

KEYWORD: Guideline F

DIGEST: The timing of debt resolution of a relevant factor in evaluating an applicant’s case for mitigation. The Judge failed to address Applicant’s history of financial problems. Favorable decision reversed.

CASE NO: 15-00208.a1

DATE: 10/20/2016

DATE: October 28, 2016

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 15-00208
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 27, 2015, 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 hearing. On July 21, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) 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

address important aspects of the case and whether the Judge's mitigation analysis was arbitrary, capricious, or contrary to law. Consistent with the following, we reserve.

Applicant is 52 years old and has worked for his current employer for about 21 years. He served in the National Guard for six years and has held a security clearance for about 30 years. His hospitalization on two occasions contributed to his financial difficulties. Having a mailing address in another state also exacerbates his ability to pay his debts in a timely fashion. He earns about \$90,000 annually¹ and is highly respected in the workplace.

The SOR alleged that Applicant had 11 delinquent debts totaling about \$15,000. The Judge found that two of the alleged debts were the same debt, that Applicant paid eight debts, and that he was making payments on settlement agreements for the remaining two debts. The Judge noted that each of the alleged debts either does not appear or does not appear as past due on Applicant's recent credit report. In his mitigation analysis, the Judge concluded that Applicant's past-due indebtedness could be attributed to his medical problems, and he has now addressed all of his past-due debts. The Judge also noted Applicant has received financial counseling.

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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). 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.

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 erroneous, we 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

¹ Transcript (Tr.) at 38.

of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

We find merit in Department Counsel's argument that the Judge failed to address Applicant's history of financial problems. At the hearing, Applicant testified that he had a car repossessed and a collection account in 1987; was cited for a passing a bad check in 1990; was arrested for six bad checks in 1994; had two other cars repossessed in the 1990s; had a garnishment for a student loan in 1998; was issued an SOR that alleged nine bad debts totaling about \$17,000 in 2003; testified at the earlier security clearance hearing that his financial problems would not happen again; and was granted a security clearance in the earlier proceeding.² None of those matters were alleged in the current SOR. While an Administrative Judge is not required to discuss each and every piece of record evidence in making a decision, he or she 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. 04-08560 at 4 (App. Bd. Oct. 10, 2006). In the case before us, the Judge erred by making no findings about Applicant's significant history of financial problems and by failing to address that history in his mitigation analysis.

We also note that Applicant testified that he (1) sometimes had lapses in judgment and had not been really dedicated to taking care of bills in a timely manner;³ (2) acknowledged "I have to be more responsible and dependable"⁴ and (3) indicated some of the alleged debts were for purchases of watches, a cruise trip, and televisions.⁵ Further, he reportedly stated in his 2012 background interview that he made poor financial decisions in the last several years and obtained accounts and lines of credit without concern for his ability to repay them.⁶ The Judge made no findings about such testimony and statements undercutting a determination that Applicant acted responsibly with regard to the alleged debts or reformed and rehabilitated himself following his first security clearance hearing.

Additionally, we find persuasive Department Counsel's argument that the Judge failed to address the significance of the timing of Applicant's resolution of the alleged debts. Timing of debt payments is relevant in evaluating an applicant's case for mitigation. *See, e.g.*, ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015). The Judge noted that Applicant began making payments to resolve one of the debts before the issuance of the SOR, but did not resolve the other debts until after the SOR's issuance. Based on the record evidence, Applicant's efforts to resolve the majority of the debts only after receipt of the SOR weakens his case in mitigation.⁷

We conclude that the Judge's decision failed to consider important aspects of the case and

² Tr. at 42-53 and 59-60.

³ Tr. at 26.

⁴ Tr. at 38.

⁵ Tr. at 45, 54, and 60-61.

⁶ Government Exhibit 3.

⁷ *See* Tr. 56-57 and 62-63.

runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board