

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant's statements of intent to pay his delinquent debt are entitled to little weight without corroborating evidence. Applicant has submitted little evidence of responsible conduct regarding his finances. Even if a debt is legally unenforceable, the government may consider the facts and circumstances applicant's conduct in incurring the debt and failing to satisfy it in a timely manner. Favorable decision reversed.

CASENO: 07-08049.a1

DATE: 07/22/2008

DATE: July 22, 2008

In Re: ----- Applicant for Security Clearance))))))))	ISCR Case No. 07-08049
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffrey, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 4, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On April 10, 2008, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s application of Guideline F Financial Considerations Mitigating Conditions (FCMC) found in ¶ 20 of Enclosure 2 of the Directive (¶ E2.20) is arbitrary, capricious, and unsupported by the record evidence; and whether her whole-person analysis is unsupported by the record evidence.¹ Finding error, we reverse the Judge’s decision.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following relevant factual findings: Applicant married in 1997. He and his wife separated and maintained two households for about a year in 2006 and then reconciled about four months before the hearing.

Applicant and his sister established an office cleaning business which was incorporated under state law. For incorporation purposes, the business had only two officers: Applicant’s sister as president and Applicant as operations manager. The business operated out of Applicant’s rental home and ceased after three years. Applicant’s sister handled all the paperwork for the business, and she did not inform Applicant of the outstanding tax issues of the business or her failure to properly dissolve the corporation. Applicant was unaware of multiple state tax liens and one federal tax lien, possibly because he moved several times after closing the business. When Applicant learned of one of the state tax liens, he resolved it in 2002; but he was still unaware of the other tax liens until he learned of them, as well as other delinquencies, as part of the security clearance process. In October 2007, Applicant hired a tax representation firm to help him resolve his tax problems.

After Applicant moved to another state in 2003, two events affected his financial situation in a negative way. When Applicant’s son caused a fire in the family’s apartment, the management

¹Department Counsel does not appeal the Judge’s findings and conclusions under Guideline E.

company charged Applicant for the damages, and Applicant had no insurance to cover the cost. In 2006, Applicant was laid off as a truck driver when his employer ceased operations in his area. In addition to Applicant's tax liens, the SOR includes three other debts. In the past, Applicant's wife has handled the family finances. Applicant attributes his former lack of knowledge of his past-due debts in part to that fact, and he is now playing a more active role in the family finances. When he has learned of the debts, he made some payments on them.

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.

To the extent that the Judge's findings are relevant to the assigned error, they will be discussed 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 found that Applicant's financial situation raised security concerns. Decision at 7. However, she found those concerns to be mitigated. Department Counsel argues that the Judge's findings of mitigation are arbitrary, capricious, and unsupported by the record evidence. Department Counsel's arguments have merit.

The Judge applied FCMC 20(a).² The Judge found that Applicant's tax liens arose between nine and 14 years ago and were the result of his former business, rather than failure to pay personal income tax. She found that liens were unlikely to recur, since Applicant no longer owns or operates his own business. Applicant provided no information about his former business. Moreover, the federal tax lien makes no mention of Applicant's former business, and Applicant testified that he did not know whether the federal lien was personal or business-related. Transcript at 31. Applicant hired a tax representation company to help him settle his tax liens, but not until after he received the SOR; and he has presented no evidence that he or the company has yet taken any tangible steps to settle them. While Applicant indicates that he intends to pay off his debts, the Board has held that such statements of future intent to pay debts, without corroborating evidence such as consistent steps already taken, are entitled to little weight. *See, e.g.*, ISCR Case No. 01-08410 at 3 (App. Bd. May 8, 2002). Applicant has very little in savings. Moreover, he has submitted little concrete evidence of responsible conduct regarding his finances, and the evidence he submitted indicates that he has difficulty in paying his monthly expenses on a regular basis.

The Judge also found mitigation under FCMC 20(b).³ In applying this mitigating condition, the Judge referred to Applicant's period of unemployment and the apartment fire which was caused by his son. Board decisions indicate that not only the involuntary circumstances, but also an applicant's responses to the circumstances, must be considered. *See, e.g.*, ISCR Case No. 02-32606

²“[T]he 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[.]”

³“[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 circumstances[.]”

at 4 (App. Bd. Jan. 21, 2004). As Department Counsel correctly notes, the fire occurred four years ago, and Applicant was laid off over two years ago. Moreover, he collected unemployment for the 90 days he was unemployed. He moved from the apartment building without leaving a forwarding address. Applicant took no action to settle the resulting debts until after he received the SOR.

The Judge applied FCMC 20(c),⁴ in part because Applicant hired a tax representation firm to help him settle his tax-related debts. However, neither Applicant nor the firm presented any evidence of any action that has yet been taken to settle the debts. The Judge also accepted Applicant's testimony that he had been making payments on his other debts without convincing documentation to prove his payments. The Judge instructed Applicant to provide such documentation after the hearing. The evidence Applicant submitted was entitled to little weight. As evidence of payment, Applicant submitted a single month's bank statement which consisted of a list of check numbers and amounts with little or no identification of the payees. Applicant put a mark by eight of the check numbers. Applicant has not demonstrated a history of payment of his outstanding debts; and the record demonstrates that his payment of standard monthly expenses is irregular, calling into question whether his financial problems are under control.

The Judge found mitigation under FCMC 20(d).⁵ Applicant's limited efforts to pay or otherwise settle his debts have been discussed above. The Judge found mitigation in the fact that Applicant has already resolved two state tax liens many years ago, although he has other state liens still outstanding. She also noted Applicant's promise to repay or settle with his creditors. The limited weight to be accorded such promises is discussed above.

The Judge also discussed the age of the tax liens against Applicant, stating her view that the federal government can only collect its lien for another year. A security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Accordingly, even if a debt is legally unenforceable, the government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring the debt and failing to satisfy it in a timely manner. *See, e.g.*, ISCR Case No. 07-09966 at 2-3 (App. Bd. Jun. 25, 2008). The Judge's findings of mitigation are arbitrary, capricious, and unsupported by the record evidence.

The Judge used the same conclusions in her whole-person analysis as she did in applying mitigating conditions. As set forth above, those conclusions are not supported by the record evidence. The Judge's analysis is therefore unsustainable.

⁴“[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[.]”

⁵“[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

Order

The Judge's favorable security clearance is REVERSED.

Signed: Michael Y. Ra'anan

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

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board