

KEYWORD: Guideline F

DIGEST: As of the close of the record, Applicant had not satisfied a deficiency judgement from a foreclosure sale. Applicant submitted as corroborating evidence unsigned letters which had not been mailed as of the close of the record. The Board is persuaded that the Judge relied on his favorable impressions of Applicant's demeanor, job performance, etc. rather than record evidence. Favorable decision reversed.

CASENO: 06-23369.a1

DATE: 08/01/2008

DATE: August 1, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-23369
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 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 February 21, 2008, after the hearing, Administrative Judge Charles D. Ablard 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 his application of the Financial Considerations Mitigating Conditions (FCMC); whether he substituted a favorable credibility determination for record evidence; and whether the Judge’s conclusion as to one of the allegations in the SOR is inconsistent with the record evidence. Finding error, we reverse the decision of the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is an employee of a defense contractor. He holds a B.S. in electrical engineering from a well-known university. Applicant has two delinquent debts, both of which arose from his interactions with a member of his family, an uncle. The first of the two concerns two houses which Applicant had purchased, along with his uncle, in order to generate rental income. Applicant had given his uncle a power of attorney for him to arrange for the purchase. However, the uncle did not make payments, and one of the houses was sold at a foreclosure sale. Applicant owes a \$95,000 deficiency resulting from this sale. Additionally, Applicant’s uncle filed for bankruptcy protection three times in 2002 and 2003, in Applicant’s name. Applicant has requested dismissal of these bankruptcies. Applicant claims that the house that was subject to the foreclosure sale was seriously overvalued at the time he purchased it. He claims that it was merely a shell of a house, having been damaged by the elements and by fire. He has sought a new appraisal of the house. He submitted some documents after the hearing, addressed to local, state, and federal officials advising them that he believes that he was a victim of fraud. Applicant also attempted to hire an attorney to represent him “but the attorney declined to take the case because of the distance from his office to the courts where the action occurred. Applicant has since attempted to resolve the matter himself. He filed a fraud and identity theft complaint against his uncle.”¹ Decision at 3 (citations omitted). The second delinquent debt concerns a repossessed car, purchased in Applicant’s name by the same uncle. This debt had been removed from Applicant’s credit report “because the creditor has agreed that it was obtained through identify theft.” *Id.*

¹Government Exhibit 4 is a written complaint in Applicant’s name addressed to a home-lending accreditation agency in California. Government Exhibit 5 is a letter to another agency, apparently in a different city, providing proof of Applicant’s identify. There are no documents or other evidence showing what action, if any, these agencies took in response to Applicant’s letters. Government Exhibit 6 is a letter to an automobile financing agency concerning a fraudulent purchase of a car in Applicant’s name. None of these documents bears Applicant’s signature.

Applicant lives with a woman and their two children. Applicant and his partner have a joint income of over \$5,000 a month, with over \$1,000 left over after expenses.

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 same 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 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel contends that the Judge's decision is not supported by record evidence. The Board will address this contention in the discussion below.

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 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 (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).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, 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. 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).

The Judge properly concluded that Applicant's case raised security concerns under Guideline F.² Department Counsel argued, however, that the Judge erred in his application of the pertinent mitigating conditions. The Judge identified three such conditions as applicable to this case. The first, FCMC 20(a), mitigates security concerns when the debts are not recent; were infrequent or unlikely to recur; or they do not cast doubt upon Applicant's "current reliability, trustworthiness, or good judgment." Directive ¶ E2.20(a). The second, FCMC 20(b), concerns debts that arose from causes outside Applicant's control. It requires that Applicant has "acted responsibly under the circumstances." Directive ¶ E2.20(b). The third is FCMC 20(e), which mitigates security concerns if the individual has "a reasonable basis to dispute the legitimacy of the . . . debt . . . and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue." Directive ¶ E2.20(e). The Judge stated that while the actions which Applicant has taken "may not have been as prompt as they might have been or as successful as he hoped," these actions "warrant the application of the above mitigating conditions in this matter." Decision at 5.

Department Counsel argued that the Judge's decision is not supported by the record evidence and that, in ruling in favor of Applicant, the Judge, in effect, substituted his favorable credibility determination for record evidence. The Board finds Department Counsel's argument persuasive. In the first place, the Board notes the fact that, as of the close of the record, Applicant had not satisfied the deficiency judgment resulting from the foreclosure sale. The ongoing nature of this debt is inconsistent with a conclusion that the debt is not recent. *See* ISCR Case No. 07-10575 at 3 (App. Bd. Jul. 3, 2008), holding that an unsatisfied debt is a continuing course of conduct for the purpose of FCMC 20(a). Furthermore, considering the evidence as a whole, there is insufficient basis to conclude that Applicant has acted responsibly in regard to this debt or that he has taken "action to resolve" it. *See, e.g.*, ISCR Case No. 07-05632 at 2 (App. Bd. May 13, 2008). He submitted to the Judge some unsigned letters complaining of fraud, letters which were not actually mailed as of the close of the record. He consulted an attorney, who declined to take his case because the courthouse was too far from the attorney's office. There is no evidence that he attempted to hire another lawyer. Neither is there evidence of other behavior that can be characterized as responsible in view of Applicant's financial circumstances as he has presented them. Government Exhibits 4 and 5, referenced above, were apparently drafted two years after Applicant's discovery of the alleged

²The Judge identified four Financial Considerations Disqualifying Conditions (FCDC) "that might be applicable" in this case. Directive ¶ E2.19(a): "inability or unwillingness to satisfy debts;" (b): "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;" (c) "a history of not meeting financial obligations;" and (d) "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust." Decision at 5.

mortgage fraud. As stated in Footnote 1 above, the record does not demonstrate the result of these complaints. On its face, the record will not sustain a conclusion that Applicant has acted responsibly in regard to the deficiency judgment or that he has taken meaningful action to resolve it. FCMC 20(a), (e).

Concerning the alleged fraud, through which Applicant attempted to show that his debt arose from causes outside his control, there is a paucity of corroboration. The evidence actually contained in the file, when read as a whole, supports a conclusion that Applicant made a bad business decision. However, although there is record evidence that the house in question was overvalued at the time of the loan, there is nothing beyond Applicant's own assertions to connect this fact with fraud perpetrated by the uncle on him.³ Furthermore, Applicant's contention that the uncle filed for bankruptcy protection three times in Applicant's name is not supported by the evidence. The bankruptcy petitions appear to have been signed by Applicant himself, there being nothing on them to suggest that some other person was signing them by means of a power of attorney or through an act of misrepresentation.⁴ Accordingly, under the facts of this case, Applicant's claim of having been a victim of identity theft or some other form of fraud is insufficient to demonstrate that his delinquent debt arose from causes outside his control.

However, even if one accepts Applicant's contention that his uncle defrauded him during the course of their real estate transaction, the episode as a whole impugns Applicant's judgment, which is at the heart of Guideline F.⁵ The fact that he relied on his uncle to make the mortgage payments on the house, despite another instance in which the uncle allegedly failed to make car payments on behalf of Applicant, resulting in repossession of the vehicle, suggests that Applicant lacks the reliability and trustworthiness necessary to justify the grant of a clearance.⁶ The evidence viewed as a whole does not sustain a conclusion that Applicant has mitigated the broad security concerns identified by the Judge as arising from this case. *See* Footnote 2 above. Neither does it support the Judge's conclusion that Applicant has met his burden under a whole-person analysis. The Board is persuaded by Department Counsel's argument that the Judge based his decision not on the weight of the record evidence but on a favorable impression of Applicant's demeanor, job performance, etc. In light of this, the Board need not discuss Department Counsel's second assignment of error, although we note an apparent discrepancy between the Judge's finding that Applicant's uncle had

³*See* Tr. at 23. “[Judge]: So you don't have any documents today that really relate to the [mortgage] issue? [Applicant]: The pictures of the house and the appraisal. [Judge]: Well, if you want to offer those into evidence, that doesn't carry us very far, but you can put it in for what it's worth.”

⁴Applicant claimed that his uncle had not used the power of attorney when he filed for bankruptcy, apparently representing himself as Applicant. Tr. at 33. There is no corroboration for this assertion. Compare, for example, the purportedly forged signatures on the bankruptcy documents with Applicant's signature on the SF 86 submitted in this case. Government Exhibit 1, SF 86, dated October 20, 2005; Government Exhibit 13, Bankruptcy Documents.

⁵*See* Directive ¶ E2.18. Delinquent debts “may indicate . . . lack of judgment . . .”

⁶Applicant testified that his car was repossessed in 2002 and that he discovered the mortgage problems in 2004. Tr. at 14-15; 40-44.

fraudulently purchased a car in Applicant's name and Applicant's own testimony describing the car as his own. The decision does not explain this discrepancy or attempt to resolve it. In light of the above, Applicant has not met his burden of persuasion that it is "clearly consistent with national interest" to grant him a clearance. Decision at 7.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael D. Hipple
Michael D. Hipple
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