

KEYWORD: Guideline F

DIGEST: Decisions of Administrative Judges are not held to a standard of perfection. The failure of a Judge to consider important aspects of the case is error. The Board does not conclude that Guideline F, mitigating condition 3 could not be applied as a matter of law. However, the Judge's application was too narrow. The Judge's analysis under mitigating condition is flawed. The Judge's analysis under mitigating condition was error. The errors are not harmless. Favorable decision remanded.

CASENO: 05-01920.a1

DATE: 03/01/2007

DATE: March 1, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 05-01920
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

Susan B. Martin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 2005 DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline F (Financial Considerations) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 8, 2006, after the hearing, Administrative Judge Christopher Graham 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 raised the following issues on appeal: whether the Administrative Judge discussed and considered important evidence in his decision and whether the Judge’s application of Financial Considerations Mitigating Conditions 3, 4, and 6 was unsupported by the record evidence and was arbitrary, capricious, and contrary to law. We remand the Administrative Judge’s decision to grant the clearance.

### **Whether the Record Supports the Judge’s Factual Findings**

#### **A. Facts**

The total amount of indebtedness admitted to by Applicant and alleged in the SOR is \$28,339.00. Applicant had no medical insurance for seven years, and this accounted for a large number of delinquent medical accounts. He was separated from his wife from January 2003 to October 2004. While separated, he had custody of his children but his wife paid no child support. He was unemployed for almost a year. Applicant found employment that provided medical benefits in August 2003. On September 14, 2005, Applicant began using the services of a financial consultant to assist him manage his finances, pay creditors, and to help him analyze his spending to make the best use of his income. The debt service agreement consolidated \$ 15, 239.00 of debts and arranged settlements totaling \$6,095.60 to be paid over 36 months. On November 30, 2005, the agreement was modified to include additional creditors. The additions increased the amount of debt enrolled in the debt service agreement to \$22,276.00. The financial consultant arranged settlements in the amount of \$8,910.40, for a savings to Applicant of \$13,365.60. Applicant has also submitted his monthly expenditures to his financial consultant for analysis. In 2005, Applicant had approximately \$9,789.00 in delinquent debt that was not included in the debt service agreement. Also in 2005, Applicant had paid 4 debts totaling \$281.00.

Applicant’s wife’s employer now pays for their medical insurance. Applicant was reimbursed \$1,300.00 for a stolen computer and he used these proceeds to pay debts. Applicant’s landlord reduced his rent by \$50.00 per month and Applicant applied the difference toward a furniture purchase. These factors have increased Applicant’s net income each month, money he will use to pay debts.

Applicant has 29 debts that have not been fully paid.

#### **B. Discussion**

The Appeal Board’s review of the Administrative Judge’s findings of fact is limited to determining if they are supported by substantial record evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo*

v. *Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Regarding the Administrative Judge's factual findings, Department Counsel on appeal does not assert that the Judge made erroneous factual findings. Department Counsel does, however, assert that there is record evidence comprising important aspects of the case that the Judge failed to mention or ignored in his decision. Specifically, Department Counsel asserts that it was error for the Judge not to mention or discuss the following: (a) the facts that Applicant had less than \$400.00 in the bank at the time of the hearing, lived "paycheck to paycheck," and had ongoing current debt obligations in addition to his sizable delinquent debt load; (b) a December 1, 2005 credit report indicating that Applicant still owed approximately \$22,000.00 in delinquent debt; and (c) the fact that Applicant has not actually made payments under his debt service agreement. Department Counsel's arguments have mixed merit.

The decisions of Administrative Judge's are not held to a standard of perfection, and there is no requirement that a Judge discuss each and every piece of evidence in the record before him. However, the failure of a Judge to consider important aspects of the case is error. With this concept in mind, the Board concludes that the Judge was not required to discuss the December 1, 2005 credit report and its contents. The Judge made findings that Applicant had a significant delinquent debt load of approximately the same magnitude and at approximately the same time as that described in the credit report. The contents of the credit report do not, therefore, significantly alter or supplement the Judge's findings. However, concerning Applicant's own description of his currently available financial resources, this was important evidence that the Judge should have enumerated and discussed. The facts that Applicant has only about \$400.00 in the bank, lives paycheck to paycheck, and has debt obligations in addition to his delinquent debt load are significant in that they tend to establish that Applicant has limited means with which to address his substantial financial delinquencies. This evidence must be evaluated in making the ultimate determination whether Applicant has eliminated the government's security concerns. It is additionally important for the Judge to discuss it in this case since the Judge gave considerable weight to the fact that Applicant had increased his net income each month through a one time insurance payoff of \$1,300.00 and a \$50.00 per month reduction in rent. Also, with regard to Applicant's debt service agreement, Department Counsel persuasively argues that it was error for the Judge not to mention the fact that, as of the close of the record, Applicant had yet to make any payments under the plan. This was a serious omission in that a reading of the Judge's decision as a whole reveals that the Judge's overall favorable security clearance decision was based in large part upon his finding that Applicant had entered into the debt repayment plan. The fact that the Applicant had not actually made any payments under the plan is critical to an overall evaluation of the significance of the plan in alleviating the government's concerns. Additionally, the Judge's failure to consider the fact that Applicant had no demonstrated track record of payment under the plan impacts his application of various Financial Considerations mitigating factors. This issue will be discussed in subsequent paragraphs.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

An Administrative 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 Appeal Board may reverse the Administrative 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge’s decision “that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . .” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42. We review matters of law *de novo*.

On appeal, Department Counsel asserts that the Administrative Judge’s application of Financial Considerations Mitigating Conditions 3, 4, and 6 in the “Conclusions” section of his decision was not supported by the record evidence and was arbitrary, capricious, and contrary to law. For the most part, Department Counsel’s arguments have merit.

After a review of the record evidence, the Board does not conclude that Financial Considerations Mitigating Condition 3<sup>1</sup> could not be applied to the case as a matter of law. There is considerable record evidence establishing that much of Applicant’s delinquent debt was acquired during periods of illness and financial hardship under circumstances where Applicant had little or no control over the situation. However, Department Counsel is correct in asserting that the Judge’s analysis under Mitigating Condition 3 was too narrow. In evaluating the applicability and force of this mitigating condition, the Judge must consider whether the Applicant dealt with his financial difficulties in a reasonable manner. ISCR Case No. 99-0012 at p. 4 (App. Bd. Dec. 1, 1999). The Judge’s decision does not address the manner in which Applicant has dealt with those debts that arose because of circumstances outside his control and whether or not Applicant’s actions were reasonable. Such omission was error.

The Administrative Judge’s application of Financial Considerations Mitigating Condition 4<sup>2</sup> is wholly dependent upon his analysis of Applicant’s debt reduction plan. On appeal, Department Counsel does not challenge the conclusion that Applicant is receiving counseling for his debt problems. Department Counsel points out, however, that to satisfy the mitigating condition, Applicant must satisfy the “second prong” of the Mitigating Condition and provide evidence of clear indications that the debt problems are being resolved or are under control. ISCR Case No. 01-03695 at 3 (App. Bd. Oct. 16, 2002). The Judge indicated that Applicant was working with his financial consultant and that his financial delinquencies were being reduced. While the record evidence establishes that the delinquencies were being reduced to the extent that the debt reduction service reached agreements with some of Applicant’s creditors to settle some debts for a reduced amount, there is no evidence of debt reduction under the plan as a result of payments made by Applicant. While Applicant’s activities under the plan arguably involve more than the mere “promise to pay” articulated by Department Counsel, Department Counsel persuasively argues that the Judge’s analysis is flawed because the Judge did not consider the extent of Applicant’s actual compliance, or even his ability to comply with the agreement. While the Board does not conclude that Mitigating Condition 4 is inapplicable to this case as a matter of law, the Judge must reevaluate its applicability

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<sup>1</sup>“The conditions that resulted in the behavior were largely beyond the person’s control (e.g., loss of employment or a death or divorce).”

<sup>2</sup>“The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.”

and force after taking into consideration the fact that Applicant has never made a payment under the plan and after considering evidence of Applicant's ability to reliably make payments on a long-term basis.

Department Counsel argues persuasively that the Administrative Judge's analysis of Financial Considerations Mitigating Condition 6<sup>3</sup> was error. As with his application of Mitigating Condition 4, here the Judge relies exclusively on his analysis of the debt service agreement. The Judge makes reference to the "apparent success" of the debt service agreement. However, the record evidence regarding the debt settlement agreement does not support a finding that Applicant had made any payments into the plan by the time the record closed. Absent a record of payment, the Judge's conclusion that the plan is an "apparent success" has no basis in the record evidence. Moreover, the Board has held that until Applicant has a meaningful financial track record it cannot be said as a matter of law that he has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. ISCR Case No. 01-21386 at 3 (App. Bd. June 11, 2003). The phrase "meaningful track record" necessarily includes evidence of actual debt reduction through payment on debts. Therefore, the Judge cannot rely on Applicant's debt service agreement as support for his conclusion that Applicant has initiated a good-faith effort for purposes of Mitigating Condition 6. Because there is other record evidence that Applicant has made payments on debts, the Board does not conclude that Mitigating Condition 6 does not apply as a matter of law. The Judge should reevaluate the applicability of Mitigating Condition 6 in light of the record evidence as a whole and in light of the Board's rulings in this case.

Considering the totality of the record evidence, the Board is not convinced that Applicant should be denied a security clearance as a matter of law. However, the errors in this case are not harmless. Absent the errors pointed out in this decision, there is a significant chance that the Administrative Judge could have reached a different result based upon the record as a whole. *Compare*, ISCR Case No. 00-0250 at 6 (July 11, 2001). Accordingly, the case is remanded to the Judge for a new clearance decision in accordance with the Directive, Additional Procedural Guidance, ¶¶ E3.1.35 and E3.1.25. Keeping in mind the Board's rulings, the new clearance decision should address the issue of whether the evidence justifies application of the Financial Considerations mitigating conditions and whether the evidence reasonably supports an overall favorable decision.

### **Order**

The judgment of the Administrative Judge granting Applicant a clearance is REMANDED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

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<sup>3</sup>"The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve bad debts."

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

**Separate Opinion of Member William S. Fields**

I think the Judge's decision in this case could be affirmed. Department Counsel is essentially arguing that the evidence shows that the Applicant was not as diligent about dealing with his financial problems as he could have been. However, Department Counsel's disagreement with the Judge's weighing of the evidence, and his ability to argue for a different interpretation of that evidence, does not demonstrate that the Judge weighed or interpreted the evidence in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Applicant reasonably established that his financial problems had their origin in circumstances beyond his control. He also demonstrated that he had paid off some of the debts, had begun using the services of a financial consultant, and had entered into a debt service agreement which consolidated most of the remaining indebtedness. His actions in that regard resulted in the settlement of some of the debts for substantially reduced amounts, a circumstance that resulted in a measurable improvement in his financial situation. Applicant was not required, as a matter of law, to establish that he had completely paid off his indebtedness. *See* ISCR Case No. 02-25499 at 2 (App. Bd. June 5, 2006).

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board