

KEYWORD: Guideline F

DIGEST: The Judge erroneously found that Applicant came back from Iraq with \$93,000 in savings. The Judge delivered lengthy unsolicited gratuitous remarks about extraneous matters at the hearing. Adverse decision remanded.

CASENO: 10-09067.a1

DATE: 11/18/2011

DATE: November 18, 2011

In Re:	)	
	)	
-----	)	ISCR Case No. 10-09607
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD REMAND DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 30, 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 August 31, 2011, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive §§ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge made an erroneous finding of fact when he found that Applicant, at the time he returned from a job overseas in 2006, had \$93,000 in savings, and Applicant spent the money during the next four years; (2) whether the Judge was biased; (3) Whether the Judge erroneously refused to accept documentary evidence of Applicant's attempts to obtain employment; (4) whether the Judge erroneously concluded that Applicant could have found a way to pay five of eight delinquent debts; and (5) whether the Judge failed to adequately consider the mitigating evidence in the case. For the following reasons, the Board remands the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 51 years old and is married to his second wife, from whom he is being divorced. Applicant has been unemployed since October 2006 when he returned from an overseas job, with the exception for part-time jobs. At the time of his return he had \$93,000 in savings. All of that money was spent during the past four years. Applicant also received \$4,000 from a lawsuit against his former overseas employer, and \$2,000 of that money is remaining. Applicant lives in a homeless shelter at present. He has sought employment in the past four years as a firefighter or fast-food restaurant manager, but none of his job searches have been successful. He received unemployment compensation for various periods between 2008 and October 2009.

Applicant owes eight delinquent debts totaling \$19,288. These debts consist of credit card debts, cell phone accounts, television service accounts, a storage facility debt and arrearages for child support to his first wife. The debts range in amount from \$95 to \$12,535 (the largest debt is the child support debt which Applicant states is now \$16,000). Five of the eight debts are for less than \$1,000. Applicant's savings account was emptied by 2008. He has not paid any of his debts since at least 2008, and they remain unresolved. Applicant's firefighter pension is garnished in the amount of \$148 monthly to pay his child support obligation. The pension remainder of \$100.67 is paid monthly to Applicant. Applicant had a state tax lien filed against him, which was released in 2004. As of the date of the hearing, Applicant had not filed his 2010 federal income tax return. Applicant stated he owes \$79. Applicant does not have any credit cards. Applicant has a reputation for being competent, honest, hardworking, and very responsible. He has extensive training in fire fighting and public safety. He worked for a city fire department from October 1998 to July 2005 when he went overseas to be a firefighter after taking early retirement from the city fire department. Applicant remarried in June 2009. He met his second wife during two trips to her native country while he was unemployed.

The Judge reached the following conclusions: Applicant has been unemployed since 2006. He sought employment since then, but also spent \$93,000 of his savings during the same time period without resolving his debts. Applicant spent money traveling overseas to get married and bring his new wife to the United States. Applicant now lives in a homeless shelter. He has not acted

responsibly under the circumstances by spending the \$93,000 while being unemployed. In the past five years, Applicant could have found a way to pay five of the eight delinquent debts because those debts are less than \$1,000 each. He has done nothing to resolve any of his debts. No mitigating conditions apply, although they have all been considered. There is no rehabilitation or behavioral changes shown. There is great likelihood of a continuation of Applicant's financial pattern of conduct. The potential for pressure, coercion, duress, or exploitation exists because of the three-year period in which Applicant has not paid his debts and the magnitude of the debts. Overall, the record evidence raises unmitigated questions or doubts as to Applicant's eligibility and suitability for a security clearance.

Applicant argues that the Judge made an erroneous finding of fact when he found that Applicant returned from overseas in 2006 with \$93,000 in savings, and that all of the money was spent during the succeeding four years. Applicant states that the finding is incorrect and that there is nothing in the record that supports it. Applicant's claim of error has merit.

There is nothing in the record evidence to support the Judge's finding that Applicant had accumulated \$93,000 at the time he returned to the United States. The record does establish that Applicant earned an income of \$93,000 during the year that he was overseas, but there is nothing in the record that supports the Judge's characterization of "savings" when referring to this money, or that he had his full year's salary available to him at job's end. Applicant points out that he incurred expenses during his year overseas, including providing support to his mother, the expenses associated with her death, including the cost of the funeral and his travel back to the United States, child support payments, and payments incurred on credit card debt acquired before he went overseas. The record evidence supports Applicant's claim that he incurred these expenses, and that he used income earned overseas to satisfy them. Although not part of the record, it can reasonably be inferred that Applicant incurred ordinary living expenses while working overseas in addition to the expenses listed previously, and that a portion of his earnings necessarily went to satisfy those expenses. Then there is the issue of income tax liability, which Applicant presumably incurred. While the record is, unfortunately, silent as to how much money Applicant had accumulated upon his return to the United States, it can reasonably be inferred from the available evidence that the amount was significantly less than \$93,000.

The Board must now evaluate this error in the context of the record and the Judge's decision as a whole to determine whether or not the error significantly affected the outcome of the case. As noted in the preceding paragraph, this evaluation is hindered by the fact that the record is completely silent as to the amount of money Applicant accumulated upon his return from overseas. Nevertheless, a review of the Judge's analysis, indicates that he relied heavily on his finding that Applicant had "saved" the \$93,000 and spent it on items other than his outstanding indebtedness. The presumed \$93,000 amount and Applicant's use of it directly influenced the Judge's conclusion that no mitigating factors applied. The Judge's finding that Applicant spent \$93,000 was also central to his analysis under the whole-person concept. The Board cannot say with a reasonable degree of certainty, that had the Judge not relied heavily on this erroneous finding of fact, he would nevertheless have arrived at the same decision. *See* ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007). The Judge's error, therefore, was harmful.

Applicant asserts that the Judge exhibited bias against him. He points to lengthy passages in the transcript wherein he alleges the Judge gave unsolicited opinions and made inappropriate comments. Applicant notes that during the hearing, the Judge spoke of employment opportunities in certain states as opposed to other states, which had nothing to do with the purpose of the hearing. Applicant alleges that in the context of discussing how he could better his chances of getting gainful employment, the Judge made disparaging remarks about a government education program, and in so doing exhibited a political bias. Applicant asserts that the Judge told him, unsolicited, that he needed to find another career. Applicant asserts that the Judge's remarks were condescending toward him. The Judge made reference at one point to one of his own relatives. Applicant interprets those remarks as the Judge making disparaging inferences about his lengthy unemployment and his efforts to find work. In the context of this record, the Judge's lengthy, gratuitous, comments and advice directed at Applicant raise significant concerns.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar 28, 2008). The standard is not whether the appealing party personally believes that the Judge was biased, but whether the record of the proceeding contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness of the Judge. *See, e.g.*, ISCR Case No. 09-05554 at 2 (App. Bd. Mar. 14, 2011). Here, even viewing the Judge's remarks in the context of the entire hearing, the Board concludes that those remarks are injudicious enough that a disinterested person reasonably could question whether the Judge's evaluation of Applicant's case was being based on a fair and impartial consideration of the record evidence in light of the applicable law, or whether the Judge evaluated Applicant's case, in part, based on his personal opinion about extraneous matters, some of which have no bearing on Applicant's security eligibility.

Applicant has asserted that there are additional errors. Because of the Board's disposition of the first two appeal issues, it is unnecessary for the Board to address the remaining appeal issues.

### **Order**

Applicant has met his burden of demonstrating harmful error that warrants a remand. Pursuant to the Directive ¶ E3.1.33.2, the Board remands the case for correction of identified error. Because of the second identified error, no useful purpose would be served by remanding the case to the same Judge. Accordingly, the Board remands the case with the recommendation that the case be assigned to another Judge for a new hearing and issuance of a new decision.

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. For reasons set forth below, I believe that the Judge's decision can be affirmed.

While I agree with the majority that the Judge erred in finding that Applicant had \$93,000 in savings at the end of an overseas job, I do not believe that this error materially affected the outcome of the case. The Judge made extensive findings, both about Applicant's delinquent debts and his years of frustration in seeking a job, and he noted that, at the close of the record, Applicant was living in a homeless shelter. The Judge found that Applicant had not acted responsibly, by using his available funds for overseas travel rather than for debt repayment and by using credit cards for ordinary expenses. He also found that Applicant did not have a reasonable plan for paying off his debts. These findings are supported by the weight of the record evidence, and they support the Judge's ultimate adverse holding. Therefore, even if the Judge had not made the error under consideration here, I am satisfied that he would have decided the case in the same way.

On the issue of bias, I agree with the majority that the Judge made statements that were ill-advised. These statements included recommendations for alternative careers better suited to a man of Applicant's age, as well as suggestions that Applicant relocate to parts of the U.S. enjoying stronger than average economic growth. The Judge also appeared to provide general lessons in living, as when he advised "You want to lead a decent American life and have something like maybe a new LLP Fiat 500 convertible instead of your 200,000-mile mini van or whatever it is, but psychologically, humans need to work and have an income." Tr. at 86. The Judge's extensive comments, which comprise several pages of transcript, were not germane to the issues before him and did nothing to advance the proper resolution of Applicant's case. However, as the majority states, a Judge is presumed to be unbiased and an applicant seeking to rebut that presumption has a heavy burden of persuasion. In this case, the Judge's comments came at the end of the hearing and did not impair Applicant's ability to present his evidence in mitigation and extenuation. Moreover, during the preparatory portions of the hearing, as well as during the taking of evidence, the Judge did or said nothing that would suggest a lack of impartiality. Viewed in that way, I believe that a reasonable person would interpret the challenged comments by the Judge as born not of malice but of sympathy for an Applicant mired in difficult circumstances. Although the Judge should not have made them, when considered in light of the record as a whole, the comments do not undermine a reasonable perception of fairness in the adjudication of Applicant's case. I do not believe that

Applicant has met his heavy burden of persuasion that the Judge was biased against him. After considering all of Applicant's arguments on appeal, I would affirm the Judge's decision.

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