

KEYWORD: Guideline F

DIGEST: As a threshold issue the Board must determine if the Judge's decision is sufficiently clear as to allow the parties and the Board to discern with confidence the Judge's findings and conclusions. Favorable decision remanded.

CASENO: 08-11940.a1

DATE: 04/02/2010

DATE: April 2, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11940
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Samuel Bluck, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 22, 2009, 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 December 15, 2009, after the hearing, Administrative Judge Richard A. Cefola granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge failed to consider the entire record evidence; whether the Judge’s application of the pertinent mitigating conditions was erroneous; and whether the Judge’s whole-person analysis was erroneous. Finding error, we remand.

As a threshold issue the Board must determine if the Judge’s decision is sufficiently clear as to allow the parties and the Board to discern with confidence the Judge’s findings and conclusions. *See, e.g.*, ISCR Case No. 08-05379 at 2-3 (App. Bd. Nov. 24, 2009) and ISCR Case No. 02-05665 at 4 (App. Bd. May 7, 2003). In the case before us the Judge’s decision does not meet that test. The Board has also held that the parties and the Board have a right to know what findings the Judge is making with respect to all the SOR allegations, not just some of them. *See e.g.*, ISCR Case No. 08-07803 at 2 (App. Bd. Sep. 21, 2009) and ISCR Case No. 03-22883 at 3 (App. Bd. Jan 19, 2006).

The SOR alleges that Applicant has four delinquent debts which taken together total over \$900,000 in value. In two separate paragraphs the Judge notes that two SOR allegations relate to a property, the property was foreclosed on, and Applicant owes nothing on these debts. The Judge’s decision does not inform the reader of when the debts were incurred, how much they were for, when the debtor became delinquent, what the debtor’s income was, if the debtor had intended to pay the debts and how he intended to do so, how much of the debts were paid before the foreclosure, how much of the debts were paid in the foreclosure proceedings, and other pertinent facts. Without delineating this type of information it is not reasonable to reach conclusions about Applicant’s judgment in a case that is about delinquent debts.

The Judge’s analysis is a little more revealing, although it largely relies on conclusory statements that Applicant’s difficulties arose from the collapse of the real estate market, his wife’s job loss, and the loss of a tenant. Here too, the reader would benefit from additional detail and explanation.

In light of the weaknesses described above, the Board is not in a position to review the alleged errors in the Judge’s decision.

Order

The Judge’s favorable security clearance decision is REMANDED for a new decision in accordance with the discussion above.

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

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

Dissenting Opinion of Administrative Judge James E. Moody

I respectfully disagree with my colleagues' resolution of this case. In my judgement, the record will not support a favorable decision.

My colleagues are correct that the Judge's findings of fact are rather minimal. In a nutshell, the Judge found that Applicant purchased two pieces of real property, financing the purchases with first and second mortgages on each. He found that Applicant no longer owed anything on these mortgages. He found that the real estate market entered a downturn and the properties went into foreclosure.

The Judge favorably applied two Mitigating Conditions (FCMC): 20(a)¹ and (b).² The Judge relied in large measure upon his view that Applicant no longer owed the debts alleged in the SOR and that the financial problems in this case were caused by circumstances outside Applicant's control. Department Counsel's argument that the record will not support these conclusions is persuasive to me.

Concerning 20(a), there is a paucity of record evidence to support the conclusion that Applicant no longer owed three of the four alleged debts and, therefore, that they are not recent. The corroborating evidence supplied by Applicant is speculative at best and is contradicted by the contents of a credit report dated one day prior to the hearing, an exhibit offered by Applicant himself. I do not believe that the evidence viewed as a whole supports a judgement that Applicant has demonstrated that he no longer owes the debts. Rather, the evidence most reasonably demonstrates that the debts are ongoing.

¹Directive ¶ 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 judgement[.]"

²Directive ¶ E2.20(b): "the conditions that resulted in the financial problems 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[.]"

The Judge also noted Applicant's testimony regarding the collapse of the real estate market and his wife's loss of employment, in support of the view that the circumstances of the debts were unusual. This was evidence which the Judge was required to consider. However, this reliance is vitiated by evidence that Applicant did not marry his wife until after the properties went into foreclosure, thereby undermining the effect her subsequent unemployment would have exerted upon his real estate difficulties.³ It is further vitiated by record evidence that Applicant entered into the purchase of two properties at 100% financing, the combined amounts of the adjustable rate mortgages exceeding \$1,000,000 and the annual payments for which were more than his annual salary. The amount of these combined debts would not have been significantly less even had the first property not been over-appraised, as Applicant contended.⁴ Under the circumstances, Applicant's purchase of these properties raises serious questions about his reliability and good judgement, questions which the Judge does not address in his decision. I do not believe that the totality of the record evidence supports a conclusion that Applicant has met his burden of persuasion under FCMC 20(a).

For similar reasons, I believe that the evidence will not support a favorable conclusion under FCMC 20(b). Applicant's problems may have been affected by a downturn in the market. However, the fact of entering into such transactions at all, given his income and the foreseeable eventuality that the interest owed on the mortgages would rise, given their adjustable nature, undermines a conclusion that the circumstances of the financial problems were largely beyond Applicant's control.

In my opinion, the record does not support the Judge's conclusion that Applicant has met his burden of persuasion as to mitigation, either under the mitigating conditions or the whole-person factors, in light of the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). I would reverse the decision.

Signed: James E. Moody

James E. Moody

³In Government Exhibit (GE) 1, Security Clearance Application, dated September 2, 2008, Applicant states that he is not married and had never been married. GE 2, Answers to Interrogatories, contains a summary of Applicant's personal interview. In this interview he described the circumstances of his foreclosures, principally that the monthly payments increased due to the adjustable rate nature of the loans. He stated in this interview that his fiancée was aware of his financial problems, demonstrating that he was not married at the time of the foreclosures. In this interview he did not attribute his financial problems to his fiancée's employment situation. To that extent, this interview is somewhat inconsistent with Applicant's presentation at the hearing. See Tr. at 51: "[W]e ran out of money and we couldn't pay any more and also my wife who is in the mortgage business lost her job as well . . ."

⁴AE A, Stipulation for Settlement, indicates that Applicant accepted \$30,000 in settlement of a lawsuit based upon fraudulent over-appraisal of one of the properties. See Department Counsel Brief at 7: "By purchasing these two properties, Applicant obligated himself to make annual mortgage payments of nearly \$118,000 (before any escalation), an amount substantially in excess of his gross annual salary . . ."

Administrative Judge
Member, Appeal Board