

KEYWORD: Guideline F

DIGEST: Applicant's relatively brief periods of unemployment during which she received compensation are not adequate to apply the first prong of Mitigating Condition 20 (b). Nor is there a basis to apply the second prong. Similarly the record does not support application of mitigating Condition 20(c) and 20 (d). The Judge's whole person analysis relies on her erroneous application of the mitigating conditions and is thus also error. Favorable decision reversed.

CASENO: 07-09304.a1

DATE: 10/06/2008

DATE: October 6, 2008

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In Re:)	
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-----)	ISCR Case No. 07-09304
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Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 6, 2008, 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 19, 2008, after the hearing, Administrative Judge Shari Dam 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 issues on appeal: whether the Judge’s application of Guideline F Mitigating Conditions (MC) 20(b), 20(c), and 20(d) is erroneous because it is unsupported by the record evidence; and whether the Judge’s whole-person analysis is contrary to and unsupported by the record evidence.

Whether the Record Supports the Judge’s Factual Findings

A. Facts:

The Judge made the following relevant factual findings: Applicant is married, but currently separated. She has a child from a former relationship and a child from her marriage. From 1996 until 2002, Applicant was an airport screener for a security company. Since that time, Applicant has worked for other security firms; and since August 2004, she has worked for a federal contractor as a security officer. Applicant was unemployed for three to four months in 2002 and 1½ months in 2003. In 2007, Applicant was out of work for six weeks after her child was born. During those periods, Applicant received unemployment compensation of about \$200 every two weeks.

In 2001, Applicant received seven credit cards, which she used for holiday presents and some expenses. At first, Applicant was able to manage the credit card bills. However, her unemployment and a significantly lower salary at her next job caused financial difficulties. Applicant admitted that from 2003 to 2006 she lived beyond her means. She tried to obtain a loan to pay off her debts, but was unable to do so because her credit rating was poor.

Applicant responded to DOHA’s interrogatories regarding 26 debts in October 2007, stating that she could not afford to pay them at that time, but would try to resolve them soon. On February 29, 2008, Applicant contacted a credit-counseling firm for assistance in paying off her debts, and she made an initial down payment for their services on March 12, 2008. The firm set up a payment plan to resolve 17 of Applicant’s debts. The monthly payment was set at \$539. At the time of the hearing, five debts had been removed from Applicant’s credit report after she disputed them, and seven others remained unresolved. Counting her salary and child support, Applicant claimed sufficient income to cover her living expenses with \$725 remaining, thereby giving her the ability to make the \$539 monthly payment. However, as of the date of the hearing, Applicant admitted that she had not made any payments on any of her debts or on the debt reduction plan for the past six months. She promised to try to pay off her debts in the future.

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.

To the extent that the Judge's factual findings are relevant to the assigned error, they will be discussed 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 contends that the Judge’s application of Guideline F Mitigating Conditions (MC) 20(b),¹ 20(c),² and 20(d)³ is unsupported by the record evidence. Department Counsel’s contention has merit.

The Judge found “partial application” of MC 20(b) in Applicant’s case. Decision at 6. The Judge cited Applicant’s periods of unemployment and underemployment. As Department Counsel points out, Applicant’s periods of unemployment were brief—three to four months in 2002 and 1½ months in 2003, as well as six weeks of unpaid maternity leave in 2007; and Applicant received unemployment compensation during those periods. To the extent that Applicant has experienced financial difficulties beyond her control, Applicant has not shown a direct connection between her employment history and her present financial situation. The Board has held that such a connection, or nexus, must be established in order for the first portion of MC 20(b) to be applicable. *See, e.g.*, ISCR Case No. 06-23362 at 4 (App. Bd. Apr. 4, 2008). Moreover, the second prong of MC 20(b) requires that an applicant act responsibly under the circumstances. While Applicant testified that she worked for a reduced salary from 2002 until 2004, she stated that she lived beyond her means between 2003 and 2006 and did not reduce her expenses to account for her reduced salary. Transcript at 68-70. Applicant also testified that she had made no payments on her debts for “probably longer” than six months prior to the hearing. Transcript at 89. She had resources to do so at that time. Decision at 6. Therefore, the record does not support the application of MC20(b) in Applicant’s case.

The Judge also found that Applicant’s actions with regard to her debts were “sufficient to trigger partial application” of MC 20(c) and MC 20(d). Decision at 6. The actions the Judge cited were Applicant’s hiring of a debt-consolidation firm; her calls to some of her creditors, which resulted in the deletion of either five or six debts from her credit reports (Decision at 3 and 6); and her submission of a budget which indicated that she had a sufficient surplus left every month after payment of her living expenses, with which she was able to pay the amount set by the debt-consolidation firm. *Id.* at 3.

Department Counsel argues that the Judge erred in even partial application of MC 20(c) and MC 20(d), because there is little or no indication that Applicant’s situation is yet being resolved or is under control or that Applicant has yet initiated a good-faith effort to repay her creditors or otherwise resolve her debt. At the time of the hearing, Applicant did not clearly understand what the financial firm she had hired would do, and she did not know which of her debts would be

¹MC 20(b) is found at Directive ¶ 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[.]”

²MC 20(c) is found at Directive ¶ 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[.]”

³MC 20(d) is found at Directive ¶ E2.20(d): “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

included in the firm's repayment plan. Transcript at 82-90. At the time of the hearing, Applicant had made no payments on her debts. *Id.* at 85-89. In the absence of payments under the plan, it cannot be said that there are "clear indications that the problem is being resolved or is under control," as required for application of MC 20(c). *See, e.g.*, ISCR Case No. 01-21386 at 3 (App. Bd. Jun. 11, 2003). Furthermore, Applicant indicated that she had made no payments on any of her debts in six months or longer, even though the budget she submitted indicated that she had more left every month in discretionary income than the \$539 she would eventually need for the firm's repayment plan. Decision at 3. In the absence of a meaningful track record of repayments, it cannot reasonably be suggested here that Applicant has initiated a good-faith effort to repay her creditors or otherwise resolve her debts, as is required for application of MC 20(d). *See, e.g.*, ISCR Case No. 01-21386 at 3 (App. Bd. Jun. 11, 2003). Moreover, promises of future repayment are not a substitute for a history of payment. *See, e.g.*, ISCR Case No. 02-31872 at 4 (App. Bd. May 24, 2005). Thus, the record does not support the application of MC 20(c) and MC 20(d).

Department Counsel also argues that the Judge's whole-person analysis is contrary to and unsupported by the record evidence. Department Counsel's argument has merit. The Judge's whole-person analysis relied in large part on the MCs she applied. While noting that Applicant had made no payments under the repayment plan, the Judge concluded that the debts covered by the plan had been resolved. Decision at 7. As discussed above, it cannot be said that debts are being resolved in such a situation when an applicant has not yet begun making payments, especially when she had resources to do so. *See, e.g.*, ISCR Case No. 01-21386 at 3 (Jun. 11, 2003). The Judge then indicated that in spite of Applicant's lack of payments under the repayment plan, she based her analysis on a favorable credibility determination. Decision at 7. While deference is to be given to a Judge's credibility determination, such a determination is not immune from review, and it cannot take the place of substantive evidence. *See, e.g.*, ISCR Case No. 04-00789 at 6 (App. Bd. Jun. 28, 2006). The totality of evidence in this case does not reasonably support the Judge's whole-person analysis.

Order

The Judge's decision granting Applicant a security clearance 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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board