

KEYWORD: Guideline F

DIGEST: Applicant has numerous delinquent debts arising from a relationship with a man she never married. Given the on going nature of the debts the Judge's application of Mitigating Condition (MC) 20(a) was misplaced. The application of MC 20(b) is also not justified given Applicant's demonstrated capacity pay debt. There is no record evidence that supports the application of MC 20(c). MC20 (e) only applies to two debts. Favorable decision remanded.

CASENO: 07-11814.a1

DATE: 08/29/2008

DATE: August 29, 2008

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In Re:)	
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-----)	ISCR Case No. 07-11814
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Tom Coale, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 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 May 14, 2008, after the hearing, Administrative Judge Mary E. Henry 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 Considerations Mitigating Conditions (FCMC); and whether the Judge erred in her whole-person analysis. Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant works as a trainer for a federal contractor. In 1982 Applicant entered into a long-term relationship with a man whom she never married. She ended the relationship in 2000. She has three children from this relationship, ranging in age from 11 to 23.

Applicant has numerous delinquent debts arising from her relationship with her partner. Although she attempted to pay the debts, she defaulted on some of them, receiving no assistance from her partner, “who had created much of the debt problem.” Decision at 4. Although Applicant acknowledges some of the debts, she disagrees with others. She completed an Associates Degree in Applied Science in 2005 and “incurred no unpaid debts for her education.” *Id* at 3. She has purchased a modular home for herself and her children and is current on her mortgage payments. She has paid off a recent automobile loan and has opened credit card accounts in the three years preceding the decision, for which she makes timely payments.

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, 620-21 (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 expressly challenged the Judge's findings of fact. However, in the course of arguing the assigned errors, Department Counsel asserts that the Judge did not give sufficient weight to contrary record evidence. The Board will address this matter 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 concluded that FCMC 20(a) mitigated the security concerns in Applicant's case, in that they were not likely to recur and that they do not raise concerns about Applicant's "current reliability, trustworthiness, or good judgement." Decision at 6. (*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 persuasively argues, however, that the ongoing nature of the debts vitiates the Judge's conclusion. *See, e.g.*, ISCR Case No. 01-03695 at (App. Bd. Oct. 16, 2002) (Failure to discharge debts is "a continuing course of conduct . . .") Given the number of

these ongoing debts, and the lack of record evidence as to Applicant's efforts to address them, Applicant has failed to meet her burden of persuasion as to this mitigating condition.

Additionally, Department Counsel challenges the Judge's favorable application of FCMC 20(b) (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 . . .") Department Counsel points to record evidence that Applicant took her partner's name and submitted federal tax returns as married filing jointly. Such evidence raises the reasonable implication that Applicant and her partner held themselves out as married, which would have facilitated her partner's having obtained credit in both their names.¹ This evidence is contrary to the Judge's conclusion that Applicant's bad debts arose from matters outside her control. The Judge's decision does not explain how, under the facts of this case, Applicant's circumstances are equivalent to those examples listed in FCMC 20(b).² Furthermore, the fact that Applicant has apparently established a current good credit rating, as evidenced by her housing, college tuition, and car payments, and her currency on credit card debts, demonstrates a capacity to pay debt. Department Counsel persuasively argues that this capacity contrasts with Applicant's failure to address her delinquent debt and casts serious doubt as to the extent to which she has acted responsibly in regard to that debt. The weight of the record evidence does not support a conclusion that Applicant has met her burden of persuasion under FCMC 20(b).³

For similar reasons, Department Counsel argues that Applicant has failed to meet her burden of persuasion under FCMC 20(c) (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 . . .") There is no record evidence that Applicant has sought credit counseling. While Applicant has established a satisfactory record as to her current expenses, the record does not support a conclusion that she has made a reasonable attempt to resolve these debts alleged in the SOR. Making allowances for Applicant's contention that some of the debts are not hers, those that remain are numerous and of considerable amounts. Under the facts of this case, these ongoing and substantial debts raise security concerns which Applicant's evidence does not reasonably mitigate under the mitigating conditions. Additionally, Department Counsel persuasively challenges the Judge's analysis of FCMC 20(e) (Directive ¶ E2.20(e): "[T]he individual has a reasonable basis to dispute the legitimacy of the past-due debts which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue . . .") on the ground that it applies only to two of the many debts alleged in the SOR. In any event, Department Counsel correctly notes that Applicant has provided little by way of documented

¹"In light of how Applicant conducted herself during this relationship, the debts that arose . . . should be viewed as the equivalent of marital debts . . ." Department Counsel Brief at 11.

²Loss of employment, business downturn, unexpected medical emergency, death, divorce or separation.

³ ". . . Applicant played a significant role in overextending [her and her partner's] finances, and . . . Applicant compounded her debts problems by making financial decisions preventing her from resolving these debts in a timely, reasonable, and good faith manner." *Id.* at 13.

proof of her basis for disputing the debts. The weight of the record evidence does not support a conclusion that Applicant has met her burden of persuasion under the Financial Considerations Mitigating Conditions.

In light of the errors noted above the Board remands the case to the Judge. The Judge is instructed to issue a new decision that does not rely upon the application of the aforesaid mitigating conditions. As a result of the foregoing, it is premature to address the remaining issue raised on appeal.

Order

The Judge's favorable security clearance decision is REMANDED.

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