

KEYWORD: Guideline K

DIGEST: Record does not support Judge’s conclusion that Applicant did not owe three of four alleged debts. Judge erred in mitigating security concerns when Applicant’s mortgage payments exceeded his income. Favorable decision reversed.

CASE NO: 08-11940.a2

DATE: 12/02/2010

DATE: December 2, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11940
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 22, 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 December 15, 2009, after the hearing, Administrative Judge Richard A. Cefola granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On April 2, 2010, we remanded case to the Judge for a new decision. On August 27, 2010, the Judge issued a Decision on Remand, in which he again granted Applicant a security clearance. Department Counsel appealed, in accordance with the Directive.

Department Counsel raised the following issues on appeal: whether the Judge failed to address the issues raised in the prior Appeal Board remand order and whether the Judge's decision is arbitrary, capricious, or contrary to law. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant purchased Property 1 as a residence in 2003 for \$410,000. He financed Property 1 with two mortgages. There was later found to have been fraud involved in the appraisal for the original lender. In 2005 Applicant purchased Property 2 for \$710,000 as a residence and financed it with two more mortgages. He converted Property 1 to a rental. Applicant made no down payment on either property. Applicant earns about \$82,000 a year. In 2008 the real estate market collapsed, Applicant's fiancé who had been earning \$31,800 a year lost her job, their monthly mortgage payments doubled, and Applicant lost the tenant for Property 1. Both properties were the subject of foreclosure actions. Applicant owed on mortgages respectively: \$344,000, \$86,000, \$567,000, and \$140,000, for a total of over \$1,100,000. Applicant no longer owes anything on the debts.

Applicant now has \$27,000 in savings bonds, an investment portfolio worth \$9,800, and two IRAs valued at \$2,255 and \$6,331 respectively. He is current with all his debts.

Discussion

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. In rendering a final decision, an "agency must 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 standard applicable in security clearance decisions "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).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See, e.g.*, ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel contends that the Judge did not comply with the Board's Remand Order. In its prior decision, the Board concluded that the Judge's decision was not sufficiently clear so as to allow the parties and the Board to discern with confidence all of the Judge's findings and

conclusions. The Board mentioned various aspects of the case where additional detail and explanation from the Judge were necessary to allow it to review the errors alleged. Department Counsel now sets forth numerous instances in which the Judge allegedly did not comply with the Board's instructions. Without providing a detailed discussion of the various points raised by Department Counsel, the Board concludes that the Judge's remand decision is sufficiently detailed to enable the Board to address the issues raised on appeal.

Regarding Department Counsel's assertion that the Judge's decision is arbitrary, capricious, or contrary to law, we have considered the Judge's decision in light of the record as a whole. The Judge favorably applied two Financial Considerations Mitigating Conditions (FCMC) : Directive, Enclosure 2 ¶20(a)¹ and ¶20(b).² The Judge relied in large measure upon his finding that Applicant no longer owed the debts alleged in the SOR and that the financial problems in this case were caused by circumstances outside Applicant's control.

Concerning 20(a), the record evidence does not support the conclusion that Applicant no longer owed three of the four alleged debts and, therefore, that they are not recent. We note the argument in Applicant's reply brief to the effect that state law protects Applicant from liability on deficiency judgments.³ On the other hand, the corroborating evidence supplied by Applicant is speculative and appears to be contradicted by the contents of a credit report dated one day prior to the hearing, an exhibit offered by Applicant himself. In light of this exhibit and the other record evidence, the Judge's conclusion that Applicant no longer owed anything arising from the foreclosure sale of his two houses is not sustainable.⁴

The Judge also noted Applicant's testimony regarding the collapse of the real estate market and his wife's loss of employment, in support of the view that the circumstances of the debts were unusual. This was evidence which the Judge was required to consider, along with all the other record evidence. However, the Judge's reliance upon this circumstance is vitiated by evidence that Applicant did not marry his wife until after the properties went into foreclosure, thereby undermining the effect her subsequent unemployment would have exerted upon his real estate

¹Directive Enclosure 2¶20(a): "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgement[.]"

²Directive, Enclosure ¶ 20(b): "the 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[.]"

³To the extent that the Judge relied on such analysis it is important to note that the purpose of the current adjudication is to determine security eligibility rather than to collect debts. *See, e.g.*, ISCR Case No. 07-16841 at 4 (App. Bd. Dec. 19, 2008) and ISCR Case No. 07-16427 at 4 (App. Bd. Feb. 4, 2010).

⁴Applicant Exhibit (AE) C is a Form 1099-A, Acquisition or Abandonment of Secured Property. This form states that, regarding one of the four mortgage debts, Applicant was not liable for repayment. This document is consistent with AE J, Credit Report, which makes no reference to the creditor for this particular loan. There is no comparable Form 1099 pertaining to the remaining three mortgage debts. The three remaining mortgages do appear on the credit report which shows past due amounts of \$44,197, \$10,101, and \$86,000.

difficulties.⁵ It is further undermined by record evidence that Applicant entered into the purchase of two properties at 100% financing, the combined amounts of the adjustable rate mortgages exceeded \$1,000,000, and the payments for these mortgages were more than his salary.⁶ There is no basis in the record to conclude that the amount of these combined debts would have been significantly less even had the first property not been over-appraised, as Applicant contended.⁷ Under the circumstances, Applicant's purchase of these properties raises serious questions about his reliability and good judgement, questions which the Judge does not address in his decision. Even assuming that state law protects Applicant from deficiency judgments, the totality of the record evidence does not support a conclusion that Applicant has met his burden of persuasion under FCMC 20(a).

For similar reasons, the evidence will not support a favorable conclusion under FCMC 20(b). No doubt Applicant's problems were aggravated by a downturn in the market. However, the fact of entering into such transactions at all, given his financial circumstances and the foreseeable eventuality that the mortgage payments would rise (given their adjustable nature), undermines a conclusion that the circumstances of the financial problems were largely beyond Applicant's control.

The record does not support the Judge's conclusion that Applicant has met his burden of persuasion as to mitigation, either under the mitigating conditions or the whole person factors, in light of the standard set forth in *Egan*. The Judge's Decision on Remand is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

⁵In Government Exhibit (GE) 1, Security Clearance Application, dated September 2, 2008, Applicant states that he is not married and had never been married. GE 2, Answers to Interrogatories, contains a summary of Applicant's personal interview. In this interview he described the circumstances of the foreclosures of both properties. He stated that his fiancé was aware of his financial problems, demonstrating that he was not married at the time of the foreclosures. In this interview he did not attribute his financial problems to his fiancé's employment situation. Compare this interview with Tr. at 51: "Q: So when you ran out of money and your wife lost her job, what happened to property number two? A: It went into foreclosure."

⁶In GE 2, Applicant stated that the combined payments for Property 1 were \$4,000 per month. The combined payments for Property 2 were also \$4,000. Applicant further advised that his gross monthly salary was around \$7,000 and his net salary was \$4,212. He stated that his financial problems began in June 2007, when his mortgage payment on Property 1 increased to \$7,000.

⁷AE A, Stipulation for Settlement, indicates that Applicant accepted \$30,000 in settlement of a lawsuit based upon fraudulent over-appraisal of one of the properties.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board