

KEYWORD: Guideline F

DIGEST: The record evidence does not support the Judge's conclusion that Applicant's decisions to move to lower paying jobs for family reasons were beyond his control. Favorable decision reversed.

CASENO: 09-08108.a1

DATE: 02/15/2011

DATE: February 15, 2011

In Re:)
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-----) ISCR Case No. 09-08108
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 12, 2010, 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 October 29, 2010 after the hearing, Administrative Judge Robert J. Tuidor 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: (a) whether the Judge erred in the application of Guideline F mitigating conditions; (b) whether the Judge’s whole-person analysis is unsustainable because it is unsupported by the totality of the record evidence. For the following reasons, the Board reverses the Judge’s favorable security clearance determination.

The Judge made the following pertinent findings of fact:

Applicant is 31 years old, has previously held a security clearance while in the military and as a civilian, and has never had a security violation. Applicant served in the Navy for ten years and was honorably discharged in 2006. Applicant married for the second time in 2002. He and his wife have five children. Applicant’s wife does not work outside the home and he is solely responsible for supporting her and the children. Applicant has settled, paid, or attempted to resolve in good faith the four debts alleged in the SOR. The first debt is a charged-off account for a \$12,000 line of credit loan. In July 2009, Applicant enrolled this debt with a debt consolidation firm and made monthly payments until April 2010. At that time he stopped making payments because he could no longer afford them, and he dis-enrolled from the consolidation program. He has sought alternative help and continues in his attempts to resolve the debt. The second debt is a \$16,000 past-due balance on a home mortgage loan. This account was satisfied following the proceeds netted in a foreclosure sale in March 2010. The third debt is a charged-off credit card account in the amount of \$4,711. This debt had also been enrolled with the debt consolidation firm and was settled and paid in December 2009. The fourth debt is the balance of \$5,222 owed on a vehicle repossession. Applicant negotiated a settlement through the debt consolidation firm and was making monthly payments through the creditor. The final payment was due in October 2010. Applicant attributes his financial problems to a job change that resulted in a substantial income reduction, a cross-country move, and the costs associated with maintaining two households following his cross-country move. After leaving the Navy, Applicant made approximately \$170,000 a year working for a subcontractor. He changed jobs to his current employer in February 2008 and his salary was reduced to about \$120,000 per year. This was later reduced to \$58,000 per year when he changed his working environment. In September 2008, he accepted a cross-country transfer. He was unable to sell his home after being transferred and was unable to afford maintaining homes in two locations. To address his indebtedness, Applicant enrolled in the consolidation program, borrowed against his 401K, refinanced his vehicle, worked overtime, and consulted a bankruptcy attorney. Applicant’s budget, although strained, reflects that he maintains a modest lifestyle and is able to keep his head above water. He has little discretionary income left over after paying his monthly expenses. Applicant is doing as well as can be expected and has addressed the majority of his debts. Applicant served with

distinction in the Navy and has engaged in above-average performance in his contribution to the defense industry.

The Judge reached the following conclusions:

Applicant's history of delinquent debt is established by his admissions and the evidence presented. He had four delinquent debts totaling \$37,933 that have been in varying states of delinquency for at least several years. The Government established disqualifying conditions under Guideline F. Applicant's conduct does not warrant full application of AG ¶ 20(a).¹ His financial problems are not isolated, and his debt is a continuing course of conduct. He receives partial credit because the debt occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability or good judgment. Under AG ¶ 20(b)² Applicant receives credit because his reduction in income and subsequent work-related move and costs associated with his move were largely beyond his control and he acted responsibly under the circumstances. Even though he did not have the funds for full repayment, he remained in contact with his creditors. AG ¶ 20(c)³ is not applicable because Applicant did not seek financial counseling. He has, however, produced evidence that reflects he is living within his means and is on the road to regaining financial solvency. There is sufficient information to establish full mitigation under AG ¶ 20(d).⁴ Applicant has paid, is paying, or attempting to resolve his debts. AG ¶ 20(e)⁵ is not applicable because Applicant does not dispute the validity of any of his debts. Although Applicant showed financial irresponsibility and lack of judgment for several years, the mitigating evidence under the whole-person concept is more substantial. Applicant's honorable military service, family involvement, and good employment record weighs in his favor. There is no evidence of any security violation. Although he is not debt-free, there is sufficient evidence that he is putting forth his best effort given the resources available to him. Applicant recognizes that his failure to regain financial responsibility can adversely affect his future employment. His monthly expenses are current. His company supports him. He has made mistakes but there is simply no reason not to trust him. He has established a meaningful track record of debt payments. He has mitigated the financial considerations security concerns.

¹ “[T]he 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 [.]”

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 responsibly under the circumstances [.]”

³ “[T]he 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[.]”

⁴ “[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

⁵ “[T]he individual has a reasonable basis to dispute the legitimacy of the 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[.]”

Department Counsel contends that the Judge erred in the application of Guideline F Mitigating Conditions ¶ 20(a), ¶ 20(b), and ¶ 20(c) because his factual findings and legal holdings are unsupported by the record evidence. These arguments have merit.

Regarding ¶ 20(a) and ¶ 20(b), Department Counsel asserts that the Judge wrongly deemed Applicant's voluntary decisions to change jobs (which led to income reductions) as being largely beyond his control, and misapplied Mitigating Condition 20(b) to the benefit of Applicant. Department Counsel maintains Applicant's decision to make career moves that would make it impossible to keep up with his financial obligations cast considerable doubt on his trustworthiness and good judgment, notwithstanding the fact that the decision was made to increase the time he could spend with his family. Department Counsel argues further that Applicant has not acted responsibly in dealing with his creditors since taking a pay cut and thus cannot claim the benefit of the second requirement enumerated in ¶ 20(b). These arguments have merit.

While his desires regarding improving his family life were laudable, the record does not indicate that Applicant's career and relocation decisions were involuntary. Thus, the Judge erred in concluding that Applicant's actions were beyond his control, and Applicant did not satisfy that particular criterion under ¶ 20(b). On the issue of whether Applicant acted reasonably under the circumstances, the Judge cites only the fact that Applicant kept in contact with his creditors when concluding that this second requirement of ¶ 20(b) was satisfied. This conclusion is not reasonably supported by the evidence and fails to take into account other evidence that runs contrary to the conclusion. As an initial matter, given the facts of this case, where Applicant has accumulated large amounts of outstanding delinquent debt over a significant period of time, maintaining contact with one's creditors, while it is a fact that is entitled to some weight in mitigation, is insufficient, standing alone, to satisfy the "acted responsibly under the circumstances" prong of ¶ 20(b). Department Counsel correctly points out that Applicant made the conscious decision to take a drastic reduction in income with the full knowledge that he would be unable to satisfy his debts. The record also indicates that Applicant abandoned his mortgage payments on a home when he changed locations in September 2008, resulting in the property going into foreclosure. A second mortgage on the property remains unsatisfied. Applicant was advised to stop paying his debts by the debt consolidation company, and there is no evidence that Applicant's use of the debt consolidation company resulted in any payments to his creditors. This record evidence cut strongly against the Judge's conclusion that Applicant has acted reasonably under the circumstances, or the Judge's conclusion that Applicant's handling of his finances does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment under ¶ 20(a). Additionally, the Judge provides no analysis regarding his conclusion under ¶ 20(a) that Applicant's financial troubles are unlikely to recur. There is no record evidence to support this conclusion. Indeed, the application of this prong of ¶ 20(a) would necessarily be limited, given the fact that Applicant's financial problems are ongoing.

Department Counsel asserts that the Judge erred by concluding that there is sufficient evidence to establish full mitigation under ¶ 20(d). Department Counsel states that the Judge's conclusion that Applicant is paying or attempting to resolve his debts is based on an erroneous factual finding. Regarding a \$5,222 debt resulting from an automobile repossession, the Judge

found that Applicant negotiated a settlement through his debt consolidation firm and was making monthly payments to the creditor through them with final payment falling due in October 2010. Department Counsel notes that at the hearing, Applicant testified that he stopped making payments to the debt consolidation firm at least two months prior to the hearing, the debt was outstanding and unresolved, and Applicant planned to include the debt in a future bankruptcy. A review of the record evidence reveals that Department Counsel's characterization of the record is accurate. Department Counsel argues additionally that the evidence does not establish that Applicant had instituted a good-faith effort to repay overdue creditors or otherwise resolve debts. Applicant has paid only one of the four debts listed in the SOR and he paid that debt only after he was sued. He walked away from a sizable mortgage obligation. Two other debts remain unpaid, there are no payments ongoing, and Applicant intends to include these debts in a bankruptcy action that has yet to be filed. In addition to the debts listed in the SOR, the evidence establishes that Applicant has an additional \$80,000 in outstanding debt, much of it delinquent, that he intends to resolve by filing bankruptcy. The Judge's application of the Guideline F mitigating factors in Applicant's favor is not reasonably supported by the record evidence.

Department Counsel also maintains that the Judge's analysis under the whole-person concept is erroneous. She notes that much of the evidence cited by the Judge in his whole-person analysis concerns his personal and professional character. A review of the record indicates that this is favorable evidence entitled to some weight. However, Department Counsel argues that the Judge's analysis failed to establish a sufficient nexus between Applicant's good character and the mitigation of the Government's concerns regarding his financial troubles. This argument is persuasive. The Judge cites such factors as Applicant's good military and civilian career record, Applicant never having had a security violation, and Applicant being a law-abiding citizen without linking these aspects of Applicant's life to an evaluation of whether he can successfully recover from a history of financial troubles. In his whole-person analysis, the Judge did note that he did not detect any recalcitrance or reluctance on Applicant's part to address his past debts and that Applicant views the process seriously and recognizes that a failure to regain financial health can adversely affect future employment. The cited evidence concerning Applicant's attitudes and desires regarding his finances cut in his favor, but they are not a substitute for a meaningful track record of addressing indebtedness. The Judge bases part of his whole-person analysis on his conclusion that Applicant has established a meaningful track record of debt repayment. This conclusion is not supported by the record evidence.

The Judge's whole-person analysis, and his conclusions in the case generally, are undercut by the fact that he failed to discuss significant evidence that has an important bearing on the case. In addition to the debts listed in the SOR, Applicant had other significant debts, including a vehicle payment, a second mortgage payment, and two credit cards, that totaled approximately \$78,700. The record evidence indicates that by the time the case went to hearing, Applicant had stopped making payments on these obligations, in part because he could not afford to make payments and in part because he anticipated declaring bankruptcy. Applicant indicated on the record his intention to declare bankruptcy, but at the time of the hearing he had not done so, in part because he had not paid the bankruptcy attorney's full \$1,800 fee, and had tendered to the attorney only \$300, a sum that he had to borrow from his mother. The Judge's decision does not mention this evidence.

None of the evidence cited in the preceding paragraph supports the Judge's conclusions that Applicant had a meaningful track record of debt payments, had demonstrated responsibility, rehabilitation, and mitigation, was living within his means, or was on the road to debt resolution. Rather, this additional evidence detracts from such conclusions. A Judge is not required to discuss each and every piece of record evidence in making a decision, but the Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). An analysis of Applicant's debts not listed in the SOR is important to the outcome in this case. It is appropriate for a Judge to consider conduct and matters not alleged in the SOR for a variety of purposes such as to evaluate a claim of extenuation, mitigation or changed circumstances, and when weighing the relevant and material information under the whole person concept. *See*, ISCR Case No. 02-23365 at 5 (App. Bd. Mar. 22, 2004); ISCR Case No. 05-05334 at 4 (App. Bd. Jan. 10, 2007).

The record as a whole does not support a conclusion that Applicant has met his burden of persuasion in light of the *Egan* standard. Therefore, the Judge's ultimate decision is not sustainable.

Order

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

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 disagree with my colleagues in their resolution of this case. The Judge found that (1) Applicant's financial problems are attributable to a job change, which entailed maintaining two households; (2) he has satisfied two of the SOR debts and is making payments on another; (3) he has enrolled with a debt consolidation firm, worked overtime, and consulted a bankruptcy attorney; (4) he is not behind on his current bills; and (5) he has held a security clearance for many years without incident or concern. I believe these findings support the Judge's favorable decision under a whole-person analysis. We need not agree with a Judge's decision in order to find it sustainable. *See, e.g.*, ISCR Case No. 08-08649 at 2 (App. Bd. May 28, 2010).

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