

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 26, 2008, after the hearing, Administrative Judge Charles D. Ablard denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.¹ Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge found that Applicant, who works for a security service doing business with the DoD, invested in three rental properties. He paid a total of \$578,000 for them. These sales were subsequently discovered to have been part of a larger scheme to defraud people into purchasing real property at inflated prices. Applicant now owes deficiency judgments resulting from foreclosure sales of the properties.² These debts have become delinquent. Applicant contacted the company that purchased the mortgages to work out a payment program or otherwise settle the matter. However, the company has insisted on full payment of all three debts. One of the persons who sold Applicant the properties was found dead of a gunshot wound in 2006, either a suicide or murder. Another employee of the mortgage company that initially held the mortgage note has pled guilty to fraud. Applicant has written a letter to the Attorney General of the state in question advising of the fraud. At the close of the record he had not received a response. Applicant holds two jobs, one earning him \$65,000.00 a year and the other \$18,000.00. He has no debts other than these deficiency judgments.

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.

¹In support of his appeal, Applicant has submitted new evidence of his continued efforts to resolve his indebtedness, which the Board cannot consider. See Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"; see also ISCR Case No. 08-05372 at 2 (App. Bd. Nov. 26, 2008).

²The total amount of these debts, as alleged in the SOR and admitted by Applicant, is \$139,915.

Applicant his not challenged the Judge’s findings. Therefore, they are not at issue in this appeal.

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 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).

In evaluating Applicant’s case, the Judge concluded that the evidence would not support a *per se* favorable application of the mitigating conditions. Given the extent of the debt, this conclusion is sustainable. However, it is permissible for a Judge nevertheless to decide in an Applicant’s favor in view of the whole person analysis. *See, e.g.*, ISCR Case No. 02-05110 at n 7 (App. Bd. Mar. 22, 2004); ISCR Case No. 99-0542 at 7 (App. Bd. Mar. 21, 2003). In this case, the Judge’s whole-person analysis states in pertinent part: “Applicant is a young adult with significant

responsibility in his two jobs and for his family. He is acting responsibly to make certain that he provides for their support. He was offered a real estate package that was too good to be true and it turned out that it wasn't. He was completely inexperienced in real estate investment and was taken in by the scheme [which the Judge previously described as fraudulent] in the belief that he could be a property owner with rental income to pay the mortgages from very little money invested. However, he has taken some steps to resolve the delinquent debts with the mortgage holder and, hopefully, will continue to do so." Decision at 7. These comments are supported by the Judge's findings of fact and by the record. However, they do not support the Judge's ultimate conclusion to deny Applicant a clearance, in light of record evidence that his debts originated from an act of fraud perpetrated against him, the fact that he has taken steps to resolve his debts, and the fact that the record discloses no other debt attributable to him. The Judge's adverse security clearance decision is not sustainable. The Board remands the case for a new decision consistent with this discussion.

Order

The Judge's adverse 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