

KEYWORD: Guideline F

DIGEST: Decision after remand contains problematic language. Board majority affirms on different theories. Adverse decision affirmed.

CASENO: 10-04405.a2

DATE: 12/28/2011

DATE: December 28, 2011

In Re:)
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-----) ISCR Case No. 10-04405
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Darin Groteboer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 28, 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 June 29, 2011, after the hearing, Administrative Judge Henry Lazzaro denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On September 19, 2011, we remanded the case to the Judge for a new decision. He issued his Decision Following Remand on October 11, 2011, again denying Applicant a security clearance. Applicant appealed this decision in accordance with the Directive.

Applicant raises the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's adverse security clearance decision.

The Judge made the following pertinent findings of fact: Applicant has been self-employed since 2007, and he seeks a clearance as part of his effort to obtain employment with a Defense contractor. His wife, a nurse, had to stop working in January 2008. She now receives disability pay.

In November 2004, Applicant began purchasing homes as a source of investment income. He purchased 11. The total amount that Applicant owed on the properties, as of July 2010, was \$1,408,037. However, the combined value of the properties as of that date was \$948,000. He also owed more on his personal residence than its value as of the close of the record.

In 2007, Applicant started up a business of his own, providing disaster recovery services. He financed the start-up costs through a bank loan of \$1,604,000. He defaulted, and the lender sought damages from Applicant. He entered into a forbearance agreement with the lender and, as of the date of the hearing, had been making all required payments. He has a credit card debt in the amount of \$20,230 that has been delinquent since February 2009. He also has a charged-off line of credit in the amount of \$16,771. Applicant has attempted to work out payment plans, but the only options offered him were beyond his ability to pay. One of the creditors has threatened a lawsuit.

Applicant's financial problems were due in most part to the national economy, which affected his ability to charge rent on his investment houses and which had a severe impact on his disaster recovery business. He is current on his mortgages only by applying the proceeds from the business to these debts. Applicant has hired an attorney, who drafted the forbearance agreement referenced above, and who has stated that Chapter 11 bankruptcy protection is a possible eventuality. Applicant's testimony and other evidence indicate that he has attempted to resolve his financial problems with every means available to him.

In the Analysis, the Judge concluded that Applicant's financial problems resulted from circumstances outside his control, such as the recession and his wife's illness. He also concluded that Applicant had done all within his means to resolve the problems. He went on to state:

If the only issues for me to consider under the financial considerations guideline were application of the mitigating conditions to the disqualifying condition and a determination under the whole-person analysis of whether Applicant's history

indicates he is reliable and trustworthy, I would unhesitatingly grant him a clearance. Decision at 8.

However, the Judge pointed out that the security concern under Guideline F recognizes that a person “who is financially overextended is at risk of having to engage in illegal acts to generate funds.” Directive, Enclosure 2 ¶ 18. The Judge concluded that Applicant’s substantial debt—nearly \$500,000 in negative equity on the houses and \$37,000 in delinquent credit accounts—balanced against his modest resources, is not likely to be resolved in the near future. Indeed, the Judge compared Applicant to a person standing on a precipice from which he could fall at any moment. The Judge stated that, while there is nothing in the record to suggest that Applicant is an untrustworthy person, neither does the record provide any basis upon which to foresee what Applicant might do should the fall occur. He concluded that, in view of the Directive’s requirement that any doubt about an applicant’s fitness for a clearance be resolved in favor of national security, it is not clearly consistent with the national interest to give Applicant a clearance. Decision at 9. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988); Directive, Enclosure 2 ¶ 2(b).

Applicant contends that the Judge erred in his analysis of the security concerns arising from Applicant’s delinquent debts. He cites to record evidence, and to the Judge’s findings, concerning the forbearance agreement, his efforts to work out payment plans, and the economic and personal circumstances surrounding his financial difficulties. He cites specifically to the Judge’s statement that, were the Judge to apply the mitigating conditions and the whole-person factors, he would grant Applicant a clearance. In effect, Applicant argues that the Judge’s ultimate adverse decision is not consistent with the analysis upon which it purports to be based.

Applicant’s point that the Judge’s decision appears to contain an inconsistency is understandable. At first blush, it is difficult to see why, if a whole-person analysis demonstrates that an applicant is trustworthy, he should not be cleared. A whole-person analysis entails an examination of the entirety of the record evidence with a view toward determining whether an applicant has demonstrated his trustworthiness in relation to the security concerns raised in a SOR. *See, e.g.*, ISCR Case No. 02-28891 at 4 (App. Bd. Apr. 22, 2004). Although the Directive lists certain factors which are normally associated with a whole-person analysis, these are not exhaustive. *See, e.g.*, ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). A Judge may conclude, as a result of his whole-person analysis, that an applicant is a person of good character. However, that analysis requires the Judge to proceed with the question of whether there is a nexus between an applicant’s evidence of good character and the applicant’s claim that he has mitigated the security concerns in his case. *See, e.g.*, ISCR Case No. 04-00109 at 4-5 (App. Bd. Jul. 13, 2006). In a Guideline F case, a whole-person analysis would require a Judge to consider whether an applicant’s mitigation evidence bears a rational connection to a conclusion that the applicant would resist those pressures that are a reasonably foreseeable from his financial delinquencies. *See Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Viewed in this way, a favorable whole-person analysis would mean that the Judge has found such a nexus and that the applicant should be cleared.

However, we do not evaluate a Judge's decision based on individual sentences in isolation. We consider the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 05-07983 at 3 (App. Bd. Oct. 1, 2007). In this case, the Judge considered the extent of Applicant's debt relative to his ability to pay. He concluded that this debt raised a real concern that Applicant could at any time be overwhelmed by economic difficulties of a magnitude as to tempt even the most resolute of persons to breach the fiduciary duty at the heart of a security clearance. He stated that the record provided no reason to believe that Applicant would, under those conditions, necessarily resist pressure to act against the interests of national security. Insofar as Applicant bore the burden of persuasion as to mitigation, it was Applicant's responsibility to demonstrate that he had met the standard set forth in *Egan, supra*. Accordingly, we conclude that, even if the Judge's analysis contains an error, the error is harmless. The Judge's adverse decision is sustainable on this record.

Order

The Judge's adverse security clearance decision in AFFIRMED.

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Separate Opinion of Administrative Judge William S. Fields

I agree that the Judge's adverse decision in this case can be affirmed. The Judge made sufficiently detailed findings of fact to indicate that he had thoroughly considered the record as a whole. Although his analysis contained language that could be characterized as problematic, there was sufficient record evidence to support his overall adverse clearance decision, given a legal standard that required him to err on the side of national security. The Judge's remand decision clarified perceived ambiguities in his initial decision, and further remand is unlikely to produce a materially different result. *See, e.g.*, ISCR Case No. 02-27133 at 6-7 (App. Bd. Oct. 24, 2005).

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

The bulk of the analysis in the Decision does not support the ultimate adverse conclusion. After concluding that: 1. Applicant is entitled to application of both Mitigating Condition 20 (b) and Mitigating Condition 20 (d) to all of the debts alleged in the SOR; and 2. Applicant is reliable and trustworthy; the Administrative Judge concludes that Applicant has not met his burden of persuasion because of the enormity of his indebtedness.

The Decision relies on a sentence from the Concern paragraph of Guideline F in a manner that seems to suggest the Mitigating Conditions do not apply to the Concern paragraph. There is no basis in the Directive, nor in case law, to support such a practice. Furthermore, the Mitigating Conditions under Guideline F do not differentiate between a situation where an applicant has more bad debt than he can pay and one where the applicant has much, much more bad debt than he can pay.

Applicant relies on a particularly problematic sentence to demonstrate the difficulties with the Decision. Even without that sentence, however, the Decision fails for the same basic reason the first Decision was remanded. Most of the findings and analysis support a favorable conclusion.

The law of the case established by Board's first remand decision, with the facts unchanged, is that reasoning such as this is not affirmable.

At this point the Board can reverse the ultimate unfavorable conclusions relying on the Judge's analysis that Applicant has demonstrated the applicability of the Mitigating Conditions to each of the debts alleged in the SOR as well as his trustworthiness and reliability.

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