

KEYWORD: Guideline F

DIGEST: Given the Judge's application of the disqualifying conditions and the implicit ascribing of responsibility for the debts to Applicant, the Judge could not logically apply the mitigating conditions in light of Applicant's continued and uncorroborated denial of responsibility for the debts. Favorable decision reversed.

CASENO: 09-08550.a1

DATE: 02/25/2011

DATE: February 25, 2011

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In Re:)	
)	
-----)	ISCR Case No. 09-08550
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 20, 2010, 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 November 9, 2010, 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 certain of the Judge’s findings of fact were supported by substantial record evidence; whether the Judge erred in his application of the mitigating conditions; and whether the Judge’s whole-person analysis was erroneous. Consistent with the following discussion, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact:

Applicant and his wife separated in 1992 and divorced in 1996. In October 2009, during a security clearance interview, Applicant was advised of the existence of two collection accounts in his name. Applicant attributes the underlying debt to his ex-wife. He has done nothing to dispute, resolve, or address them, because he did not believe they would affect him. A credit report shows one account, for \$5,845, was opened in 2007 and the other, for \$32,973 was opened in 2006 with the date of last activity in 2002. Because they are collection accounts it cannot be determined when the underlying debt was first acquired.

A credit report from May 2010 does not show either of the two collection accounts. Applicant’s attorney provided an opinion that the debts are not collectable under state law.

Applicant lives well within his means.

We review the Judge’s findings of facts to determine 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).

Department Counsel notes that the Judge relied heavily on a favorable credibility determination of Applicant. Such a determination, however, is not a substitute for record evidence. *See, e.g.*, ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009). In this case there is no documentation that corroborates Applicant’s claim the debts are his ex-wife’s. For the larger debt there is no documentary evidence that would corroborate dating the debt back to the marriage. For the smaller debt there is no documentary evidence which would support dating the debt back to prior

to the separation. Therefore, to the extent that the Judge found that the debt's are not really Applicant's responsibility, those findings are not sustainable. Also, to the extent the Judge relied on the non-presence of debts on a recent credit report as indicia of some sort of corrective action, such a finding is not sustainable, given Applicant's acknowledgment that he has not acted to dispute the debts.

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 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. 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, e.g.*, ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge concluded that Applicant acquired the two debts in the 1990's but failed to address them and invoked appropriate disqualifying conditions. Then the Judge extended favorable

application of Financial Considerations Mitigating Condition (FCMC) 20(a),¹ FCMC 20(b),² and FCMC 20(c).³

Department Counsel points out that, given the Judge's application of the disqualifying conditions (thus ascribing responsibility for the debts to Applicant), Applicant's continued and uncorroborated denial of responsibility for the debts, and his failure to address them in any way, the Judge could not logically apply any of the three mitigating conditions in Applicant's favor. We agree. Furthermore, to the extent the Judge is focused on Applicant's advice of counsel, he is in error. Repeatedly Applicant's counsel qualified his knowledge of the case with language such as "apparently" or Mr. [Applicant] asserts. Applicant's attorney concluded by saying that the creditors would have had to have sued within a certain period and that Applicant asserts that he has not been sued. The Board has repeatedly held that non-collectibility of a debt does not preclude consideration of the debt and circumstances surrounding it in a security clearance adjudication. *See, e.g.*, ISCR Case No. 10-03656 at 3 (App. Bd. Jan 19, 2011).

Finally, Department Counsel persuasively argues that the Judge's whole-person analysis does not provide an additional reason to grant Applicant a clearance but, rather, essentially restates his mistaken analysis of the mitigating conditions. The record, viewed as a whole, does not support the Judge's favorable decision. The Judge's decision is not sustainable.

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: Jeffrey D. Billett

Jeffrey D. Billett

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 judgment[.]"

²Directive, Enclosure 2 ¶ 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[.]"

³Directive, Enclosure 2 ¶ 20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

Administrative Judge
Member, Appeal Board

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