

KEYWORD: Guideline F

DIGEST: Applicant’s bad debts did not originate from causes outside his control. Department Counsel cites Applicant’s decision to pay tuition costs by means of a credit card and his having been fired due to having not mastered his job. These circumstances appear to have resulted from Applicant’s own conduct rather than from events that intruded upon him. The fact that Applicant has permitted the three remaining debts to linger despite a net worth in excess of \$200,000 undermines the Judge’s conclusion that he has acted reasonably in response to his debts. There is no record evidence of financial counseling, nor does the record support a conclusion that there are “clear indications” that Applicant’s financial problems are being resolved. The Board notes Applicant’s testimony at the hearing that he does not keep track of his finances, having turned that responsibility over to his wife. Applicant has not demonstrated a good faith effort to pay off his delinquent debts, relying on the statute of limitations and the fact that his debts have been charged off. Favorable decision reversed

CASENO: 07-10575.a1

DATE: 07/03/2008

DATE: July 3, 2008

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In Re:)	
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-----)	ISCR Case No. 07-10575
)	
Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 11, 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 27, 2008, after the hearing, Administrative Judge Kathryn M. Braeman 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 raises the following issues on appeal: whether the Judge’s application of the Financial Considerations Mitigating Conditions (FCMC) is unsupported by record evidence; and whether the Judge’s whole person analysis is unsupported by record evidence. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

Applicant is a financial analyst for a defense contractor, making sure that obligated funds are appropriately expended and that his employer’s projects do not overspend their budgets. He holds a B.A. degree in accounting. He has four delinquent debts alleged in the SOR, for \$11,572, \$11,211, \$15,068, and approximately \$6000. He has settled one debt but does not have sufficient funds to settle the remaining three, although they are now unenforceable due to the statute of limitations. He has had no adverse debts withing the five years preceding the decision.

At the hearing, Applicant stated that his bad debts were due to “poor credit and cash flow management.” (Decision at 3). He had charged some of his college tuition expenses on his credit cards. In addition, Applicant’s financial history has been affected by his efforts to assist his son in paying medical bills on behalf on his grandson, who had a brain tumor. It has also been affected by his own loss of a job due to “not learning it fast enough,” (Decision at 4) and to his wife not being able to work due to health problems. Applicant earns \$50,000 annually. In addition, he receives a gift of \$11,000 each year from his mother. He owns a house worth approximately \$200,000, which is paid off. He also owns two cars, both of which are also paid off. Applicant owns a classic car worth about \$30,000. At the time of the hearing he had no formal budget, because his wife handled all the family finances.

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.

Department Counsel has not challenged the Judge’s findings. His argument that the Judge’s decision is not supported by record evidence will be addressed 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 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 rebut or mitigate those concerns. *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 extended favorable application to FCMC 20(a) through (d). Department Counsel argues persuasively that the Judge's conclusions are not supported by the record evidence. For example, the Judge concluded that Applicant's financial problems are not recent, insofar as there is no evidence of additional delinquent debt since 2003. (*See* Directive ¶ E2.20(a): "[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 upon the individual's current reliability, trustworthiness, or good judgment . . .") Department Counsel argues on appeal that Applicant's use of a credit card to pay tuition expenses does not demonstrate the good judgment required by this mitigating condition. Furthermore, the ongoing nature of the remaining three debts vitiates a conclusion that Applicant's financial problems are not recent or that they do not impugn his trustworthiness or reliability. *See, e.g.,* ISCR Case No. 01-03695 at (App. Bd. Oct. 16, 2002) (Failure to discharge debts is "a continuing course of conduct" that precludes a finding that the debts are attenuated.) As Department Counsel notes, a strategy of merely waiting out creditors is not an adequate substitute for serious and reasonable efforts to pay off debts.

Regarding FCMC 20(b), the Judge noted Applicant's efforts to assist with his grandson's medical bills and his loss of employment. (*See* Directive ¶ E2.29(b): "[T]he conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances . . .") However, Department Counsel persuasively argues that, viewed as a whole, Applicant's bad debts did not originate from causes outside his control. Department Counsel cites Applicant's decision to pay tuition costs by means of a credit card and his having been fired due to having not mastered his job. These circumstances appear to have resulted from Applicant's own conduct rather than from events that intruded upon him. In any event, the fact that Applicant has permitted the three remaining debts to linger despite a net worth in excess of \$200,000 undermines the Judge's conclusion that he has acted reasonably in response to his debts. The Board agrees with Department Counsel that the Judge's favorable consideration of this FCMC is not supported by the evidence.

Neither does the record support a favorable application of FCMC 20(c) and (d). There is no record evidence of financial counseling, nor does the record support a conclusion that there are "clear indications" that Applicant's financial problems are being resolved. (Directive ¶ 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 . . .") In addition to the matters discussed above, the Board notes Applicant's testimony at the hearing that he does not keep track of his finances, having turned that responsibility over to his wife. (Tr. at 54) Furthermore, Applicant has not demonstrated a good faith effort to pay off his delinquent debts, relying as he apparently does on the statute of limitations and the fact that his debts have been charged off. (*See* Directive ¶ E2.20(d): "[T]he individual initiated a good-faith effort to repay over due creditors or otherwise resolve debts . . .") (*See also* ISCR Case No. 06-14521 at 2 (App. Bd. Oct. 15, 2007): "[T]he concept of good faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than show that he or she relied on a legally available option . . . in order to claim the benefit of [this mitigating condition.]" (internal citations omitted) After examining the Judge's decision in light of the record as a whole,

the Board is persuaded by Department Counsel's argument that the record will not sustain a favorable application of the Guideline F mitigating conditions cited in the Judge's decision.

For similar reasons, the Board concludes that the record will not sustain the Judge's favorable whole-person analysis. The Judge stated that Applicant "is a sincere person who made substantial efforts to reform his financial practices. There is little potential for pressure, coercion, exploitation, or duress because of his stable employment and his substantial assets." (Decision at 8) However, in light of Applicant's unresolved delinquent debts, despite his having sufficient assets and income to pay them off, there is a paucity of evidence to support this conclusion by the Judge. Additionally, the Board notes that, in his response to the SOR, Applicant claimed that all the debts listed in the SOR had been "settled for a reduced amount." (Response to SOR, October 24, 2007) This is not consistent with his testimony at the hearing that only one of the debts had been settled, while the others were charged off. Applicant testified as to his opinion that a charged-off debt is the same as one that has been settled with the creditor. (Tr. at 44). The Judge does not explain why such a belief, even if honestly held, is reasonable in light of Applicant's degree in accounting and his professional experience as a financial analyst. Certainly this testimony is not consistent with a view that Applicant has mitigated the security concern arising under Guideline F, that bad debts can evidence a lack of judgment which, in turn, raises questions about an applicant's reliability. Viewed as a whole, the record does not support the Judge's favorable decision.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, 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