

KEYWORD: Guideline f

DIGEST: There is record evidence which identifies with sufficient specificity for a reasonable applicant to respond. The timing of Applicant's actions is relevant to the application of mitigating condition 20 (d). Favorable decision remanded.

CASENO: 08-06058.a1

DATE: 09/21/2009

DATE: September 21, 2009

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In Re:)	
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-----)	ISCR Case No. 08-06058
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 5, 2008, DOHA issued a statement of reasons (SOR) 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 May 29, 2009, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her analysis of the evidence produced in reference to two of the allegations and whether the Judge’s application of the Guideline F mitigating conditions is erroneous. Finding error, we remand the case to the Administrative Judge for further proceedings consistent with this decision.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Administrative Judge made the following pertinent findings of fact:

Applicant is a 52 year old employee of a contractor. Applicant graduated from high school and attended a technical school. He worked a second full-time job from 2000 until 2004, when his employer laid him off and his income decreased from \$108,000 a year to approximately \$60,000 a year. He has not worked a second job since 2004, but he is now seeking part-time employment.

Applicant married in 1989. He and his wife separated in 2001. For several years after his separation, Applicant continued to pay the car insurance and car payment on his wife’s car. He stopped making these payments in 2004. He has a 25 year-old son, who lives independently and has chronic illness. He regularly provides his son with money to pay for medicine.

For several years prior to his father’s death in 1994, Applicant regularly traveled about 150 miles away to help care for his father. He helped his father pay for medications and helped other family members with expenses. He used his credit cards to pay for these expenses. By 1998, his debt overwhelmed him. He enrolled in a credit management program. From 1998 through 2005, he paid the program approximately \$550 a month. Through this program, he resolved many of his outstanding debts.

In 2003, the Internal Revenue Service (IRS) filed a tax lien against him personally. The IRS collected the moneys due through garnishment on his wages. From May 2003 until approximately November 2004, Applicant paid the IRS \$1,166 twice a month for a total payment of more than \$44,000.

The SOR lists numerous debts, which are listed at least once on each credit report and sometimes more than once because the debt is under other creditors’ names. The Judge said that after reviewing the credit reports and the SOR, she compiled a list of the total debts owed, excluding

any duplicate entries. The Judge found that Applicant has one undisputed unpaid debt of \$4,810 and five other disputed debts cumulatively worth about \$9,000.

In 2004, after he lost his second job, Applicant fell behind on his rent and other expenses because of the IRS garnishment. At this time, he paid his wife's car payment and insurance as well as his own. His former landlord obtained a judgment for unpaid rent in 2005 and he has not paid this debt. He contacted the creditor sometime ago, but has not resolved the debt because the creditor demanded full payment and refused to accept a monthly payment. Two debts listed in the SOR ¶¶ 1.c and 1.i are unknown to Applicant as he does not recognize the listed creditors. Applicant's credible denial of knowledge of these two debts is sufficient to refute the allegations of delinquent debts. The pertinent credit report did not have sufficient information for Applicant to locate the account. Appellant denied owing a debt to the cable company listed in SOR allegation 1.n. In the past, he received cable service from another cable company and two satellite companies. Although he acknowledged at the hearing that he returned a cable box for his girlfriend who had service with this cable company, he strongly denies any service in his name. Subsequent to the hearing, he filed an identity theft claim on this debt. Applicant credibly denied owing the unpaid cell phone listed in allegation 1.j. He has had a cell phone with three other cell phone companies, but not this company. Several years ago, he asked this creditor to provide him with evidence that he owed them money. At that point, the creditor sent him a bill. Applicant currently earns \$5,915 in gross income each month and \$4,214 a month in net income. His monthly expenses total approximately \$4,000 and include rent, utilities, a car payment, gasoline, credit cards, food, and a time share. He uses his remaining income to help his son with medicine and occasionally other family members.

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 Department Counsel's brief challenges the Judge's findings of fact, such challenges will be included in the discussion below.¹

¹Department Counsel's brief contains the following language "With the exception of the specific factual findings challenged on appeal, the Government adopts the Administrative Judge's findings of fact for the purposes of this appeal and, in further support of its appeal arguments specifically relies on the following evidence[.]" The brief does not clearly delineate those instances where it is relying on a finding of fact made by the Judge and those instances where it is relying on portions of the record that were not the source of a specific finding of fact on the part of the Judge. Also, when challenging the Judge's findings of fact, the brief is reasonably specific in one instance, but vague in another.

Whether the Record Supports the Judge's Ultimate Conclusions

The Judge reached the following conclusions:

(1) The government failed to establish a *prima facie* case as to the debts identified in SOR allegations 1.c and 1.i because it has not provided evidence which identifies the creditor for these debts.

(2) Concerning the debt identified in SOR allegation 1.j, without evidence that Applicant signed a contract to retain the services of the company in question, the mere mailing of a bill is not enough to show a contractual obligation which would give rise to the debt as a bill can be created simply and easily. SOR allegation 1.j is found in favor of Applicant.

(3) Regarding mitigation, Adjudicative Guideline 20 (b),² applies since Applicant's initial financial problems arose when his father became ill and he accumulated numerous credit card debts associated with his father's care. Applicant also separated from his wife. As part of an informal separation agreement he continued to make her car payment and paid for her car insurance until he lost his second job.

(4) Adjudicative Guideline 20 (d)³ applies as Applicant has resolved many of the delinquent debts listed in the SOR, either by payment or settlement. Although an outstanding judgment is not paid, Applicant attempted to pay the debt through monthly payments, but the creditor refused. He did not ignore the debt. His finances are sound and he acts responsibly in regard to his finances.

The Board has previously noted in response to prior briefs with similar language that we have no authority to make *de novo* findings of fact. A party relying on a portion of the record assists themselves and the Board by indicating whether the portion relied upon is the basis of a finding of fact made by the Judge, or is a portion of the record not addressed by the Judge's findings. Similarly, a party challenging the Judge's findings assists themselves and the Board by stating with some precision which of the Judge's findings are being challenged. Further clarification (of such challenges) is obtained when the party states whether the Judge's finding of fact error is an error of commission (*e.g.*, a finding that the light was red when the record indicates that it was green; a finding that Applicant had two DWI convictions when the record indicates he had three) or an error of omission (a piece of record evidence important to the resolution of the case is not incorporated into a finding of fact or is otherwise not commented upon by the Judge). *See e.g.*, ISCR Case No. 03-1176 at 3 (App. Bd. Apr. 11, 2005); ISCR Case No. 03-15485 at fn. 1 (App. Bd. Jun. 2, 2005).

²[T]he 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 reasonably under the circumstances.

³[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

(5) Adjudicative Guideline 20 (e)⁴ has some applicability as Applicant disputed the debt listed in SOR allegation 1.e as he believes this debt has been paid through an earlier payment plan. The credit reporting agency has not responded to his notice of dispute nor resolved the conflict in information about this debt.

(6) Under the whole person concept, Applicant has taken affirmative action to pay or resolve most of the delinquent debts raising security concerns. Even though he has had financial problems, he has demonstrated a meaningful track record of debt repayment. For four years, he managed his expenses, including a substantial monthly payment to the IRS. While some debts remain unpaid, they are insufficient to raise security concerns, particularly since he has resolved the majority of his debts.

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 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 general standard 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). 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.

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 application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

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

⁴[T]he individual has a reasonable basis to dispute the legitimacy of he past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel asserts that the Judge's determination that the Government had not established a *prima facie* case as to allegations 1.c and 1.i was arbitrary and capricious because it was contrary to the record evidence and contrary to precedent established by the Board. Department Counsel notes that the Judge found that the debts alleged at these two SOR paragraphs remained unproven because "they were unknown to Applicant as he does not recognize the listed debts." Department Counsel alleges that the Judge's requirement that the Government provide greater detail than was set forth on its credit reports improperly increased the Government's burden of proof regarding the two debts. In the case of the two debts, neither the Judge nor the parties at the hearing seemed to know who the creditors were. However, there is evidence in the record which identifies both creditors with sufficient specificity that a reasonable applicant ought to be able to respond to the allegation of delinquent indebtedness (*See* Credit Report dated August 12, 2008 in Government Exhibit two with page numbers "25 of 29" and "26 of 29" at the tops of the pages and page numbers 142 and 143 at the bottom of the pages). It is of course, well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under E3.1.14 for pertinent allegations. *See, e.g.*, ISCR Case No. 03-20327 at 3 (App Bd. Oct. 26, 2006). In fact, the credit reports were detailed enough to establish the government's case regarding the two allegations.

Department Counsel asserts that the Judge committed error by applying Adjudicative Guideline 20 (d) in mitigation and by stating that "Applicant had resolved many of the delinquent debts listed in the SOR, either by payment or settlement." Specifically, Department Counsel alleges that the Judge erroneously applied the mitigating condition with regard to debts alleged at SOR allegations 1.a, 1.b, 1.c, 1.f, 1.g, 1.i and 1.n. Evaluation of this claim of error is hampered somewhat by the fact that, when discussing the applicability of this mitigating condition, the Judge specifically mentioned only the debts at 1.a and 1.b. After a review of the record the Board concludes that, although the evidence regarding Applicant's diligence in dealing with the debt is mixed, the Judge's application of the mitigating condition to the debt alleged at 1.a was not error. However, the Judge's analysis of the IRS garnishment of Applicant's wages in allegation 1.b is not sustainable. The Judge gives Applicant credit under the mitigating condition for initiation of payment of a debt. On its face, satisfaction of a debt through the involuntary establishment of a creditor's garnishment is not the same as, or similar to, a good-faith initiation of repayment by the debtor. Regarding debts 1.c and 1.i, since the Judge based her analysis on a finding that the Government had not initially established its case with regard to these debts, a further analysis under Adjudicative Guideline 20 (d) would not follow logically. However, on remand, given the Board's preceding ruling on these two allegations, analysis under the mitigating condition may well be necessary.

Also, under Adjudicative Guideline 20 (d), Department Counsel complains that, regarding the debts covered in allegations 1.f, 1.g, and 1.n, the Judge erred in applying the mitigating condition because the debts were not addressed by Applicant until his security clearance processing had proceeded through its entire investigation and a due process hearing, and therefore could not constitute a "good faith effort to resolve debts." On this record, the timing of Applicant's attempts

to resolve these particular debts does not make the mitigating condition inapplicable as a matter of law. However, the timing of Applicant's actions impacts upon the degree to which the mitigating factor applies. Department Counsel's argument raises the issue of the Judge's failure to consider the fact that any efforts on the part of Applicant to resolve these debts came very late in the process. Under these circumstances, the failure of the Judge to analyze the timing of Applicant's actions when considering the mitigating factor was error.

Department Counsel contends that the Judge erroneously applied Adjudicative Guideline 20 (e) in mitigation. It should be mentioned at the outset that, despite the breadth of Department Counsel's argument, the Judge's decision appears to limit the application of this mitigating condition to a single debt (allegation 1.e). Regarding that debt, the Judge's analysis is problematic in that it states only vaguely that the mitigating condition has "some" applicability and it focuses on the reasonableness of Applicant's belief that the debt has been resolved while at the same time acknowledging that his belief may be erroneous. The mitigating condition also requires documented proof to substantiate the basis of the dispute or evidence of actions to resolve the issue, and the Judge's discussion of whether Applicant has satisfied these requirements is inadequate.

Department Counsel asserts that the Judge erred by applying Adjudicative Guideline 20 (b) to this case. Department Counsel states that the record evidence fails to establish a nexus between conditions beyond Applicant's control and the various, ongoing financial delinquencies alleged in the SOR, and contends that even if there is some connection, there is little evidence that Applicant acted reasonably under the circumstances. After a review of the record evidence, the Board concludes that the Judge's application of Adjudicative Guideline 20 (b) was not inappropriate as a matter of law. However, Department Counsel challenges the adequacy of the Judge's discussion of this mitigation issue in her decision. The record reveals that Applicant encountered serious financial difficulties during the period of his father's illness and death, but that over a period of years, much of that delinquent indebtedness was resolved. The record further indicates that a second round of financial difficulties followed the loss of a job in 2004. The Judge's discussion lacks sufficient detail in that she does not discuss individual debts and how the rise of those debts relate to either of the two distinct periods in Applicant's past where he lost control of his finances. The Judge also fails to explain the relevance of Applicant's voluntary entry into a separation agreement with his wife and the subsequent acceptance of her car payment and insurance obligations, given the fact that the mitigating condition covers circumstances largely beyond the debtor's control.

The Board remands the case to the Judge with instructions to re-open the record for the limited purpose of obtaining from Applicant an admission or denial regarding the two creditors referred to in SOR allegation 1.c and 1.i in light of the discussion above. Department Counsel shall be given an opportunity to respond. The Judge shall write a new decision in which she evaluates the additional information. The new decision shall not give Applicant credit under Adjudicative Guideline 20 (d) for the IRS garnishment nor for any debt which Applicant disputes, denies or otherwise has not paid. The new decision shall discuss the significance of the timing of each of Applicant's actions on his debts which were taken in the aftermath of the initiation of security clearance due process. The Judge's new decision shall include in any discussion of either Adjudicative Guideline 20 (b) or Adjudicative Guideline 20 (e) a complete discussion as to how each

prong of the Adjudicative Guideline applies for each debt under discussion in light of the Judge's own findings of fact and the record evidence. The Judge's new decision shall not contain a discussion of her appraisal of the Board's authority (*See* ISCR Case No. 07-15281 at fn. 5 (App. Bd. Jun. 16, 2009)).

Order

The Judge's favorable security clearance decision is REMANDED in accordance with the decision above.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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