he incurred approximately \$25,000.00 in legal fees on behalf of his son, who had been arrested following a high school prank.

B. Discussion

The Appeal Board’s review of the Judge’s findings of facts 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 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, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Whether the Record Supports the Judge’s Ultimate Conclusions

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 choices 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 establish any appropriate mitigating conditions. *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).

The security concern raised by Guideline F recognizes that “[f]ailure 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.”¹ In the instant case the Judge properly concluded that the Government had presented substantial evidence of security significant unpaid debt. Department Counsel’s appeal challenges the Judge’s conclusion that Applicant had met his burden of persuasion as to mitigation.

¹Directive ¶ E2.18.

Department Counsel disagrees, for example, with the Judge’s conclusion that Applicant had established FIMC 23(b)². The Judge pointed out that Applicant’s debt problems were affected by lost employment, family medical difficulties, and a divorce. However, Department Counsel argues that these misfortunes are not significant mitigating factors in Applicant’s lengthy history of bad debt. Department Counsel’s argument has merit. The Board notes, for example, that Applicant resigned from the Air Force in lieu of court-martial, receiving a UOTHC, for allegedly obtaining services to which he was not entitled.³ Furthermore, his having been fired for misusing a company credit card resulted in several months of unemployment. While these incidents may have had some bearing on his poor financial condition, it cannot be said that twice having been terminated for cause is a matter beyond Applicant’s control. By the same token, while Applicant incurred medical expenditures on behalf of his daughter, the evidence does not support the conclusion that these debts were ever a major portion of Applicant’s difficulties, and in any event there is no reason to believe that the \$2,000.00 he spent on her surgery affects his current financial condition, as this expenditure predates his 1995 Chapter 7 bankruptcy discharge. In addition, his divorce occurred in 1989, and the evidence supplied by Applicant does not demonstrate that it continues to play a meaningful role in his ongoing financial worries. To the extent that Applicant has faced difficulties beyond his control, the record does not support the conclusion that they are quantitatively different from what an average person might expect to encounter during the course of a lifetime. As it is, evidence supplied by Applicant does not demonstrate that he has acted responsibly in addressing his financial problems.

Neither are the other mitigating conditions which the Judge favorably applied—the receipt of counseling⁴ and good-faith efforts to repay creditors⁵—supported by the weight of the record evidence. While Applicant did engage the services of a credit counselor, he did so in January 2007 as a precondition to filing for bankruptcy. The counseling certificate, which he submitted as part of his court filing, states that no debt repayment plan was prepared during the course of this “briefing,” suggesting that it was *pro-forma*, thereby reducing the weight to which the counseling is entitled.⁶

²Directive ¶ E2.23(b). “[T]he 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 . . .”

³Applicant was alleged to have secured medical treatment at government expense on behalf of his ex-wife, who, following the divorce, would not have been entitled to it. Government Exhibit (GE) 11 is a statement by Applicant on this matter, in which he explains that he was honestly mistaken as to his marital status at the time in question, given the fact that he and his wife had each filed for divorce in different jurisdictions. GE 12, however, is a statement by a fellow officer to the effect that Applicant admitted that he knew his wife was not entitled to dependent benefits at the time she received them. Applicant paid the government back for the cost of the services. GE 11 at 3.

⁴Directive ¶ E2.20(c). “[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 . . .”

⁵Directive ¶ E2.20(d). “[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts . . .”

⁶Applicant Exhibit (AE) N.

That he apparently received similar counseling prior to his 2006 bankruptcy petition,⁷ which was subsequently dismissed due to non-payment, is significant record evidence contrary to the Judge's conclusion under FCMC 20(c) that Applicant has demonstrated "clear indications that the problem is being resolved or is under control." Furthermore, Applicant's lengthy history of financial problems, going back to the repossession of his car in 1986, makes it difficult to conclude that his having made payments under his most recent bankruptcy proceeding demonstrates good faith sufficient to mitigate the security concerns established by the Government's evidence. Given Applicant's financial history, as reflected in the record evidence, his having made six months of payments on a second Chapter 13 plan, expected to extend years into the future, is not sufficient to support the Judge's conclusion under FMCM 20(d).

Department Counsel argues that the Judge subjected Applicant's case to a piecemeal analysis. The Board finds this argument persuasive. While any one factor, such as divorce or illness, considered in isolation, might put Applicant's credit history in a sympathetic light, a Judge must evaluate the various aspects of an applicant's case in light of the totality of the record evidence. *See U.S. v. Bottone*, 365 F. 2d 389, 392 (2d Cir. 1966), *cert. denied* 385 U.S. 974 (1966) ("The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than the sum of the parts.") In this case the Judge's decision runs counter to the weight of the record evidence. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). The record, viewed as a whole, does not support a conclusion that Applicant has met his burden of persuasion that it is "clearly consistent with the interests of national security" for him to have a clearance. *Egan*, 484 U.S. at 528.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

⁷AE H at 4.

James E. Moody
Administrative Judge
Member, Appeal Board