

KEYWORD: Guideline F

DIGEST: Although the Judge was required to consider the untoward events in Applicant's history, Applicant's financial delinquencies predated the tragedies and continued unabated through the close of the record. Favorable decision reversed.

CASENO: 09-01309.a1

DATE: 04/29/2010

DATE: April 29, 2010

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In Re:)	
)	
----)	ISCR Case No. 09-01309
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 1, 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 7, 2009, after the hearing, 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’s treatment of the pertinent mitigating conditions is erroneous and whether the Judge’s whole-person analysis is erroneous. Finding error, we reverse.

Facts

The Judge made the following pertinent findings of fact: Applicant is an administrative assistant working for a Defense contractor. Applicant married at age 19. In 2004, she and her husband separated, after 24 years of marriage. She moved into an apartment and, for the first time in her life, was responsible for paying bills.

In the same year as her separation, Applicant’s 22-year-old son was murdered. The FBI became involved, and the case was even reported on a national television program. The killer was eventually brought to trial. As a consequence of the murder and subsequent investigation and prosecution, Applicant became emotionally distraught, suffering from panic attacks. It became difficult for her to continue employment. Applicant moved out of her home and lived in a shelter for a month. Eventually she found an apartment she could afford.

Applicant’s estranged husband was in an automobile accident in August 2005. As a result, he was hospitalized, suffering from severe neurological impairment. He died about four months after the accident, during the holidays. Applicant visited him in the hospital every day. She breached her rental agreement, moving back into the home her husband had rented, assuming his lease in order to help her unemployed daughter and grandchildren during the crisis.

In 2006, suffering from depression, Applicant forgot to file her state income taxes. Additionally, she neglected her bills, and they began to pile up. She received mental health treatment, having been diagnosed with depression, post-traumatic stress disorder, and related panic attacks.

Subsequently, Applicant moved into another apartment and gave her daughter a cell phone, the account for which was in Applicant’s name. Her daughter neglected to pay the bills, and the account became delinquent. She broke her lease and moved into a shelter, after which she rented a cottage. She was charged for a pre-existing balance for telephone services. Her personal property was destroyed in a flood, and in 2007 her automobile caught fire as it sat in a parking lot. She returned another automobile as a voluntary repossession. On October 18, 2009, Applicant sought

financial counseling.¹ Before the counseling she found it difficult to manage and document “even the basics regarding her finances.” Decision at 5. Applicant was instructed as to how to dispute an account, and she was advised to consult a bankruptcy attorney.

She has discovered that her employers have not withheld enough of her taxes. Some of the debts alleged in the SOR are judgments against Applicant. She did not go to court regarding these judgments, because she felt overwhelmed.

Applicant currently has a budget. Her take-home pay is \$2,100 per month, plus \$300 - \$400 from a second job. However, her monthly expenses run to just under \$2,500 per month.

In the Analysis portion of the decision, the Judge noted that Applicant’s delinquent debts “remain virtually unaddressed today[.]” *Id.* at 8. He also noted that “no tangible efforts have been demonstrated or documented regarding the past due accounts at issue.” *Id.* at 9. However, he attributed the debts to Applicant’s traumatic experiences and concluded that the security concerns in her case had been mitigated.

Discussion

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

¹The hearing occurred on October 22, 2009. Tr. at 4.

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).

Although the Judge properly concluded that Applicant's case raised security concerns under Guideline F, Department Counsel argues that the Judge erred in concluding that the record as a whole is sufficient to mitigate these concerns. Department Counsel's argument has merit.

The Judge extended favorable application to two Financial Considerations Mitigating Conditions (FCMC), 20(a)² and 20(b).³ We note the untoward events and tragedies in Applicant's personal history, which was evidence the Judge was required to consider. However, as Department Counsel points out, Applicant's delinquencies actually began around the year 2000, well prior to her son's horrific death, and they continued unabated through the close of the record, more than five years after his death. Accordingly, the disqualifying behavior did not only occur "long ago" within the meaning of FCMC 20(a). *See* ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008), *quoting* ISCR Case No. 01-03695 at 3-4 (App. Bd. Oct. 16, 2002) (Failure to discharge debts "is a continuing course of conduct[.]") Under the circumstances, the record does not support a conclusion that Applicant has met her burden of persuasion that her debts are not recent. Furthermore, the ongoing nature of her debts undermines her contention that the debts are not likely to recur. Given that her delinquencies span the better part of a decade and given the Judge's own finding that she has taken no action in regard to them, the record evidence cannot support a conclusion that her conduct of security concern is behind her. Although Applicant states that she is considering filing for bankruptcy protection, there is little evidence in the record of any concrete steps she has taken toward this goal or whether it is simply an inchoate plan for possible future action.⁴

²Directive ¶ E2.20(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[.]"

³Directive ¶ E2.20(b): "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances[.]"

⁴*See* Department Counsel Brief at 8: "Applicant also testified that she met with a bankruptcy attorney after seeing the financial counselor. The record reflects no action taken after this meeting, no preparation for filing, no filing, and no approval of bankruptcy." (internal citations omitted) The Judge left the record open for Applicant to submit additional matters. She submitted a letter from a registered nurse attesting that Applicant had received outpatient psychiatric services. However, she did not submit any documents to substantiate her testimony about her proposed bankruptcy filing. Neither did she submit a copy of a budget, although at the hearing she intimated that she would do so. Tr. at 91.

Furthermore, the record does not demonstrate that Applicant has established the second clause of this mitigating condition, that her debts cast no doubt on her judgment, etc. In addition to evidence that her debts began prior to the traumatic events of 2004 and 2005, we note the Judge's own finding that Applicant simply did not know how to maintain a budget.⁵ We also note Applicant's own testimony that she engages in "impulse shopping," which she has only begun to address since her meeting with the credit counselor just prior to the hearing.⁶

For similar reasons, we conclude that Applicant has not met her burden of persuasion regarding FCMC 20(b). The record does not support a conclusion that, viewed as a whole, Applicant's debts originated from causes outside her control. To the contrary, as stated above, the record demonstrates that Applicant's debts began in approximately 2000, and that they were affected not only by her emotional dislocation but by other things, such as her lack of knowledge regarding budgeting and her impulse shopping. Furthermore, the Judge's own analysis undermines a conclusion that Applicant has behaved responsibly in regard to her debts. *See, e.g.*, his comments described above, to the effect that Applicant has not addressed her debts as of the close of the record.

After examining the record as a whole, we conclude that the evidence does not support the Judge's favorable decision, either as regards the mitigating conditions or the whole-person analysis. Leaving aside questions as to whether Applicant's debts originated on the whole from causes outside her control, there is no record evidence of responsible behavior in regard to those debts, within the meaning of the Directive. *See, e.g.*, ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) (Applicant must develop a reasonable plan for repayment of debt, accompanied by "concomitant conduct," *i.e.*, actions which evidence a serious intent to effectuate the plan.) The record does not support a conclusion that Applicant has met her burden of persuasion under the *Egan* standard. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive ¶ E2.2(b).

⁵"Before counseling, she found it exceptionally difficult to manage and document even the basics regarding her finances." Decision at 5. *See also* Applicant's testimony about her lack of financial understanding: "My first experience with paying a bill was when [she and her husband] separated in 2004." Tr. at 15. Applicant also testified that she "never got a chance to properly learn how to pay bills," that she did not keep good financial records, and that she had not contacted her creditors as of the close of the record. Tr. at 17, 31, and 59.

⁶"Q: . . . And did you go through any sort of budgeting classes with [the credit counselor]? A: They do budgeting and learning how to not impulse shop. She went over my budget with a fine tooth comb. Q: Is impulse shopping something that you have been trying to get under control? A: Yes. I don't spend a whole lot of money, I really spend very little. But I do impulse shop. If I see something, like a pair of shoes, I have to buy them." Tr. at 55.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, 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