Date: January 18, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 20-00618
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Aubrey M. De Angelis, Esq., Department Counsel

FOR APPLICANT
Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 4, 2020, DoD 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 initially requested a decision on the written record but subsequently requested a hearing. On November 7, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law and the record evidence. Consistent with the following, we remand.

The Judge's Findings of Fact

Applicant, who is 44 years old, has been a defense contractor employee since 2016. He is married with two young children and an adult child. Applicant admitted the 16 SOR allegations, which include: a 2006 Chapter 13 bankruptcy that was dismissed in 2009; a failure to file his Federal and state income tax returns for tax years (TYs) 2006 through 2013, 2015, and 2017; his indebtedness to the Federal government for delinquent taxes for TYs 2004 and 2005 in an amount totaling about $11,100; his indebtedness to the Federal Government on a 2009 tax lien of about $10,200 and a 2019 tax lien of about $99,200; his indebtedness of about $2,100 on a delinquent consumer account; and his indebtedness on eight delinquent medical accounts totaling about $14,400.

Applicant's Federal tax debts from 2004 and 2005 and tax liens from 2009 and 2019 were part of an Offer in Compromise contract that he submitted to the Internal Revenue Service (IRS). Because Applicant satisfied the payment provisions of his contract with the IRS, these tax debts/liens were released by the IRS.

Applicant filed his Federal income tax returns for the TYs alleged. "Applicant also complied with the state taxing authority's concerns regarding his filings for tax years 2006-2013, 2015 and 2017." Decision at 2–3.

Regarding the delinquent consumer account, Applicant is making monthly payments through a counseling service and has reduced the alleged delinquency of $2,179 to about $1,400 as of April 2022.

Regarding his delinquent medical accounts, Applicant submitted documents indicating that he is making twice monthly payments of $131 to address the debts, which total approximately $14,400.

The Judge's Analysis

"Applicant has addressed his delinquent state and Federal income taxes, and filed all the required tax returns. He has also addressed his debts to the remaining two creditors through payment plans. Mitigation under AG ¶ 20 has been established." Decision at 5.

Discussion

Department Counsel argues that the record in this case does not support the Judge's favorable mitigation analysis. She also contends that the Judge did not consider important aspects of the case and that his analysis runs contrary to the weight of the record evidence. Department Counsel's arguments are of mixed merit.

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, we 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. 20-01450 at 3 (App. Bd. Jun. 9, 2022).

Errors in Department Counsel's Facts

Because she contends that the Judge's findings of fact contain significant errors, Department Counsel submitted her own statement of the facts and based her arguments on those facts. However, several of Department Counsel's facts are not supported by the record, to include:

Department Counsel asserts that Applicant's 2004 tax account transcript reflects a balance of $0.00 only because he was in a Currently Not Collectable (CNC) status and argues that the Judge failed to address or consider Applicant's ongoing 2004 arrearage. In fact, the tax account transcript indicates that Applicant satisfied the 2004 delinquency entirely by May 2019 through payments and tax refunds, paying a total of about $9,300 in principal, interest, and penalties on the alleged $4,700 debt. Applicant's Exhibit (AE) A at 11–13 and SOR Response at 11–13.

Department Counsel asserts that Applicant made no payments towards his Federal tax delinquency for 2005 prior to the IRS writing it off in January 2020. In fact, the tax account transcript indicates a payment via tax refund of about $2,200 in April 2019. *Id.* at 14–16.

Department Counsel does not dispute that Applicant has satisfied the terms of his Offer in Compromise to the IRS that covered his tax obligations for TYs 2006 – 2009, 2011, 2012, 2014, and 2017. Nevertheless, Department Counsel repeatedly asserts that Applicant has not proven that he filed his delinquent Federal returns for those tax years. Appeal Brief at 5, 11, and 17. "[T]here is no evidence that any of the delinquent returns were actually prepared and filed with the IRS." *Id*. at 12. She argues that it is "mere speculation" that the delinquent returns were filed and that the Judge erred in concluding that they were. *Id.*

As Department Counsel herself stated at the hearing, "a condition of the offer in compromise is to have filed all of one's income tax returns." Tr. at 48. *See also* https://www.irs.gov/payments/offer-in-compromise. Indeed, at hearing, Department Counsel conceded that "the letter from the IRS, saying that the offer in compromise was accepted and satisfied" was some evidence that the tax returns were filed. Tr. at 48. To assert on appeal that "the record does not contain any documentary evidence demonstrating that the returns were . . . filed" (Appeal Brief at 17) is puzzling. Applicant's exhibits document his satisfaction of the Offer in Compromise and the release of the 2019 Federal tax lien and support the Judge's finding that the Federal returns were filed. AE B and C.

Regarding Applicant's medical debts, Department Counsel asserts that Applicant has not provided evidence that medical accounts are being addressed through his payment plan; that he

has provided evidence of only six payments to a credit counseling service between 2018 and 2022 totaling about $700; and that only one medical debt (SOR ¶ 1.l) is documented as being on the plan, having been added after the hearing. Appeal Brief at 7 and 8. Instead, the record confirms that 13 medical accounts were on Applicant's original payment plan and that he made 58 payments between July 2018 and December 2020 alone, totaling approximately $9,000. Answer to SOR at 20–21, 25–26. Moreover, the record confirms that—at a minimum—the debts alleged at SOR ¶¶ 1.o and 1.p were added to the original payment plan in February 2021, after the SOR was issued. Answer to SOR at 1, 24; AE D at 2, 4.

Errors in Judge's Findings of Fact and Analysis

Although Department Counsel's arguments are clouded by the errors highlighted above, several of her arguments are meritorious in that she highlights the following aspects of the case that the Judge failed to consider or address.

First, with regard to the Federal tax allegations, the Judge simply stated in his Analysis that Applicant had addressed his delinquent Federal income taxes and filed all required returns. The Judge failed to address Applicant's lengthy and troubled Federal tax history to include:

- Applicant's failure to pay his delinquent tax debt for 2004 until it was ultimately resolved in 2019 by tax refunds;
- Applicant's failure to pay his delinquent tax debt for 2005 until it was largely written off in 2020; and
- Applicant's failure to file tax returns, as required, for TYs 2006 – 2013 and 2015 until sometime after hiring a tax relief company in November 2017 and prior to submitting his December 2019 Offer in Compromise.

Second, with regard to the state tax allegations, the Judge again simply stated that Applicant had addressed his state income taxes and "filed all the required tax returns." Decision at 5. The Judge failed to consider or address:

- The fact that Applicant did not file state returns for the alleged years and that instead the state ultimately filed substitute returns; and
- The fact that Applicant's state tax debts were resolved involuntarily through the levy of his bank account and garnishment of his wages. Tr. at 32–33.

Third, with regard to the medical debts, the Judge failed to articulate how he determined that the delinquent medical debts alleged were all on Applicant's payment plan. The evidence establishes that Applicant entered two of the debts (SOR ¶¶ 1.o and 1.p) into his payment plan after receipt of the SOR and one of the debts (SOR ¶ 1.l) after his hearing. The evidence of record is unclear as to whether the four debts alleged at SOR ¶¶ 1.i, 1.j, 1.m, and 1.n, totaling about

$4,600, were ever part of Applicant's payment plan, and the Judge does not explain his conclusion that all debts had been addressed.[1]

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 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)). When analyzing a case, a Judge must consider the evidence as a whole and not view it in an isolated or piecemeal manner that focuses only on matters favorable to one party. *See, e.g.*, ISCR Case No. 14-05005 at 8 (App. Bd. Sep. 15, 2017). In this case, the Judge erred by failing to analyze the significant matters highlighted above and failing to articulate a satisfactory explanation for his conclusions.

Additionally, the Judge failed to identify the specific mitigating conditions that applied, instead simply noting that five mitigating conditions were potentially applicable.[2] The Judge's brief analysis leaves us guessing which mitigating conditions he concluded either fully or partially applied and the rationale for making those determinations. This was error. As we have previously stated, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 17-00944 at 4–5, n.4 (App. Bd. Feb. 15, 2019).

Given these circumstances, we conclude that the best resolution of this case is to remand the case to the Judge to correct the identified errors in his findings of fact and analysis. Upon remand, a Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130. Other issues in the case are not ripe for consideration at this time.

[1] The debt alleged at SOR ¶ 1.k. is a duplicate of SOR ¶1.i. Answer to SOR at 3; GE 7 at 5; GE 8 at 2.

[2] Directive, Encl. 2, App. A ¶¶ 20(a)-(d) and (g).

Order

The Decision is **REMANDED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board