

DATE: September 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07360

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 15, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 30, 2006, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's conclusion that the security concerns raised by Applicant's history of indebtedness and excessive gambling had been mitigated is arbitrary and capricious. [\(1\)](#)

(1) Department Counsel contends that it was arbitrary and capricious for the Administrative Judge to conclude that the security concerns raised by Applicant's history of indebtedness were mitigated by application of Guideline F Mitigating Conditions 4 [\(2\)](#) and 6, [\(3\)](#) and a "whole person" analysis. In support of that contention, Department Counsel argues that: (a) not all of the debts have been paid off, (b) two of the four debts were satisfied by garnishment, and (c) what counseling Applicant received was for his depression and excessive gambling, not financial counseling. Department Counsel's contention has some merit, but does not render the Judge's overall favorable decision arbitrary or capricious.

The findings that Applicant had successfully mitigated the security concerns under Guideline F reflect permissible interpretations of the record evidence by the Administrative Judge. The fact that Department Counsel can articulate a reasonable alternative interpretation is of no moment. Department Counsel has not met her burden of demonstrating that the Judge's findings do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's findings about Applicant's history of indebtedness are sustainable.

Given the record evidence in this case, it was error for the Administrative Judge to fully apply Financial Considerations Mitigating Condition 4. In this instance, Applicant did not complete any type of financial counseling and did not favorably complete the counseling for depression and excessive gambling.

As to Guideline F Mitigating Condition 6, it was error for the Administrative Judge to favorably apply that mitigating

condition to the individual debts that had been satisfied by garnishment. However, Applicant was not required, as a matter of law, to establish that he had paid-off every debt in its original full amount, and Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to give Applicant some credit for the mitigating evidence he produced under Guideline F Mitigating Condition 6, particularly when analyzing Applicant's financial circumstances in the overall context of his depression and gambling problem.

Department Counsel is essentially arguing that the record evidence shows that Applicant was not as diligent about dealing with his financial problems as he could have been. However, the unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, Applicant had demonstrated that he had gotten his gambling problem substantially under control and that most of his indebtedness has been resolved. The result had been a not insubstantial improvement to his financial situation. Applicant is now alert to the security concerns presented by his circumstances and the responsibilities incumbent on him as a result. The Board need not agree with the Judge's decision under Guideline F to conclude that it is sustainable.

(2) Department Counsel also contends that it was arbitrary and capricious for the Administrative Judge to conclude that the security concerns raised by Applicant's history of excessive gambling was mitigated by application of Guideline E Mitigating Condition 5⁽⁴⁾ and a "whole person" analysis. In support of that contention, Department Counsel argues that: (a) Applicant did not complete his counseling and treatment programs for depression and excessive gambling, and (b) he did not completely discontinue gambling, but still does so in very small amounts. The Board does not find these arguments persuasive.

The findings that Applicant had successfully mitigated the security concerns under Guideline E reflect permissible interpretations of the record evidence by the Administrative Judge. The fact that Department Counsel can articulate a reasonable alternative interpretation is of no moment. Department Counsel has not met her burden of demonstrating that the Judge's findings do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's findings about Applicant's history of excessive gambling are sustainable.

Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Administrative Judge to give Applicant some credit under Guideline E Mitigating Condition 5 with respect to the mitigating evidence he produced. Applicant was not required, as a matter of law, to establish that he had ceased to gamble. The Judge's conclusion that Applicant's modest level of gambling no longer presented a security concern was not unreasonable, particularly when analyzed in the overall context of his personal and financial circumstances.

Again, Department Counsel is essentially arguing that the record evidence shows that Applicant was not as diligent about dealing with his depression and gambling problem as he could have been. However, the unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, Applicant had demonstrated that he had gotten his gambling problem substantially under control and that most of his indebtedness has been resolved. The result had been positive changes in his life style and a not insubstantial improvement to his financial situation. Applicant is now alert to the security concerns presented by his circumstances and the responsibilities incumbent on him as a result. The Board need not agree with the Judge's decision under Guideline E to conclude that it is sustainable.

Order

The decision of the Administrative Judge granting Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Member Mark W. Harvey

I agree with the opinion of my colleagues that the Administrative Judge correctly concluded (1) that Guideline E, Mitigating Condition 5⁽⁵⁾ applied; (2) that Applicant's conduct was mitigated under the whole person analysis; and (3) that the decision to grant Applicant's security clearance should be affirmed. I respectfully disagree with my colleagues' comments that the Judge erroneously fully applied Guideline F, Mitigating Conditions 4⁽⁶⁾ and 6⁽⁷⁾

I. The Administrative Judge's findings and conclusions.

A. Findings of fact. The Administrative Judge made the following material Findings of Fact (citations were deleted, and minor modifications made for purposes of brevity):

Applicant is a 58-year-old financial analyst for a defense contractor. He has worked for this contractor for more than twenty-four years. He completed a security clearance application (SF 86) in December 2001. . . . He and his wife divorced in 1998. He has two daughters and seven grandchildren.

As part of his divorce settlement in 1998, Applicant assumed responsibility for payment of \$30,000 of credit card and other marital debt. Subsequent to his divorce, he became depressed, started gambling, and isolated himself. He incurred additional gambling debts totaling \$20,000. Thus, by 2001, Applicant had incurred debt totaling nearly \$50,000. By October 2003, he still owed about \$15,000-\$20,000, much of which has been paid.

The Statement of Reasons (SOR) alleged that Applicant had five unpaid debts. Two SOR debts were paid through garnishment of Applicant's pay, and another debt was resolved through a settlement. The Judge found that four of five SOR debts were paid, and the unpaid SOR debt was for \$1880. At the time of the hearing, Applicant had not yet paid the \$1880 debt because of holiday expenses. He indicated an intent to pay this debt. In light of his previous payments, his testimony is credible. As of the hearing, he owed approximately \$2,700 in debt, which included a credit card debt of \$300 and a loan of \$656 that were not listed on the SOR. His net income is \$3,030 a month, and his monthly expenses total \$1,950. Applicant has sufficient income to pay the remainder of his debt.

At times, Applicant gambled most of his paycheck, reserving enough money to pay his rent. At some point, he realized he could not continue to gamble. He began going to church, and sought treatment/counseling with a mental health provider for his gambling problem and his depression. His counseling began in 2000 and continued until 2003. At one point, he and his therapist agreed on [] twelve sessions of treatment. He did not complete these sessions. In March 2003, he met with another counselor once, but was not comfortable so he did not continue. He also attended gamblers anonymous. Throughout this time period, he continued to gamble. In 2003, on two occasions, he signed a paper directing two different casinos to remove or arrest him if the casinos found him gambling in this establishments. He has not gambled in the casinos since this time. He has restructured his life. He plays racquetball and lift weights many evenings, instead of gambling. He continues to attend church and is more interactive with his family.

Decision 2-5.

B. Discussion of findings of fact. On appeal, Department Counsel does not challenge the Judge's findings of fact, but emphasizes that two SOR debts were paid involuntarily through a wage garnishment, and one SOR debt was settled for less than the full amount. Applicant did not contact the creditor for the unpaid SOR debt for six months before his hearing, and two debts not listed on the SOR were past due by 60 days at the time of his hearing. Applicant said he planned to pay his unpaid debts in March or April 2006. Applicant continued to gamble after receiving counseling about gambling.

"There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise." ISCR Case No. 02-27133 at 5 (App. Bd. Oct. 24, 2005). The appealing party's "disagreements with the Judge's findings, standing alone, are not sufficient to rebut that presumption." *Id.* The appealing party's ability to cite to record evidence and contentions that the Judge should have given greater weight to such evidence is not sufficient to overcome that rebuttable presumption. ISCR Case No. 03-19006 at 5 (App. Bd. Oct. 17, 2005). "Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence." *Id.* The issue of the weight that the Judge gave the manner of payment of debts, the failure to pay a debt, and Applicant's continued gambling will be addressed in the discussion of the mitigating conditions and "whole person" analysis later in this decision.

II. Whether the Record Supports the Administrative Judge's Conclusions on the Application of Specific Mitigating Conditions

A. The Judge's material conclusions. The government has established a *prima facie* case to deny Applicant a security clearance because Applicant had a history of not meeting his financial obligations, *see* Directive ¶ E2.A6.1.2.1, and his financial problems are linked to gambling, *see* Directive ¶ E2.A6.1.2.5. The Judge noted, "Applicant began gambling after his divorce in 1998. He incurred significant debt from his gambling in addition to the marital debt he had assumed as part of his divorce settlement. He failed to pay much of his debt for a long period of time, and he still has some outstanding bills." Decision at 8. The Judge also concluded that Applicant received counseling and there were clear indications that his financial problem is being resolved or is under control, *see* Directive ¶ E2.A6.1.3.4 and that Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts, *see* Directive ¶ E2.A6.1.3.6. The Judge explained her rationale for finding that Financial Considerations Mitigating Conditions 4 and 6 were applicable stating:

Between his marital debts and his gambling, Applicant incurred nearly \$50,000 of debt by 2001. By 2003, he had paid \$30,000 to \$35,000 of this debt, without filing for bankruptcy. Some of the debt was paid following garnishment and the rest through his efforts. By the time of the hearing, he owed \$2,700. \$900 is new debt. He has taken responsibility for his financial problems. He developed a plan to pay his debt, and followed through. At his current level of income, he can pay off his remaining debt.

A few years ago, he realized he was depressed and could not continue to gamble because of its negative effects on his life. He initiated counseling to address the source of his depression. During these sessions, he also discussed his gambling problem. Although he developed a treatment plan with his therapist, he did not complete all the sessions. He did attend ten sessions of gamblers anonymous. However, neither the counseling nor gamblers anonymous successfully helped him overcome his issues with depression and gambling. Instead, he found that his faith provided him with the strength to manage his gambling problem and resolve his depression. Without intervention by a court or other entity, Applicant took the initiative to take control of his gambling problem. He has stayed away from the casinos. While he still gambles, he not only limits it to off-track betting on horse races, but he also significantly limits the amount of money he bets. His gambling is no longer creating a financial problem as sho[wn] by his current debt level. Decision at 8.

The government established a *prima facie* case to deny Applicant a security clearance because Applicant's personal conduct increases his vulnerability to coercion, exploitation or duress, *see* Directive ¶ E2.A5.1.2.4. The Judge stated, "Applicant developed a serious gambling problem after his divorce in 1998. Because of this problem, he ignored his bills and significantly increased his debt. His conduct left him vulnerable to coercion, exploitation or duress." Decision at 9. The Judge concluded that Applicant has taken positive steps to significantly reduce or eliminate his vulnerability to coercion, exploitation or duress, *see* Directive ¶ E2.A5.1.3.5. The Judge articulated her rationale for finding that

Mitigating Condition 5 was applicable stating:

By paying off ninety-five per cent of his debt, Applicant has substantially eliminated his vulnerability to coercion, exploitation or duress. He has changed his after work life style to a much healthier one which includes exercise and more family time. He continues to practice his faith which gives him the internal strength and emotional support he needs to control his gambling. It has also helped to resolve his problems with depression. The fact that he has paid most of his large debt without filing bankruptcy shows he can manage his gambling desires. In addition, by self-excluding himself with the casinos, he has made it more difficult to access casino gambling, the source of his large gambling debt.

Decision at 9.

B. Discussion.

An Administrative 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 Appeal Board may reverse the Administrative 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We may not set aside an Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the [Judge] . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

The majority holds that the Judge's conclusions with respect to Financial Considerations Mitigating Condition 4 were arbitrary, capricious or unsupported by record evidence. The majority declines to give Applicant full credit for counseling because it was not in connection with his financial problems under Financial Consideration Mitigating Condition 4. To obtain more than partial application of this mitigating condition, counseling must be specifically oriented towards financial issues, such as credit or debt reduction.⁽⁸⁾ This mitigating condition, however, does not specify the type of counseling that is required.⁽⁹⁾ The type, purpose, manner, intensity, quality and duration of counseling are all factors that should be left to the Judge to consider when applying Financial Considerations itigating Condition 4. A Judge should have broad discretion in determining the weight to give counseling, and this discretion should not be disturbed when it reflects a reasonable, plausible interpretation of the record evidence. The Judge's conclusions about the sources or origin of Applicant's financial problems (divorce, depression, and gambling), and the counseling's types (gambling and depression) and sources (church, therapist and gamblers anonymous), do not preclude her from concluding that this counseling met the requirements of Financial Considerations Mitigating Condition 4.

The majority opines that it is arbitrary, capricious or unlawful for the Judge to apply Financial Considerations Mitigating Condition 6 because two debts were paid by garnishing Applicant's salary. Department Counsel also asserts one debt was settled, and three debts were overdue and not paid at the time of Applicant's hearing. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted). ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001). The evidence was weak that Applicant showed "good faith" with respect to four creditors listed in the SOR. Two SOR debts were paid through judgment and garnishment, and one SOR debt was paid through settlement. The SOR ¶ 1.c. debt was never paid. Moreover, at the time of his hearing, Applicant had not contacted the SOR ¶ 1.c. creditor for six months, and had not tendered any payment for part or all of the \$1,880 debt. There was no record evidence showing Applicant acted reasonably, prudently, or that he adhered to his obligations with

respect to these four SOR debts, or that he acted in good faith. But an analysis that focuses on these four debts to the exclusion of other record evidence would be piecemeal, isolated consideration of the evidence, which is contrary to the Boards' requirement that application of a "mitigating condition requires the exercise of sound discretion in light of the *record evidence as a whole* (emphasis added)." ISCR Case No. 03-18254 at 2 (App. Bd. Feb. 16, 2006). The Judge's findings accurately discussed the manner of Applicant's payment or nonpayment of the SOR debts. Her conclusion of good faith, however, properly focused on Applicant's overall reduction of his \$50,000 debt by 95% from 2001 to January of 2006, his efforts to eliminate the underlying causes of those debts., and his promise to pay the remaining debt in the near future.

Department Counsel argued the evidence did not support application of Personal Conduct Mitigating Condition 5 because Applicant continued to gamble, failed to complete treatment, and failed to follow treatment recommendations. These factors showed Applicant failed to take the positive steps necessary to significantly reduce his vulnerability to exploitation. The Judge explained how Applicant's gambling was under control-Applicant no longer went to casinos, and the magnitude of his betting on horse races was insignificant. There is no security requirement for termination of all gambling. Applicant's counseling was sufficiently effective to result in a 95% reduction in Applicant's debts. The overall reduction in gambling and debt are the most important steps Applicant has taken to significantly reduce his vulnerability to exploitation-they outweigh the factors Department Counsel lists. The Judge articulated a satisfactory explanation for her application of Personal Conduct Mitigating Condition 5.

Whether the Record Supports the Administrative Judge's Conclusions on the Application of Mitigating Conditions to the Whole Person Analysis

Department Counsel argues that at the time of Applicant's hearing, he had multiple, unpaid, delinquent debts. His gambling aggravated his financial problems, and he continued to gamble despite receiving some counseling. The Judge discussed the facts supporting these concerns, but found that Applicant reduced his \$50,000 debt by 95%, and had his gambling under control. She also found Applicant's testimony that he would pay the remainder of his debts within a few months to be credible. [\(10\)](#)

Under the whole person concept, an Administrative Judge must apply all relevant and material information about an applicant's conduct and circumstances, and must not do so in a piecemeal or separate manner. [\(11\)](#) Whole person analysis is required, and it includes consideration of pertinent Adjudicative Guidelines disqualifying and mitigating conditions, as well as appropriate information about the applicant, such as age, motivation, and rehabilitative measures, and information about the misconduct, such as its nature, seriousness, recency, and frequency. *See Directive, Section 6.3 and ¶¶ E3.1.25 and E2.2.1; ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005).* The obligation to consider these factors "are complementary, not exclusive, in nature." ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). Then the Judge must decide what weight can reasonably be given to the applicable disqualifying or mitigating condition. [\(12\)](#) Under appropriate circumstances, the Judge can "render a favorable decision in the absence of an[y] Adjudicative Guidelines mitigating condition." [\(13\)](#)

The Judge's decision articulated a rational basis and analysis for her whole person conclusion and decision. Her application of mitigating conditions, whole person conclusion, and decision are not arbitrary, arbitrary, capricious, or contrary to law.

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable finding with respect to SOR paragraph 2.d is not at issue on appeal.
2. Directive ¶ E2.A6.1.3.4. "The person has received or is receiving counseling for the problem and there are clear

indications that the problem is being resolved or is under control."

3. Directive ¶ E2.A6.1.3.6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

4. Directive ¶ E2.A5.1.3.5. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

5. Directive ¶ E2.A5.1.3.5 provides, "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

6. Directive ¶ E2.A6.1.3.4 provides, "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."

7. Directive ¶ E2.A6.1.3.6 provides, "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

8. Department Counsel cites ISCR Case No. 99-9020 at 2 (App. Bd. June 4, 2001), where the Board decided that the Judge's decision not to apply Financial Considerations Mitigating Condition 4 was not arbitrary or capricious, stating "Because Applicant's financial difficulties were not limited to his gambling debts, the counseling Applicant received concerning his gambling did not compel the Judge to apply this mitigating condition." The Board noted that the Applicant accumulated approximately \$120,000 in credit card debt and \$60,000 in gambling debts over a two year period. *Id.* at 2-3. The Board has not previously stated that a Judge's conclusion is arbitrary, capricious or unlawful to accept non-financial or non-debt counseling as adequate to apply Financial Conditions Mitigating Condition 4.

9. *Compare* Directive ¶ E2.A6.1.3.4 (unspecified counseling) *with* Directive ¶ E2.A7.1.3.4 (alcohol counseling required for mitigating condition pertaining to alcohol problem) and Directive ¶ E2.A8.1.3.4 (drug counseling required for mitigating condition pertaining to drug abuse).

10. The Judge may consider Applicant's promise to pay off his unresolved debts in the future as evidence of reform and rehabilitation. However, if the Judge determines this promise is not credible, or if record evidence does not corroborate the promise, a favorable conclusion is not required. *See e.g.*, ISCR Case No. 03-02805 at 3 (App. Bd. Dec. 20, 2005); ISCR Case No. 03-06259 at 3 (App. Bd. Sept. 20, 2005); ISCR Case No. 00-0365 at 3 (App. Bd. May 16, 2001) (promise to take remedial steps in future concerning delinquent debts is not evidence of reform or rehabilitation requiring the judge to make a favorable security clearance decision).

11. ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005); ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003).

12. ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005) (citing ISCR Case No. 02-05110 4-6 (App. Bd. Mar. 22, 2004); ISCR Case No. 01-08565 at 5 (App. Bd. Mar. 7, 2003)).

13. ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). *See* ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004); ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004).