

KEYWORD: Guideline F

DIGEST: The Judge's finding that Applicant's delinquent tax debt covers only the period of the downturn of his business is not sustainable. Applicant's evidence in mitigation relies on speculation. The Judge's favorable application of the mitigating is not sustainable on this record. Favorable decision reversed.

CASENO: 10-00194.a1

DATE: 02/01/2011

DATE: February 1, 2011

In Re:)
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-----) ISCR Case No. 10-00194
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)
Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Christopher Graham, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 18, 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 October 25, 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 is an engineer working for a Defense contractor. Applicant has numerous debts, including two for tax liens in the amounts of \$55,127 and \$15,725. He also has several other smaller debts.¹ Applicant opened a restaurant in 2004, operating on a waterfront. He rented the premises. His business was profitable. However, he began to discover substantial structural problems with the building.² These problems resulted in the closing of Applicant’s business in November 2007.

Applicant and the landlord went to court, which found in favor of Applicant on the ground that the landlord had breached his contractual duty of repair. However, the court rejected Applicant’s contention that he had been constructively evicted, because Applicant had not surrendered the keys to the premises when his business failed. Accordingly, the court held that Applicant owed the landlord back rent and the landlord owed Applicant damages resulting from the loss of his business.³

Applicant became indebted to the state for back sales tax. This was as a result of the loss of his business and the related costs. Applicant has kept the state informed of his situation, and the state chose not to seize any of the business assets. Once Applicant has recouped damages from his

¹The SOR alleges that these debts are owed to medical providers, a provider of TV services, an energy company, etc.

²The record contains evidence that these problems were significant. “The plumbing and piping was illegal. The header beams in the kitchen were physically snapped in half . . . [T]he entire roof had to be replaced. The entire electrical system had to be replaced. The engineer came in and said that basically it would be cheaper for them to knock the facility down and start from scratch then to repair what was there.” Tr. at 28-29. This testimony is corroborated by a report of an engineer’s inspection of the premises. In addition to the problems described above, the report states that there was mold in the bathroom, toxic mold in the kitchen, rot and water leaks behind the freezer, and that sinkholes were developing around the building. AE D, Engineer’s Report, dated May 17, 2010.

³The amount of damages had not been determined by the close of the record.

landlord, he is to meet with state officials concerning his tax liability. The precise amount of his liability is “undefined” by the state. Decision at 4. Applicant and the state are reviewing a repayment plan while the case against the landlord proceeds to closure. Applicant’s restaurant collected sales tax in the course of its operations. The tax monies were deposited in the general business account rather than a separate account. Applicant disputes that he owes sales tax following his restaurant’s closure.

Of the remaining debts, Applicant has paid some and has disputed others. Some of these debts are no longer reflected on Applicant’s credit report.

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 a reasonable inference can be drawn from the evidence that the underlying tax debts cover the period when the business was profitable. Department Counsel’s point is well taken, in part for the following reasons: (1) the tax rate as cited in the transcript is “approximately” 8 percent; (2) the indebtedness for the tax judgment exceeds \$70,000; and (3) income sufficient to yield \$70,000 in sales tax at a rate of 8% would be \$875,000, which exceeds the total income of the business from 2003 until it closed in November 2007 as described in Applicant Exhibit (AE) C. Indeed, this is more than twice the income for the business for 2007, the year of the downturn.

This calculation might be amended to the extent that the judgments include penalties and interest. However, the only evidence which might have shed light on that question is AE T, which has a white streak running down the page rendering key numbers illegible. The Judge’s finding that the tax debt covers only the downturn in the business cannot be sustained.

Department Counsel also challenges the following statement in the Decision:

Applicant has worked openly with the state regarding [his tax liens]. The state has not proceeded against Applicant further. It refrained from seizing the restaurant’s possessions. It appears to be willing to wait until Applicant’s lawsuit against his landlord is resolved and damages paid, to conduct a final audit as to the true extent of Applicant’s sales tax liability. Decision at 8.

Department Counsel argues that this statement is not supported by the record evidence. We find this argument persuasive regarding the purported willingness of the state to wait until the lawsuit is finished to determine the final amount of Applicant’s liability. Under the facts of this case, there is no apparent connection between the two. That is, there is no basis in the record to connect

Applicant's tax liability to the damages owed by his landlord for failure to repair. Applicant's testimony that the state has not seized the business assets does not constitute substantial evidence that the state is unsure of the extent of Applicant's tax liability. Neither does Applicant's testimony demonstrate that the state has decided to forbear collection of this debt. AE T is a state court document authorizing garnishment of Applicant's wages in payment of the larger of the two listed tax liens. Accordingly, we conclude that the quoted statement is erroneous to the extent that it implies an agreement between Applicant and the state concerning the liens at issue.

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).

Department Counsel argues that the Judge erred in extending favorable application to Financial Considerations Mitigating Condition (FCMC) 20(a).⁴ He argues that the Judge erred in attributing the tax liens to the failure of Applicant's business rather than to his business practices themselves. Department Counsel's argument has merit. The Judge's decision states that the tax liens arose during a time of business tumult. The Judge concluded that the circumstances of the liens were unlikely to recur and did not cast doubt on Applicant's reliability, trustworthiness, or good judgment. However, the record does not demonstrate that the tax liens arose due to the business failure. In addition to the calculations presented earlier in this decision, we note that AE Y, District Court Decision, reflects that Applicant's restaurant stopped operating on November 28, 2007. AE T states that the state filed for the larger tax lien on November 5, 2007, prior to the closure of the business. While it is conceivable that these tax liabilities could have arisen only during 2007, when the business was in jeopardy, the record evidence as a whole does not support the Judge's finding nor the conclusion based upon it.

Furthermore, the record demonstrates that Applicant failed to segregate tax monies from general business receipts, with the result that he spent on business expenses funds properly owed to the state. Accordingly, his tax problems were, at least in part, caused by his own practices rather than the landlord's breach of contract. This undermines the Judge's conclusion that Applicant's tax debts do not reflect upon his reliability, trustworthiness, or good judgment.

Additionally, the record does not support the Judge's favorable application of FCMC 20(b),⁵ in light of record evidence concerning Applicant's business practices discussed above. Furthermore, Applicant's evidence in mitigation reflects a plan to address his tax liens that is speculative, in that it is dependent on an award of damages from the landlord. Because Applicant himself owes the landlord back rent, the final amount that Applicant will receive from the case is not contained in the record. It is not clear from the record, therefore, that the award will be enough to pay off these liens or that such an award will actually be collectable from the landlord. *See* ISCR Case No. 09-08142 at 3 (App. Bd. Aug. 19, 2010) (The applicant presented no reasonable plan for resolving his debts, "beyond his hope for a substantial award of damages in his lawsuit"). The speculative nature of Applicant's repayment plan is further buttressed by AE X, a letter from his lawyer, which states in part that the lawyer will pay the tax debts "[i]f we are successful in the case and collect money upon a judgment[.]" (emphasis added) At the close of the record, therefore, success on the question of damages was not certain.⁶

⁴Directive, 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[.]"

⁵Directive, 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[.]"

⁶Regarding the speculative nature of Applicant's plan of repayment, *see also* Tr. at 85: "Right now any . . . excess funds that are being generated are being used to pay the attorneys to solve the lien issue first. Once that issue is resolved we will then be trying to set up a payment plan and work with the state to figure out what exactly the issue is, how much it is, and we'll work out a payment plan with them and try to use the funds that we would normally be

For similar reasons, we conclude that the record will not support the Judge's favorable application of FCMC 20(c)⁷ and (d),⁸ in that it does not provide "clear indications" that the tax liens are being resolved or that Applicant has initiated a good-faith effort to repay them. *See, e.g.*, ADP Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008) (Promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner). 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 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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

using for our attorney . . . to satisfy that until the judgement is paid."

⁷Directive, 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[.]"

⁸Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"