

KEYWORD: Guideline F

DIGEST: Reliance on the non-collectability of a debt does not constitute a good-faith effort to resolve the debt within the meaning of the Directive. The Judge decision did not take into account record evidence which ran contrary to her favorable decision. Applicant presented little corroboration for his claims to have been defrauded. Nor did he demonstrate reasonable efforts to resolve his delinquent debts including those unrelated to the alleged fraud. Favorable decision reversed.

CASENO: 07-16841.a1

DATE: 12/19/2008

DATE: December 19, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-16841
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Gina L. Marine, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 7, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 12, 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 Guideline F mitigating conditions and whether the Judge's whole-person analysis was erroneous.¹ 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 owns and operates a company which is a DoD contractor. He started his business 30 years ago. In 2005, a real estate broker approached Applicant about purchasing rental property. After discussing the matter with the broker, Applicant agreed to buy 22 rental properties, consisting "primarily of single family homes." Decision at 4. The broker orally promised to sell Applicant the properties at 10% below market value. He stated to Applicant that all the properties were rented and that Applicant would not have any out-of-pocket expenses. The broker also promised to make the down payments, pay all closing costs, and cover any shortfall between the loan payments and the rental receipts for a period of one year. The broker obtained the services of an appraiser and of a mortgage broker, both of whom he knew. He obtained 100% financing for the houses, by means of a primary and secondary mortgage on each.

During the settlement process, Applicant learned that the properties were titled in the name of the real estate broker's wife. At the final closings, the wife refused to sign the agreement through which the real estate broker would pay the difference between the monthly mortgage and the rent received on each property. The real estate broker then refused to sign the agreement himself. Applicant lacked the financial resources to pay the difference.

After settlement, Applicant hired an attorney to review the sale. "The attorney found serious irregularities in the overall transaction," including that the purchase prices had been inflated; that the properties were not all rented, contrary to representations by the broker; and that the real estate broker had in the past filed for bankruptcy. The attorney concluded that the broker, his wife, the mortgage broker, and the appraiser had employed an elaborate scheme whereby they dumped "poorly performing properties" on Applicant. Decision at 4. Applicant was not able to meet the mortgage obligations after the final closing.

Subsequently, Applicant's attorney wrote to the lenders holding the mortgages on the homes, advising them that the broker had refused to pay his promised share of the mortgage amounts. Applicant offered to work out a financial resolution "to mitigate the damages caused [to] the mortgage lenders and Applicant by the scheme." Decision at 4-5. Through his attorney, Applicant offered to pay the net rents on the properties to the lenders, to rent the vacant properties, to cooperate with selling the properties, and to pursue claims against the broker and the other parties in question.

¹The Judge's favorable decision under Guidelines E and J is not at issue in this appeal.

In exchange, Applicant requested that the lenders not “negatively impact” his credit rating. Decision at 5.

The lenders chose to foreclose on the properties, all of which had been sold as of the close of the record. “Three law firms advised Applicant that he would not be liable for any unpaid mortgage debt following the sale of these properties under the state’s anti-deficiency statutes because his loans were purchase money mortgages . . . The lenders’ only recourse in this situation is to list the debts on Applicant’s credit report.” Decision at 5.

Applicant’s subsequent credit reports show delinquent debt on two corporate credit cards and on 18 mortgages, “many of which are second mortgages on the rental properties. His other debts are timely paid and 24 mortgages have a zero balance (some of these mortgages are related to his own home.)” Decision at 5. Applicant owes a significant amount of money on these two cards. “Because there are problems with fraudulent charges on the larger debt, the negotiations are not complete.” Decision at 5-6. Applicant has filed complaints against the various parties with the State Board of Appraisal, the Department of Real Estate, and the Department of Financial Institutions. These complaints had not been resolved at the close of the record. He has expressed an intent to sue these parties in court, but lacks the resources to do so.

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.

In her brief, Department Counsel argues that the Judge’s decision is not supported by substantial record evidence. The Board will address this concern 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 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 security concern under Guideline F is that an applicant's failure to meet financial obligations "may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."² Given the extent of Applicant's financial problems, the Judge's conclusion that Applicant's case raises Guideline F security concerns is sustainable. The issue to be decided upon appeal is whether the Judge properly concluded that Applicant had met his burden of persuasion as to mitigation.

Department Counsel argues that the Judge's decision failed to address significant contrary record evidence. This argument is persuasive. The Judge's favorable decision relied, to a large extent, on her findings that (1) the broker deceived Applicant into purchasing the houses and (2) the state's anti-deficiency laws prevent a lender from collecting from a homeowner the difference between the amount realized at a foreclosure sale and the remaining balance of the home loan. On the latter point, reliance on the non-collectability of a debt does not constitute a good-faith effort to resolve that debt within the meaning of the Directive. *See, e.g.*, ISCR Case No. 07-09966 at 3 (App. Bd. Jun. 25, 2008).

Moreover, in this case, the Judge's decision did not take into account contrary record evidence which is less favorable to Applicant. The Board notes Applicant Exhibit G, a legal memorandum from a law office representing Applicant in his real estate dispute. The memorandum

²Directive ¶ E2.18.

acknowledged that state law forbade collecting deficiency judgments. However, it went on to say, “the magnitude of [Applicant’s] indebtedness on these transactions may cause the lenders to seek some other theory on which to recover, such as misrepresentation or a scheme or artifice to defraud, possibly alleging that [Applicant] and [the broker] collaborated in a scam designed to pay off the [the broker’s] creditors by duping the present lenders . . . it does not seem likely that the anti-deficiency statutes would prevent the banks from pursuing that type of claim which could result in a personal judgment against [Applicant].” AE G at 4.

Another memorandum, by a lawyer working for a different firm, contains similar language. While acknowledging the general effect of anti-deficiency statutes, the memorandum goes on to say that state case law does not conclusively resolve the question of whether such anti-deficiency statutes relieve a homeowner of debt resulting from fraud. “Clearly the lenders would be remiss if they failed to argue that the anti-deficiency statutes cannot be used as a shield to prevent recovery of damages resulting from fraudulent conduct.”³ While neither of these memoranda categorically state that Applicant actually engaged in fraudulent conduct, at the very least they undermine the Judge’s finding that Applicant does not owe the banks for the unpaid balance of the mortgages. However, even assuming that Applicant did not knowingly participate in a scheme to defraud (Applicant presented no independent corroborating evidence of his claims that the broker defrauded him.), the record still raises serious questions about his judgment. He was offered a business proposition containing promises by the broker that would have prompted a reasonable person to inquire further before committing to the deal. This is especially true in light of record evidence of Applicant’s extensive business experience. However, he entered into legally enforceable agreements to purchase these 22 houses without reducing to writing the broker’s promises to pay down-payments, closing costs, and the shortfall between rents and amounts owed on the debts. Neither is there record evidence of efforts by Applicant to verify other representations made to him by the broker as to the value of the houses, the extent to which they were actually rented, etc. As an attorney testifying for Applicant stated, “[I]f he had done a little more due diligence he wouldn’t have got in this jam.”⁴

The Board has considered the entire record, including the matters which Applicant presented in mitigation. Applicant provided little corroboration for his claims of having been defrauded. Neither did he demonstrate reasonable efforts to resolve his delinquent debts, including those relating to his credit cards. The Judge herself found that he did not provide evidence of a repayment plan for the credit card debts. The record as a whole does not demonstrate that Applicant’s delinquent debts arose from causes outside his control or that he has taken steps to resolve the debts sufficient to meet his burden under the *Egan* standard. The Judge’s favorable security clearance decision is not sustainable.

³Government Exhibit 2, Response to Interrogatories, which contains this memorandum as an attachment at p. 16.

⁴Tr. at 58.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin
Jean E. Smallin
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