

KEYWORD: Guideline F

DIGEST: A Judge's failure to discuss a significant aspect of a case that reasonably could be expected to be taken into account raises a serious question as to whether the Judge forgot that aspect, ignored it, failed to appreciate its significance, or engaged in arbitrary or capricious analysis. The \$100,000 personal loan is important because of its size and nature and the fact that Applicant had been unable to make payments on it since November 2007 and would not be able to make payments at least until later in 2008. The debt is significant because Applicant cannot identify what he did with the proceeds of the loan. The money was borrowed between 2002 and 2007. Applicant can only attribute its use to financial bleeding. There is no evidence that it has been used to satisfy the delinquencies in the SOR. This calls into question Applicant's ability to live within his means, satisfy debts, and meet financial obligations. The record does not support the Judge's application of MC 20(a). While Applicant testified about his financial difficulties in 2002, he did not demonstrate that the delinquencies in the SOR were from that period. Three of the delinquencies arose from his purchase of a larger home in 2005, which Applicant now says was not a wise choice. The record does not support a conclusion that Applicant's debts are under control or that he has made a good-faith effort to pay them off. The Judge apparently gave considerable weight to Applicant's plan for paying off his debts after his wife has finished training and gets a new job. The Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. The Judge's whole-person analysis fails to consider important aspects of the case that reasonably should have been addressed. Most notably, Applicant borrowed more than \$100,000 in personal loans from a friend between 2002 and 2007, and cannot explain how he expended these proceeds or why he needed to borrow such a large amount.

CASENO: 07-08291.a1

DATE: 08/26/2008

DATE: August 26, 2008

_____)
In Re:)
)

-----) ISCR Case No. 07-08291
)
)
Applicant for Security Clearance)
_____)

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 December 19, 2007, DOHA issued a statement of reasons 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 April 22, 2008, after the hearing, Administrative Judge Noreen A. Lynch 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 raises the following issues on appeal: whether the Judge’s decision is arbitrary and capricious because she failed to adequately address certain disqualifying evidence; whether the Judge applied Guideline F Mitigating Conditions in a piecemeal fashion that was unsupported by the record evidence; and whether the Judge’s whole-person analysis is unsustainable because it is unsupported by the record evidence. Finding error, we reverse the Judge’s favorable security clearance decision.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following relevant factual findings: Applicant married for the second time in 2000. Applicant and his wife have two children. Applicant’s wife quit her job during her first pregnancy. The first child was born in 2002. Applicant has experienced financial difficulties due to loss of her income and to medical expenses. Applicant was unemployed for a period of time in 2003. At that time, he unsuccessfully attempted to start his own consulting business.

Additionally, Applicant's wife experienced a very difficult second pregnancy and was on bed rest for six months prior to the child's birth in 2004. After the birth, his wife was not able to return to work due to health problems of the child. In 2005, Applicant and his wife sold their house and bought a larger one, refinancing it at a mortgage rate of 8.5%. Applicant expected to refinance the house again at a lower interest rate in two years, but was unable to do so because he was unemployed from January 2007 until March 2007.

The SOR alleged delinquent debts in the amount of \$14,000. Applicant also owes approximately \$99,000 to a friend and is not making payments on that debt. However, the friend told Applicant that he needn't make any payments until his financial situation improved.

At the time of the hearing, Applicant's wife was learning a new skill. She was expected to graduate in June 2008 and go back to work. Applicant had finally been able to refinance his home at the reduced rate of 5.12% for three years. With the income from his wife's expected job and increased disposable income from reduced mortgage payments, Applicant has created a plan to pay off his debts promptly, although it will take over 15 years to pay off the personal loan.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not challenged the above facts. However, she contends that the Judge failed to adequately address certain disqualifying evidence. The Board will address that contention below.

Whether the Record Supports the Judge's Ultimate Conclusions

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 of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the 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 and ¶ E3.1.33.3. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel points out the Judge properly applied Disqualifying Conditions (DC) ¶¶ E2.19(a) and (c) to Applicant's \$14,000 in delinquent debt and his inability to satisfy that debt.¹ However, Department Counsel contends that the Judge's decision is arbitrary and capricious because she failed to adequately address certain disqualifying evidence—*i.e.*, the personal loan in the approximate amount of \$99,000. The Judge mentioned the debt (Decision at 4 and 7), but failed to address its significance. Department Counsel contends that the personal loan also raises DC ¶ E2.19(e).² Department Counsel's contention has merit.

While there is a rebuttable presumption that a Judge has considered all the record evidence, a Judge's failure to discuss or even mention a significant aspect of a case that reasonably could be expected to be taken into account in a decision raises a serious question as to whether the Judge forgot that aspect, ignored it, failed to take it into account, failed to appreciate its significance, or engaged in arbitrary or capricious analysis. *See, e.g.*, ISCR Case No. 02-00318 at 7-8 (App. Bd. Feb. 25, 2004). In this case, the personal loan is important because of its size and nature and the fact that as of the time of the hearing in April 2008, Applicant had been unable to make payments on it since November 2007 and would not be able to make payments until his wife graduated from her training and obtained a job as Applicant expected later in 2008. However, the debt is more significant because Applicant cannot identify what he did with the proceeds of the loan. The money was borrowed over time—between 2002 and 2007, and Applicant can only attribute its use to “financial bleeding.” Transcript at 159. There is no record evidence that it has been used to satisfy the delinquencies in the SOR. This calls into question Applicant's ability to live within his means, satisfy debts, and meet financial obligations. Directive ¶ E18 (Financial Considerations Concern).

Department Counsel also argues that the Judge applied Mitigating Conditions (MC) in a piecemeal fashion that was unsupported by the record evidence. In her decision, the Judge applied

¹ Directive ¶ E2.19(a): “inability or unwillingness to satisfy debts;” and ¶ 19(c): “a history of not meeting financial obligations[.]”

²Directive ¶ E2.19(e): “ consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis[.]”

Mitigating Conditions (MC) 20(a),³ 20(b),⁴ 20(c),⁵ and 20(d)⁶ at least in part and therefore found in Applicant's favor as to all the SOR allegations. In applying MC 20(a), the Judge stated that Applicant's financial problems arose in 2002 due his wife's pregnancy and unemployment and his son's medical bills, and she concluded that "the circumstances that occurred do not raise concerns about his current reliability, trustworthiness, or good judgment." Decision at 7. The record does not support the Judge's application of MC 20(a). While Applicant testified about his financial difficulties in 2002, he did not demonstrate that the delinquencies in the SOR were from that period. Three of the delinquencies arose from his purchase of a larger home in 2005, which Applicant now says was not a wise choice. Transcript at 87. (Those three are SOR ¶ 1(b), an equity line of credit; ¶1(e), the primary mortgage; and ¶ 1(f), tree work on the new property.) Applicant had already experienced the loss of his wife's income and the birth of his young sons by 2005. Applicant's child support arrearage for his son from his prior marriage began to accrue when Applicant was unemployed from January until March 2007, but continued until the son graduated from high school three months later. Moreover, the personal loan accrued in increments from 2002 until 2007, and Applicant's inability to account for his use of the proceeds of the loan casts doubt on his "current reliability, trustworthiness, and good judgment."

Application of MC 20(b) requires both that the financial difficulties occurred due to circumstances beyond the individual's control and that the individual acted responsibly under the circumstances. Here again, the Judge relied on circumstances beyond Applicant's control--such as his periods of unemployment, the failure of his consulting business, his children's medical expenses, his wife's unemployment, etc. As discussed above, Applicant did not demonstrate that his current financial problems are directly connected to two brief periods of unemployment and the other circumstances listed above. Furthermore, the periods of unemployment Applicant experienced are not different from what an average person might expect to encounter during the course of a lifetime, and there is no evidence that the medical expenses accounted for a major portion of his financial difficulties. *See, e.g.*, ISCR Case No. 06-23362 at 4 (App. Bd. Apr. 4, 2008). Since the difficulties appear to be more closely connected to his purchase of a larger home in 2005 under terms he could not afford, it does not appear that Applicant acted responsibly in the aftermath of the loss of his wife's income, medical expenses, etc.

³Directive ¶ E2.20(a): "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

⁴Directive ¶ E2.20(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[.]"

⁵Directive ¶ E2.20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

⁶Directive ¶ E2.20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

The Judge discussed mitigation under MC ¶¶ 20(c) and 20(d) together, concluding that Applicant's financial difficulties are now under control and that he has made a good-faith effort to repay his delinquencies. Decision at 7. The record evidence does not support the Judge's conclusions. The only two delinquencies that had been paid at the time of the hearing were the child support arrearage and the primary mortgage. The child support arrearage was paid by a partial withholding of Applicant's income tax refund, and the mortgage delinquency was folded into his mortgage when it was refinanced. Applicant was still delinquent on the equity line of credit, was making only minimal payments (\$50 to \$100 instead of \$375 per month) toward the tree service debt, and was not making any payments on a state tax debt, the balance on a computer, or the large personal loan. The record does not support a conclusion that Applicant's debts are under control or that he has made a good-faith effort to pay them off. The Judge apparently gave considerable weight to Applicant's plan for paying off his debts after his wife has finished training and gets a new job. The Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. *See, e.g.*, ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999).

Finally, Department Counsel argues that the Judge's whole-person analysis is unsustainable because it is unsupported by the totality of the record evidence. Department Counsel's argument has merit. In her whole-person analysis, the Judge focused on positive aspects of Applicant's life history—the fact that he served in the United States Air Force with a security clearance, developed a career in a technical field, is praised for his work and integrity, cared for his son after he and his first wife separated, and spent large sums in a legal battle for custody of his son. Decision at 8. She also relied on the factors which she considered to be beyond Applicant's control—his second wife's difficult pregnancies and unemployment, the medical problems of his youngest son, the poor economy, his unemployment, and his problems with refinancing his house. *Id.* Finally, the Judge noted Applicant's increased income and his plan to pay off his debts with increased family income when his wife returns to work. *Id.*

However, the Judge's whole-person analysis fails to consider important aspects of the case that reasonably should have been addressed. Most notably, Applicant borrowed more than \$100,000 in personal loans from a friend between 2002 and 2007, and cannot explain how he expended these proceeds or why he needed to borrow such a large amount. Transcript at 159-161. As explained above, the Judge merely notes that Applicant used the money for "various things." Decision at 4. She found Applicant not to be delinquent on repayment because the friend did not expect further repayment until Applicant's wife returns to work. *Id.* at 7. The Judge never addressed clearly significant issues such as the large outstanding amount of the debt (over \$99,000), why it was incurred, or Applicant's inability to explain how he expended the proceeds. The Judge also failed to analyze other conduct of serious security significance. For example, Applicant still is not paying other debts in a timely manner. One debt involving support payments that was repaid was satisfied not by voluntary payment, but by involuntary collection through the IRS. Transcript at 141-142; Applicant Exhibit A. Applicant was able to satisfy past due amounts on his basic mortgage loan only after he recently negotiated a lower interest rate, but the Judge did not discuss the obvious issue of Applicant's lack of self-control and good judgment in buying a larger home and incurring significantly more debt in 2005 after he had already incurred considerable debts during the years

immediately preceding this purchase. A reasonable whole-person analysis would have considered these aspects of the case and other conduct of security significance along with the positive evidence noted by the Judge. The Judge did not reasonably analyze this negative conduct against the whole-person factors in Directive ¶ E2.2(a), and her whole person analysis is not sustainable.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

CONCURRING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I agree with my colleagues' analysis of this case. In my opinion the most significant factor is the private loan which Applicant received from his friend. I note record evidence that Applicant received this money incrementally over a five year period and that the total amount of the loans exceeded \$100,000, though Applicant was not certain as to the exact amount. "Q: So . . . it was about \$100,000? A: No. I would have to say it was probably a little more than that because there was a stretch that after he had loaned me like the first \$5,000 or \$10,000, I was making consistent payments . . . It's probably been a little more than \$100,000." Transcript at 161. I also note Applicant's apparent inability to state what he did with the money. "It was used over the years. I know back in August—I'm trying to remember how much he [loaned] me back in August . . . It's been here and there. It's been so many, I don't remember every little thing. It's—it's been consumed." Transcript at 159. Furthermore, there is scant record evidence about the person who loaned Applicant the money, except that he is a friend, former co-worker, and a millionaire. Transcript at 155-156. I have considered these matters in light of the record and have taken particular note of the fact that Applicant's has suspended his repayment efforts on this loan. *See* Decision at 4. I conclude that Applicant has failed to demonstrate (1) that the facts underlying these loans do not impugn his judgment; (2) that he has acted responsibly in regard to them; or (3) that he is resolving the loans or engaging in a good-faith effort to repay. Viewed in light of the entire record, I concur that Applicant has failed to meet his burden of persuasion under the *Egan* standard.

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