

KEYWORD: Guideline F

DIGEST: Judge’s adverse conclusion based, in part, on statements that were not supported by the record. Judge went beyond the plain language of the Guidelines in analyzing Applicant’s response to his debts. Adverse decision remanded.

CASE NO: 11-09258.a1

DATE: 09/30/2013

DATE: September 30, 2013

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In Re:	)	
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	)	
Applicant for Security Clearance	)	

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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 1, 2013, DoD 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 decision on the written record. On July 30, 2013, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the decision to the Judge.

### **The Judge's Findings of Fact**

Applicant has worked for his current employer, a Defense contractor, since October 2010. He was unemployed from March 2009 until October 2010. He served on active duty with the U.S. military from 1982 to 1986, when he received an honorable discharge.

Applicant has two delinquent debts, one for a home equity loan in the amount of about \$60,000 and the other a mortgage which is past due in the amount of \$45,000. His problems resulted from his unemployment, when he exhausted his savings while looking for work. He sought a loan modification on his mortgage, but it was denied in 2010. In August 2011, he retained a law firm to assist in negotiating with his creditors. The last correspondence regarding his mortgage was dated January 2013. There is no record evidence showing any modification to Applicant's home equity loan. The last correspondence regarding the home equity loan was dated September 2012 and shows a new servicing creditor for the loan. In his response to the File of Relevant Material (FORM), Applicant stated that he had sufficient funds to qualify for a modified mortgage loan, although he did not corroborate this claim.

### **The Judge's Analysis**

The Judge concluded that Applicant's delinquent loans raised security concerns under Guideline F. In further concluding that Applicant had not mitigated these concerns, the Judge cited to evidence that the debts were recent and unresolved. He stated that there is no evidence that the law firm Applicant hired had produced favorable results concerning the mortgage. Additionally, there is no evidence of any action at all to resolve the home equity loan. This demonstrates a lack of responsible behavior. AG ¶20(b)<sup>1</sup> He stated that Applicant had not presented evidence of financial counseling. The Judge also concluded that there is no clear evidence that Applicant's financial problems are being resolved or are under control because both debts remain unpaid. There is no evidence that Applicant has made a good-faith effort to pay the remaining debts. AG ¶¶20(c)<sup>2</sup> and 20(d)<sup>3</sup> do not apply. In the whole-person analysis, the Judge stated that Applicant had not

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<sup>1</sup>“[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[.]”

<sup>2</sup>“[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[.]”

<sup>3</sup>“[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]”

demonstrated a track record of financial stability and that the record lacks evidence that Applicant has made an overall good-faith effort to resolve his debts.

## **Discussion**

Applicant asserts that he has acted responsibly and in good-faith throughout the period of his financial difficulties and that the home loan modification process is still ongoing and under control. He takes issue with the Judge's statement that there is no record evidence of action to resolve the home equity loan and that this demonstrates a lack of responsible behavior. Applicant also disagrees with the Judge's statement that, although he hired a law firm to negotiate a home mortgage modification, nothing resulted from that effort. Applicant states that this comment suggests that the loan modification process is complete, whereas the modification process is still ongoing. Applicant asserts that the Judge erred when he concluded that AG ¶¶20(a),<sup>4</sup> 20(c), and 20(d) do not apply and that 20(b) partially applies.

Applicant cites to his interview summary, included in Item 6, Response to Interrogatories, to the effect that the law firm was seeking to combine the home equity loan with the mortgage and modify them in one effort. This constitutes evidence that Applicant made efforts to resolve the home equity loan. Thus, the challenged statement by the Judge was erroneous as was his follow-on conclusion that Applicant's failure to address the home equity loan demonstrated a lack of responsible behavior, inasmuch as his conclusion about a lack of responsible behavior appears to be based specifically on the Judge's statement regarding inattentiveness to the home equity loan.

Applicant argues that the Judge erred when concluding that although he hired a law firm to negotiate a home mortgage modification, nothing resulted from that effort. Applicant is correct in stating that the Judge's language could reasonably be interpreted as a conclusion that efforts to negotiate a mortgage modification have terminated. There is no record evidence to support a finding that mortgage negotiation efforts have ceased, and, to the extent that the Judge so finds, his finding is in error. On appeal, Applicant has presented evidence not contained in the record consisting of letters from his mortgage lender concerning the proposed modification. These documents are evidence of ongoing modification efforts. We cannot consider new evidence on appeal. *See, e.g.*, ISCR Case No. 11-09742 at 2 (App. Bd. Jul, 8, 2013), nor can the Judge be charged with error based on documents that were never before him. However, there is record evidence indicating ongoing efforts at loan modification. Applicant's answer to the SOR (Item 4), Item 6, and Applicant's June 28, 2013 response to the Government's File of Relevant Material all reference ongoing efforts to obtain loan modification.

Applicant's disagreement with the Judge's statement that "nothing resulted from that effort" (referencing loan modification) raises another issue. The Judge is basing his conclusion that Applicant failed to demonstrate responsible behavior in part on his finding that loan modification

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<sup>4</sup>"[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[.]"

efforts did not produce results. AG ¶20(b) requires that an applicant act responsibly under the circumstances. It is silent as to results. To the extent that the Judge based his conclusion that Applicant failed to act responsibly on lack of results, the Judge erred, especially in light of evidence that Applicant took numerous steps in an attempt to address his indebtedness. Of course, the Judge was entitled to assess record evidence of Applicant's conduct to determine if it constituted acting responsibly for the purposes of AG ¶20(b). On this record, however, it was error for the Judge to go beyond the plain language of the Guidelines and rely on the results (or lack thereof) of Applicant's conduct.

In this case, the evidence establishes that Applicant paid on the mortgage and the home equity loan after losing his job and continued to pay until his savings were exhausted. He then attempted to work with the lender to obtain payment modifications on the loans. When he experienced difficulties in working with the lender, he hired an attorney to negotiate with the lender on his behalf. There is no evidence that Applicant or his attorney have abandoned the negotiation process. This is substantial evidence of responsible conduct.

On remand, the Judge should issue a new decision after correction of identified errors and should reevaluate the applicability of AG ¶20(b) and ¶20(d).

### **Order**

The Decision of the Judge is **REMANDED**.

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. The record contains various letters from the lender discussing options for Applicant in his efforts to obtain mortgage assistance. The last one, dated January 31, 2013, requests additional documentation from Applicant, but the record contains no evidence of a response. Applicant's reply to the FORM was dated June 28, 2013, almost five months later. This

reply restates information already contained in the file, but it does not provide any evidence as to efforts at debt resolution after January 2013 beyond an uncorroborated statement that Applicant is complying with his lawyer's strategy. The Judge's view that there is insufficient evidence of responsible action is consistent with the record that was before him. I would affirm.

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