KEYWORD: Guideline F

DIGEST: Department Counsel's comments during the hearing may have led Applicant to believe that if he submitted certain evidence he would receive a clearance. Neither the Judge nor the Department Counsel can promise an applicant a clearance. Department Counsel's comments possibly misled Applicant as to the scope of evidence that he could present in mitigation. Adverse decision remanded.

CASE NO: 14-00156.a1

DATE: 10/16/2014

DATE: October 16, 2014

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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**
***Pro se***

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 13, 2014, 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 requested a hearing. On August 7, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

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

**The Judge's Findings of Fact**

Applicant holds bachelor's and master's degrees. He has worked for his current employer since 2011. He has worked in Defense contracting for 20 years, although he experienced unemployment in 2006 to 2007 and again in 2010. He states that he has held a clearance for several years.

Applicant has delinquent debts totaling $78,839, for a judgment against him, various collection accounts, and a home mortgage. He claims that he did not know about his delinquent bills until 2013. He acknowledged the mortgage account in his clearance interview, stating that the house had gone into foreclosure.

Applicant has had several heart attacks in recent years. He suffered one attack in October 2010, when he was homeless, unemployed, and did not have health insurance. He now earns $95,000 a year. He has a monthly remainder of $800 and is current on his household bills. Applicant has hired an attorney recently to seek financial advice. He was advised to file for bankruptcy. Although he claimed has paid a filing fee, he has not completed the paperwork.

Applicant submitted letters of recommendation, all attesting to his ability to be a team player and to accomplish any task. A current supervisor states that he is reliable and honest. Another reference, from a current manager at Applicant's place of employment, states that he has never questioned Applicant's judgment or reliability. This person is aware of Applicant's financial situation and does not believe that it poses a security risk.

**The Judge's Analysis**

The Judge stated that Applicant had only recently sought advice about resolving his debts. She acknowledged that he had experienced conditions beyond his control, such as unemployment and five heart attacks from 2007 to 2014. However, she concluded that he had not acted responsibly in regard to his debts. In the whole-person analysis, the Judge reiterated her concern that he had only recently begun to address his financial problems and had not contacted his creditors.

**Discussion**

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 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 access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, 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* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Applicant challenges the Judge's application of the mitigating conditions, arguing that he had demonstrated responsible action in regard to his debts. In doing so, he implicitly raises an issue of due process. He argues that he, Department Counsel, and the Judge negotiated an agreement concerning the quantum of evidence that would satisfy the criteria of Mitigating Condition (MC) 20(b).[1] He contends that he submitted the required evidence and that the Judge should have concluded that his security concerns were mitigated.

There is some merit to Applicant's argument. The Judge made detailed findings about Applicant's numerous and severe medical problems and his unemployment. These findings support a conclusion that Applicant had satisfied the first clause of MC 20(b). Department Counsel conceded this issue during the hearing: "I will stipulate that the Government believes you have established that your debt has arisen from circumstances largely beyond your control." Tr. at 61.

At the hearing, Department Counsel told Applicant that the Government needed to see evidence of responsibility and that bankruptcy is sometimes a reasonable means of addressing significant delinquent debt. He continued:

> if you had walked in today with your testimony about your medical conditions and with a filed Chapter 13 and some record of payments, a couple payments, probably the Government would leave this matter in the sound discretion of [the Judge] . . . I'm not your lawyer . . . [b]ut if, perchance, you were to file promptly a Chapter 13 and submit the filing to me, to be submitted further to [the Judge] we would take that into consideration . . . Tr. at 61-62.

Applicant replied, "God bless you." Tr. at 62. At Applicant's request, the Judge left the record open for him "to submit what it is that you have from your attorney concerning the status of the

[1]Directive, Enclosure 2 ¶ 20(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]"

bankruptcy." Tr. at 97. Department Counsel's colloquy may have led Applicant to believe that if he submitted some evidence of a bankruptcy filing then he would be granted a clearance. The Judge's failure to correct this mis-impression may have lent force to it. Following the hearing, Applicant submitted evidence that he had consulted an attorney for the purpose of filing for bankruptcy. Applicant Exhibit (AE) D, Retainer Agreement. In his appeal brief, Applicant contends that, by submitting AE D, he had "fulfilled [his] part of the negotiation and supplied what [he] needed . . ." Applicant Brief at 2. The brief also contains representations regarding his contract with his attorney. Those statements constitute new evidence, which we cannot consider. *See* Directive ¶ E3.1.29.

Neither a Judge nor a Department Counsel can promise an applicant a security clearance. *See, e.g.*, ISCR Case No. 11-10813 at 3 (App. Bd. Dec. 6, 2013); ISCR Case No. 09-06602 at 2 (App. Bd. Jan. 28, 2011). To the extent that they appeared to have done so in this case, they erred, and we conclude that the error was not harmless. An applicant has a right under the Directive to submit any relevant evidence in mitigation of the concerns raised by the SOR. Moreover, he or she may do this not only to satisfy the explicit criteria of the mitigating conditions listed in the Directive, but, even in cases in which those criteria are not met, by presenting evidence that would support a favorable whole-person analysis. *See, e.g.*, ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008). The right that applicants enjoy to submit evidence is broad, and it is not unusual for a Judge to hold a record open after a hearing in order to permit an applicant to submit additional evidence beyond what was already admitted at the hearing. It is possible that Applicant, who acted *pro se*, relied on the mis-impression created by Department Counsel (and, to an extent, the Judge), and thus may have failed properly to understand the wide scope of evidence that he could or should have presented in mitigation.

We have, on occasion, remanded cases to Judges to permit the taking of additional evidence in order to correct an erroneous limitation on an applicant's exercise of his rights under the Directive. *See, e.g.*, ISCR Case No. 94-0729 at 7 (App. Bd. May 31, 1995). Under the unusual circumstances of this case, we conclude that the best way to correct the issue raised by Applicant is to remand the case to the Judge to permit the parties to submit additional evidence. The Judge will then issue a new decision in accordance with the Directive.

## Order

The Decision is **REMANDED**.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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