

KEYWORD: Guideline B; Guideline F

DIGEST: Department Counsel contends that the record in this case does not support the Judge's favorable Guideline F mitigation and whole-person analysis. He persuasively argues that, even though the Judge discussed many of Applicant's financial shortcomings, he reached a decision that runs contrary to the weight of the evidence. Favorable decision reversed.

CASENO: 17-03229.a1

DATE: 6/07/2019

DATE: June 7, 2019

In Re:)	
)	
-----)	ISCR Case No. 17-03229
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Mark A. Myers, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 13, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 12, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 application of Guideline F mitigating conditions was arbitrary, capricious, or contrary to law. Department Counsel raised no issues on appeal regarding the Judge’s favorable Guideline B findings and conclusions, which are not discussed further below. Consistent with the following, we reverse.

The Judge’s Pertinent Findings of Fact

Applicant, who is 32 years old, has been working for his current employer since early 2019. He previously worked for other contractors. He served honorably in the military, including in Iraq and Afghanistan, and has been awarded a number of medals and decorations. He was granted a security clearance in 2005. He is unmarried but cohabitates with his fiancée. They have a child.

The SOR alleged seven delinquent debts totaling about \$121,000. It also listed a foreclosed mortgage and a 2013 Chapter 13 bankruptcy that was dismissed. In responding to the SOR, he admitted, in whole or in part, with comments the foreclosed mortgage, the Chapter 13 bankruptcy dismissal, and four of the delinquent debts.

Applicant’s father has medical issues. For about ten years, Applicant has supposedly been supporting his parents with monthly payments “which he inconsistently quantified as \$500, \$700, and \$1,000.” Decision at 4. He also has been paying for his fiancée’s medical and housing expenses and has been sending her child support. He did not submit documentation to show he has been making any of those payments.

In 2013, Applicant filed Chapter 13 bankruptcy, primarily to save his residence from foreclosure. The bankruptcy reflected that he owed about \$208,000 in secured claims, including \$8,000 in mortgage arrears; approximately \$3,500 in unsecured priority claims; and over \$134,000 in unsecured nonpriority claims. While residing overseas with his fiancée, his employment contract expired. Due to medical and childcare expenses and a lack of income, he was unable to comply with the bankruptcy plan. The bankruptcy was dismissed with no payments having been made to creditors. In 2014, his residence was foreclosed upon.

In March 2017, Applicant told an investigator that, after the bankruptcy, he hired a law firm to negotiate settlements of his debts and set up payment plans. Those efforts did not include the foreclosed mortgage. He failed to provide documentation of those efforts. During the interview, he

also indicated that he expected to take action to resolve the delinquent debts that month. About nine months later, he enrolled in a credit counseling service to customize his plan and review options.

Almost a year after the SOR was issued, Applicant engaged the services of a credit repair organization to challenge the accuracy of his credit reports by disputing accounts. He was unable to explain the specific reasons that would constitute a reasonable basis for disputing the debts. Around this time, he also engaged services of a professional debt organization to negotiate settlements of his debts. The debt settlement program lists five creditors with debts totaling over \$121,000 for which settlements are to be negotiated. Under this program, he is to pay about \$1,800 a month for 53 months, which includes a fee of about \$30,000.

Applicant resolved an alleged credit card account of about \$6,200 by paying a settlement of about \$2,500 in 2017. He is in the process of resolving two other accounts. For one of these accounts, he negotiated a settlement of about \$18,000 on an unsecured loan of about \$45,000. The settlement was negotiated approximately one year after the SOR was issued. He submitted documentation of several payments made towards that settlement. For unexplained reasons, he disputed this debt after reaching the settlement. For the other account, he negotiated a settlement of about \$4,000 on a credit card account of about \$10,700. This settlement was negotiated about 15 months after the SOR was issued. He submitted documentation of one payment under this settlement.

Applicant likely owes a deficiency on the foreclosed mortgage because the unpaid balance on that account was about \$27,000 more than the property's fair market value at the time of the foreclosure. He disputes the mortgage account without providing a reason. Four of the other alleged debts remain unresolved. They include a charged-off credit card account of about \$10,300; an unspecified account of about \$31,000; a credit card account of about \$14,700; and a credit card account of about \$2,400. The first two of those accounts are listed in his debt settlement program, but are not yet in the process of being resolved. With regard to the latter two accounts, Applicant initially denied these debts in his SOR response claiming they were paid; in doing so, however, he referred to debts with different account numbers in support of his contention that they were paid. These latter accounts remain unresolved in the absence of documentation establishing resolution.

Applicant's income has fluctuated between \$80,000 to \$140,000. He has an average monthly remainder of over \$1,300. Days before the hearing, his annual salary increased to \$154,000. In a post-hearing submission, he provided a budget that reflected monthly debt payments totaling \$2,145 and a monthly remainder of about \$3,700. He provided character references who attest to his professionalism, integrity, and trustworthiness.

The Judge's Pertinent Analysis

Several of Applicant's delinquent accounts remain unaddressed. Despite a recent net monthly remainder of about \$3,700, Applicant has chosen not to increase his monthly debt payments, and it is unclear why he is unwilling to do so. Applicant also failed to explain why he got into debt before his bankruptcy. Considering his salary, he "might have more reasonably started addressing

his creditors in 2014, not waiting [to] 2017 to do so.” Decision at 16. He decided to address his delinquent debts about the time of his background interview, hired a law firm to negotiate settlements, and took some meaningful actions. He has resolved or is in the process of resolving several of the delinquent accounts. He also failed to document other claimed resolution efforts. Additionally, because he was unable to provide a reasonable basis for disputing the legitimacy of some accounts, he is not given credit for those disputes.

Mitigating Conditions 20(b), 20(c), and 20(d) apply.¹ Although applicants who begin resolving debts after their clearances are in jeopardy may be lacking in judgement and self-discipline, “there is clear evidence that Applicant took some resolution actions before he received the SOR.” Decision at 16. Security clearance adjudications are not debt-collection actions, but instead are aimed at evaluating an applicant’s judgment, reliability, and trustworthiness. An applicant is not required to establish resolution of every debt. In this case, “Applicant had demonstrated a belated but good track record of debt reduction and elimination efforts, [finally] taking meaningful and documented corrective actions with respect to his delinquent debts.” Decision at 22.

Discussion

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). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. 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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” Directive, Encl. 2 App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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

¹ These mitigating condition are listed in Directive, Encl. 2, App. A ¶ 20 as follows:

“(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; [and]

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

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* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel contends that the record in this case does not support the Judge's favorable Guideline F mitigation and whole-person analysis. He persuasively argues that, even though the Judge discussed many of Applicant's financial shortcomings, he reached a decision that runs contrary to the weight of the evidence. Of note, the following findings, conclusions, or record evidence undercuts the Judge's favorable decision:

a. Applicant has a history of financial problems, which, of course, began before he filed Chapter 13 bankruptcy in 2013. All of the debts in the SOR were listed in the bankruptcy petition. Government Exhibit (GE) 5.²

b. Applicant's period of unemployment in 2014, the birth of his child, and his subsequent child support obligations all occurred after he filed the bankruptcy. Consequently, there is no causal connection between those conditions and Applicant's initial financial problems. *Id.*

c. Applicant failed to document that he had been supporting his parents for ten years and provided inconsistent information about the amount of that support. Decision at 4.³

d. When asked at the hearing the reasons why the delinquent debts were incurred, Applicant either did not know or provided responses such as for "expenses" or "gas." Tr. at 59-65.

e. Since his reemployment in October 2014, Applicant has been earning a yearly salary ranging between about \$110,000 and \$140,000. Tr. at 29-30, 48-49, and 55-56.

f. While reemployed and earning income, Applicant claimed in his 2016 security clearance application (SCA) that he was negotiating debt settlements (GE 1) and claimed in his 2017 background interview that he "expects to be in the process of resolving them this month." GE 2. However, no proof was offered to show he took those claimed actions in a prompt manner.

g. Although he resolved one of the smaller debts after his background interview (Applicant's Exhibit (AE) J), he did not start making payments towards the other debts until about a year after the SOR was issued. AE T and Z.

² Applicant's bankruptcy petition reflects that he had an \$8,000 mortgage arrearage. GE 5, Schedule D. Additionally, a credit report reflects that the date of last activity on a number of his accounts was a month or more before he filed bankruptcy. GE 3.

³ Applicant's bankruptcy petition reflects his father was providing him a monthly contribution of \$500. GE 5 at Schedule I, line 13. In Schedule J, line 13c, however, it also reflects that he has an average or projected monthly payment of \$700 to his parents for their support.

h. Regarding the two debts for which the Judge found that Applicant was resolving, Applicant provided documentation of making three payments on one account and one payment on the other account. Decision at 6-7; AE T and Z.⁴

i. Five of the alleged debts, which constitute a significant amount of Applicant's delinquent debt, remain unresolved. He has not shown any progress on resolving three of those debts, which includes the likely deficiency on the foreclosed mortgage. Decision at 6-7.

j. Despite having a significant net monthly remainder, Applicant has apparently chosen not to increase his monthly debt payments to effectuate a more rapid resolution of the debts. "[I]t is unclear if he unwilling to do so." Decision at 14.

k. The Judge made multiple findings and conclusions implicating Applicant's veracity and reliability. The Judge repeatedly used language such as "purportedly," "claimed," and "supposedly." He noted several instances of uncorroborated statements.

The above circumstances undermine the Judge's conclusions that Mitigating Conditions 20(b), 20(c), and 20(d) applied in this case. Applicant did not address his financial problems in any meaningful manner for many years. Most of Applicant's actions that the Judge relies on to mitigate the financial security concerns were taken after the SOR was issued. As we have previously stated, the timing of resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who takes action to resolve financial problems only after being placed on notice his or her clearance is in jeopardy may lack the judgment, and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. *See, e.g.*, ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). In short, given his failure to account clearly for why he encountered his financial problems, his lack of action in addressing them over the years despite a considerable income, and his recent steps taken to resolve them only after his security clearance was placed in jeopardy, Applicant has failed to establish that he acted responsibly and in good-faith under the circumstances.

We conclude that the Judge's decision is arbitrary and capricious because it runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard. The decision is not sustainable.

⁴ AE Z reflects that Applicant enrolled with the debt settlement organization in September 2018. He has been making the \$1,833 monthly payment towards that program from October 2018 until at least February 6, 2019. *See* AE T and Z. While five debts are enrolled in that program, the debt settlement organization has so far only negotiated settlements for two of those debts.

Order

The Decision is **REVERSED**.

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

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

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