

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge’s application of several mitigating conditions is not supported by the record. The Judge’s reliance on the unenforceability of some of Applicant’s debts is error. Favorable decision reversed.

CASENO: 07-13041.a1

DATE: 09/19/2008

DATE: September 19, 2008

In Re: ----- Applicant for Public Trust Position)))))))	ADP Case No. 07-13041
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Gina Marine, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On January 3, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On May 12, 2008, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a trustworthiness designation. 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 Judge’s application of Guideline F Mitigating Conditions (MC) 20(b)-(d) is unsupported by the record evidence and therefore arbitrary, capricious, and contrary to law; and whether the Judge’s whole-person analysis is unsupported by the record evidence and therefore arbitrary, capricious, and contrary to law.¹

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following relevant factual findings: Applicant is a 44-year-old man who has been married twice and divorced twice. Applicant attended college for several years, but did not graduate. Applicant earns \$12.82 per hour; with shift differential, overtime, and various awards, Applicant’s net pay for 2007 was \$18,750. Decision at 4. Applicant cannot afford to live on his own; he lives with his niece and her family, sharing a room and paying \$400 a month in rent.

Applicant has two children aged 24 and 21 from his first marriage and a 21-year-old child from a relationship. At one time, Applicant owed approximately \$42,000 in child support arrearages—about \$30,000 for the first two children and over \$12,000 for the other child. *Id.* At the time of the hearing, Applicant had three garnishments against his salary, totaling \$627 per month. Two of those are for child support arrearages, and one is for federal income tax. Another garnishment for a child support arrearage was paid off in August 2007. *Id.* The current garnishments will be paid off in 2008. *Id.* at 4-5.

Among Applicant’s other debts are deficiencies from two car repossessions, and student loans from his years in college. Applicant will not be able to address the student loans and other obligations until after he has paid off the child support arrearages. The debts related to the car repossessions are uncollectible due to the state statute of limitations. *Id.* at 5.

Applicant enjoys his job. He is able to perform his job well despite a hearing loss. He is rated highly by his employer and has received two performance awards. He cannot afford to live on his own and will not be able to do so for some time.

¹Department Counsel does not appeal the Judge’s findings and conclusions regarding Guideline E. Those findings and conclusions are not at issue here.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same 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 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent that the Judge's factual findings are relevant to the assigned error, they will be discussed below.

Whether the Record Supports the Judge's Ultimate Conclusions

The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a trustworthiness determination if it is arbitrary, capricious, or contrary to law. *See* Directive ¶¶ E3.1.32.3 and ¶ E3.1.33.3. Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *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* ADP Case No. 05-12037 at 3 (App. Bd. May 10, 2007). A trustworthiness determination must be guided by common sense in light of the record as a whole.² *See* Directive ¶ E2.2(c).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board 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 of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ADP Case No. 06-12901 at 4 (App. Bd. Jul. 31, 2003).

²The standards for security clearance decisions and trustworthiness determinations are the same.

Department Counsel contends that the Judge's application of Guideline F Mitigating Conditions (MC) 20(b),³ 20(c),⁴ and 20(d)⁵ are unsupported by the record evidence and therefore arbitrary, capricious, and contrary to law. Department Counsel's contention has merit.

The Judge applied MC 20(b) regarding Applicant's two voluntary car repossessions, which occurred after his 1998 divorce. Prior to their divorce, Applicant and his wife co-signed each other's car loan, and Applicant's wife stopped making payments on her car. Unable to afford two car payments after his divorce, Applicant turned his wife's car over to the credit company in 1998. Applicant testified that he believed that the credit company would sell the car and he would have no further liability. When he did not hear anything further from the credit company at that time, Applicant also turned the other car over to them in 1999. Applicant learned in 2000 or 2001 that he still owed balances on both cars. Decision at 3-4; Transcript at 28-32, 73-80. The Judge concluded that the car debts as well as some rent-related debts were beyond Applicant's control. Decision at 7-8. Even if it is assumed that the first voluntary repossession was a result of the divorce and therefore beyond Applicant's control, there is no evidence that the second voluntary repossession was beyond his control. Applicant testified that he did not want to take a car with him when he moved. Transcript at 78-79. Moreover, MC 20(b) also requires that an applicant act responsibly under the circumstances. Applicant did not verify that the two debts were satisfied by the sale of the cars. More significantly, Applicant took no steps to resolve the two debts after he was contacted by the creditor in 2000 or 2001 and has been waiting for the debts to disappear from his record due to the operation of the statute of limitations. Transcript at 30.

The Judge found that MC 20(c) applied only in part. Although Applicant had not sought financial counseling, the Judge found some mitigation in the fact that Applicant's financial situation is improving. The situation is improving only to the extent that the debts which were being paid by garnishment were soon to be paid in full. Applicant has other significant debts, such as student loans in excess of \$17,000, which he has not addressed at all.

With regard to MC 20(d), the Judge concluded that Applicant had "initiated a good-faith effort to repay creditors or otherwise resolve debts." It should be noted that Applicant's arrearages in child support payments at one time totaled over \$42,000, and there is no indication that Applicant was addressing those debts until involuntary garnishments were executed. With the exception of one federal and one state income tax debt, Applicant has not addressed his other overdue obligations. Applicant expects some of those debts to become uncollectible due to the statute of limitations. He

³MC 20(b) is found at Directive ¶ E2.20(b): "the 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[.]"

⁴MC 20(c) is found at Directive ¶ E2.20(c): "the 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[.]"

⁵MC 20(d) is found at Directive ¶ E2.20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

testified that he would make arrangements to pay the others as soon as his garnishments are paid off. The Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. *See, e.g.*, ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999). Moreover, it appears that Applicant relies on overtime and bonuses to make ends meet even while he lives with his niece, and he is not receiving any overtime at present. The record indicates that Applicant is behind in his rent payments to his niece in the amount of \$1,000. Transcript at 102-103.

Department Counsel argues that the Judge's whole-person analysis is unsupported by the record evidence and is therefore arbitrary, capricious, and contrary to law. Department Counsel's argument has merit. The Judge's whole-person analysis relies in large part on the MCs she applied. Specifically, the Judge again discussed Applicant's taking of responsibility in the payment of his child support arrearages. As discussed above, the arrearages at one time amounted to over \$42,000. There is no evidence in the record that Applicant took any action to pay child support until he was forced to do so by garnishment. With the exception of the two tax debts, Applicant has taken no action to pay the other debts listed in the SOR. The Judge also reiterated the circumstances surrounding the voluntary repossession of the two cars. The circumstances are discussed above, including Applicant's failure to take any steps to satisfy the resulting debts.

As noted above, Applicant was waiting for the two car debts to drop off his credit report due to the operation of the statute of limitations. Transcript at 30. The Judge stated that she gave "some credit" to Applicant under her whole-person analysis for the fact that the car debt were now time-barred. Decision at 8. The Judge's reliance on the unenforceability of those debts in analyzing Applicant's situation is error. The Board has held that merely waiting for a debt to drop off a credit report by the passage of time is not a factor in an applicant's favor. *See, e.g.*, ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001). Even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner. *See, e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003). Given the record in this case, the Judge has not articulated a sustainable rationale for her favorable application of the whole-person factors.

Order

The Judge's decision granting Applicant a trustworthiness designation is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

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

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