

DATE: October 29, 2009

In Re:)
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 -----) ISCR Case No. 08-06567
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 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 2009, 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 July 27, 2009, after the hearing, Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

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

The Judge found that Applicant had been employed in the communications industry, suffering unemployment when his business failed. He started up another company, which installed

wireless communication technology. He was current on his bills until this business faltered in 2007. After that he became delinquent on many of his bills.

He subsequently began working for a defense contractor but was laid off. He has held a variety of jobs since, including driving a taxicab. He has experienced a 90 % drop in income. In addition to his employment difficulties, his daughter has “major medical issues.” Decision at 3.

As stated above, Applicant has had several delinquent debts in the recent past. Two of the largest, for taxes owed the federal government and the state, have been resolved. He has paid off other debts, but he has three outstanding, which total in excess of \$17,000. His principal source of income at the present time is unemployment benefits.

Applicant has engaged the services of a credit counseling agency. This agency has devised a debt repayment plan. “His financial counselors advised that he would be able to increase his monthly payments once he returned to work.” *Id.* at 4.

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

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 the Analysis portion of the decision, the Judge noted that Applicant's financial problems were rooted in circumstances outside his control, that he had paid off some of his debts, and that he was making payments on others. "Based on his evidentiary showing, Applicant's proofs are sufficient to establish some extenuating circumstances associated with his debt accumulations. As a result, MC ¶ 20(b) . . . has some application to Applicant's circumstances." Decision at 7.¹ The Judge stated, however, that Applicant has not been able to estimate when he will be able to pay off his remaining debts without a full time job. Applicant's "documented payments and payment agreements with individual creditors and a debt consolidation firm are encouraging but not enough at this time to warrant full application of any of the mitigating conditions covered in the financial guideline." *Id.*

The Judge's adverse conclusion under FCMC 20(b) appears to rest on a view that Applicant has not demonstrated responsible behavior with regard to his debts. While the Judge noted Applicant's repayment efforts and his having secured the services of a credit counseling agency, he seems to have concluded that the extent of Applicant's remaining debts, viewed in light of his precarious employment situation, are such that it will be a long time at best before he has paid them all off. However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. *See* ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

What constitutes the responsible behavior contemplated by FCMC 20(b) depends on the facts of a given case. In the circumstances at issue here, the Judge acknowledged that Applicant's poor financial condition originated in job losses and his daughter's medical problems, both of which were outside his control. In light of the Judge's findings, Applicant appears to have acted responsibly given his limited resources in that he has addressed his financial problems by (1) resolving some of the debts, including the two largest, the tax liens, (2) developing a repayment plan for the remaining creditors, and (3) taking reasonable actions to effectuate the plan. The Judge's decision noted that Applicant's primary source of income is his unemployment benefits and that he does not have substantial assets that could be converted to cash for debt repayment at this time. But the Judge has not explained what he believes that Applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by Applicant was not "responsible" in light of his limited circumstances. The Judge states that, without

¹Financial Considerations Mitigating Condition (FCMC) 20(b), Directive ¶ E2.20(b): "[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 the circumstances[.]"

a job, Applicant cannot say when he will have his debts paid off, but he does not appear to question that, were Applicant to have stable employment, he would strive to do so. Therefore, the Judge has not articulated a satisfactory explanation for his conclusions.

The Board concludes that the best resolution to this case is to remand it to the Judge for a new decision, one that addresses the issue of Applicant's response to his debts, in light of ISCR Case No. 07-06482.

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