

KEYWORD: Guideline F

DIGEST: Even if Applicant was a victim of fraud, the record does not sustain the Judge's favorable conclusion as to Financial Considerations Mitigating Condition 20(b). A stranger proposed to use Applicant's good credit history as a basis for obtaining real estate. There is evidence that she has a college degree, owns two rental properties, and owns investment accounts. Applicant failed to perform a prior inspection of the property. The Judge statement that Applicant had no indication she was being set up, nor did she have reason to suspect anything was awry is not consistent with the evidence. The agreement placed a reasonable person on notice that she could end up with responsibility for the mortgage loan. The record does not sustain a conclusion that Applicant's debt arose from causes outside her control. There is no evidence to demonstrate what action, other than foreclosure, Applicant proposes to discharge a facially valid debt. This paucity of record evidence is significant, since foreclosure could result in a deficiency. The record does not suggest that she is penurious or otherwise incapable of arranging a satisfactory means of addressing this debt. Favorable decision reversed.

CASENO: 08-08435.a1

DATE: 07/16/2009

DATE: July 16, 2009

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In Re:)	
)	
-----)	ISCR Case No. 08-08435
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 12, 2008, 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 decision on the written record. On March 31, 2009, after considering the record, Administrative Judge Arthur E. Marshall, Jr., granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in failing to apply Financial Considerations Disqualifying Condition (FCDC) (b); whether the Judge erred in his application of the mitigating conditions; and whether the Judge erred in his whole-person analysis. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a 58-year-old executive assistant working for a Defense contractor. She earns around \$96,000 a year in salary and retirement benefits. She has a degree from an accredited university.

Applicant is in debt resulting from two real estate purchases. She is indebted to one mortgagee on an account that is \$18,799 past due. This debt is in foreclosure, the balance on the loan being \$63,750. She is indebted to a second mortgagee on an account that is \$45,399 past due. This property is also in foreclosure, the balance of the loan being \$380,000. Neither debt has been paid. Applicant submitted “no evidence of subsequent payment[.]” Decision at 2.

In late 2005 or early 2006, Applicant answered an ad in a newspaper which she believed might lead to a career in real estate. The Judge quoted Applicant: “At that time, everyone was getting in on making money by flipping real estate.” As a consequence of answering the ad, Applicant met with a man (P) who proposed “to use her credit for six months to purchase houses.” For each house purchased, Applicant would make \$10,000. The houses would be fixed up and quickly resold “at a competitive price.” *Id.*

In May 2006, Applicant entered into a joint venture with P and his limited liability corporation (LLC). The agreement was to be in effect for one year for the purpose of selling property and, should the property not sell within that year, the agreement was to expire. The agreement stated that Applicant would receive \$5,000 up front and the remaining \$10,000 after purchasing the property.¹ The property would be transferred to LLC after six months, and, if that transfer did not occur, the LLC would pay Applicant an additional \$5,000.² LLC was to make the mortgage payments for one year and would lease the properties from Applicant. The agreement stipulated that LLC would be named on the deeds while Applicant would be named on the mortgages.

Two houses were purchased in Applicant's name. The rent checks owed by P/LLC bounced. Subsequently, Applicant went to view the properties for the first time. She discovered that they were in substantial need of repair. One had extensive water damage; the other had a flooded basement "and the garage was pulling away from the house. A contractor working across the street told [Applicant] that [P] had a bad reputation and that he would not deal with him."³ Decision at 3.

Applicant believed the appraiser had submitted a false report concerning the properties. She later discovered that she could not make contact with P, so she began investigating him. She discovered that he had been fired from a previous real estate company for "shady dealing." "She has since filed charges against the man for bad checks. She is helping her mortgage company investigate the matter as fraudulent and is helping another victim in her legal suit against the man." *Id.* The Judge found that Applicant has taken responsibility for the mortgages but that they are too much for her. The properties have gone into foreclosure, which she believes was her only option, bankruptcy being "the coward's way out." *Id.*

B. Discussion

¹Item 3, Applicant's Response to the SOR, contains a copy of this joint venture agreement. This agreement states that P would pay Applicant \$5,000 up front and the remaining \$5,000 after the property has been transferred "absolutely" from Applicant's name to P's name.

²The joint venture agreement states that P is "the principle party" of LLC.

³"In her response to the SOR, Applicant refers to two separate houses, both of which were apparently worth less than the value of the loans. As stated above, the Judge also found that Applicant and P purchased two houses. However, the joint venture agreement appears to reference only one house, listing only one address rather than two. It is not clear whether the two SOR allegations refer to two houses or to two mortgages obtained on one house as part of the financing arrangement. For example, in Item 3 Applicant states that one house was purportedly valued at \$575,000 and the other at \$425,000. The two SOR allegations refer respectively to two mortgages, one with a balance of \$63,750 and the other with a balance of \$380,000. This apparent discrepancy is not explained in the record. If the first allegation is supposed to refer to the first house, there is no explanation as to how the amount of the loan was paid down so significantly. *See* Department Counsel Brief at 4, n. 16: "Note that Applicant discusses that she purchased two homes in this same manner. Only one property appears to be showing up as a foreclosure. There is no evidence regarding the status of the other property."

The Appeal Board's review of the Judge's findings of fact 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 defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Throughout Department Counsel's brief she asserts that the Judge's decision is unsupported by the weight of the 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 as follows: “Failure or inability to live within one’s means, satisfy debts, and 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.” Directive ¶ E2.18. Department Counsel agrees that the evidence supports the Judge’s conclusion that the circumstances of Applicant’s case raise FCDCs. However, Department Counsel contends that the Judge’s favorable application of the Financial Conditions Mitigating Conditions (FCMC) is not supported by record evidence. Department Counsel’s argument has merit. The Judge applied FCMC 20(b), which mitigates security concerns when “the conditions that resulted in the financial problem were largely beyond the person’s control . . . and the individual acted responsibly under the circumstances[.]” Directive ¶ E2.20(b). Department Counsel contends that the record is not sufficiently developed to sustain the Judge’s conclusion that Applicant was a victim of fraud. The Board notes this argument. While there is evidence to demonstrate that P has been charged with fraud arising out of numerous real estate ventures, there is little evidence to resolve reasonable questions as to the nature of Applicant’s involvement. However, even assuming that Applicant was a victim of fraud, the record evidence does not sustain the Judge’s favorable conclusion as to FCMC 20(b). For example, record evidence demonstrates that a stranger proposed to use Applicant’s good credit history as a basis for obtaining real estate. This alone could have prompted a reasonable person not to participate in the venture. Furthermore, Applicant failed to perform a prior inspection of the property, the address of which was listed in the written agreement. The Judge’s decision does not seriously address the significance of this evidence; rather, he states, without sufficient analysis, that Applicant “had no indication she was being set up, nor did she have reason to suspect anything was awry.” Decision at 6. This statement is not consistent with the evidence described above, nor is it even consistent with the plain terms of the joint venture agreement, which obligate P, after six months, only to “start the process” of transferring the purchased property to his name, and to pay Applicant the full balance owed under the agreement only “[w]henver the transference is complete[.]” However, the agreement also provides that if the subject property has not been sold within a year, the agreement will expire, which could have placed a reasonable person on notice that he or she could well end up with ultimate responsibility for the mortgage loan. Item 3, Response to SOR. The record does not sustain a conclusion that Applicant’s debt arose from causes outside her control.

Furthermore, Department Counsel argues persuasively that the record does not support the second clause of FCMC 20(b), that Applicant has acted responsibly in regard to the debt. In the first place, the fact of incurring this debt under the circumstances of this case is not consistent with responsible behavior. Second, there is no evidence, other than the fact that the property is subject to foreclosure, to demonstrate what action Applicant proposes to discharge a facially valid debt to the mortgagee. This paucity of record evidence is significant, insofar as it is foreseeable that the foreclosure sale could result in a deficiency, given Applicant’s admission that the property is not

worth the value of the loan.⁴ Department Counsel cites evidence that Applicant has a college degree, that she owns two rental properties, and that she owns investment accounts. The record does not suggest that she is penurious or otherwise incapable of arranging a satisfactory means of addressing this debt.

The Judge also states that FCMC 20(a) “partially applies.” This provision of the Directive mitigates security concerns when the behavior that gave rise to the debts happened a long time ago, was infrequent, or not likely to recur and which “does not cast doubt on the individual’s current reliability, trustworthiness, or good judgement.” Directive ¶ 20(a) The Judge does not provide analysis of this provision. In light of the discussion above, however, the Board concludes that Applicant has not met her burden of persuasion that her case casts no doubt on her good judgment. Furthermore, the Board has considered the Judge’s whole-person analysis and also concludes that it is not sustainable on this record.⁵ The Judge states that P’s proposed venture “was sufficiently simple as to make sense [however, it] was sufficiently complex in its execution as to obfuscate a less than experienced real estate investor.” Decision at 8. However, the Judge’s findings and the record as a whole suggest a plan not daunting in its complexity but unreasonable on its face, especially to a person like Applicant who apparently has some experience in real estate matters, as demonstrated by her response to the SOR. The record contains a number of assertions that raise serious questions about Applicant’s good judgement. For example, Applicant’s response to the SOR includes a letter she wrote to the state attorney general, complaining about P’s activities. This letter states that “the loan officer that handled my loan said there was something wrong about my loan and she did not like it. She soon after that quit that company.” Item 3. This reinforces previously discussed record evidence as to the facial unreasonableness of Applicant’s undertaking with P.⁶ As Department Counsel argues, the questions raised by the evidence are not resolved by the matters Applicant has submitted in her behalf. The Judge’s whole-person analysis is not supported by the record. Accordingly, the Judge’s favorable decision is not sustainable. In light of this conclusion the Board need not address Department Counsel’s argument that the Judge failed to apply FCDC 19(b).

Order

⁴See Item 3, Response to SOR, Letter to Attorney General. “When I went to see [the house] there were water stains in the living room from upstairs and there was water damage in the basement. A lady was living in the house. This lady was the previous owner of the house. [P] had told her she could rent the house for a year and then buy it back. She took me around and showed me all the damage.” Referring to a second house, Applicant stated that it “was in worse shape than the first one. This house was valued at \$425,000.00. When I first saw it I was shocked. I would not have paid \$200,000 for it. The garage was pulling away from the house.” See note 3 above regarding the apparent discrepancies in the record concerning whether there were two houses or one that were the subject of the agreement contained in Item 3.

⁵Applicant introduces new evidence in her reply brief. The Board cannot consider Applicant’s new evidence on appeal. Directive ¶ E3.1.29.

⁶See also the Judge’s finding, referenced above, and record evidence that P or his LLC were to be placed on the deed. However, the record demonstrates that his name was not on the mortgage document, which remains in Applicant’s name alone. Decision at 3; Item 3, Response to SOR, Joint Venture Agreement.

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board