

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge’s decision must be written in a manner that allows the parties to discern the findings the Judge is making and what conclusions the Judge is reaching. Favorable decision remanded.

CASENO: 08-05379.a1

DATE: 11/24/2009

DATE: November 24, 2009

	)	
In Re:	)	
-----	)	ISCR Case No. 08-05379
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION AND REMAND ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 12, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security 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 August 26, 2009, after the hearing, Administrative Judge Martin H. Mogul 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 erred in his application of Financial Considerations Mitigating Condition (FCMC) 20(d)<sup>1</sup>; and whether the Judge's whole-person analysis was erroneous.<sup>2</sup> Finding error, we remand the case back to the Judge for issuance of a new decision.<sup>3</sup>

The Judge made unchallenged findings that Applicant is a 38-year-old employee of a defense contractor. She has three delinquent debts which total in excess of \$31,000. The largest delinquent debt is \$29,630 owed on a vehicle. One of the debts alleged in the SOR was a repeat of another. Five of the debts alleged in the SOR have been resolved. Two of those were resolved by Applicant's payment for a total of about \$900; the others were paid by Applicant's insurance carriers. Applicant has secured the services of a credit counseling service,<sup>4</sup> and she intends to pursue bankruptcy protection.<sup>5</sup> Applicant is paying her current bills.

Department Counsel argues that the Judge erred in his favorable application of FCMC 20(d), in that he gave too much weight to Applicant's intention to file for bankruptcy protection. The Judge's decision offers scant analysis of the case in mitigation and cites one mitigating condition, FCMC 20(d). What little analysis there is includes a citation to Applicant's meeting with an attorney to file for bankruptcy. We cannot discern how much weight the Judge gave to that fact.

Applicant has the burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15. Department Counsel is correct that Applicant's mere intention to file for bankruptcy is not entitled to much weight. A promise to take remedial steps in the future does not constitute evidence of demonstrated reform and rehabilitation. *See, e.g.*, ISCR Case No. 96-0544 at 5 (App. Bd. May 12, 1997)(promise to take remedial action in future, however credible and sincere, not evidence of actual rehabilitation). Furthermore, Department Counsel notes the Judge did not

---

<sup>1</sup>Directive ¶ E2.20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

<sup>2</sup>The Judge's favorable decision under Guideline E is not at issue in this appeal.

<sup>3</sup>Applicant did not file a reply brief.

<sup>4</sup>Applicant testified that she had worked with this agency since August 2008. She states that, pursuant to her agreement with the agency, she puts aside \$405 a month into a savings account, the value of which at the time of the hearing was \$3,300. Once the value of this account has built up, the agency will use it to pay off certain of Applicant's debts. Tr. at 44.

<sup>5</sup>Applicant Exhibit C is a post-hearing letter from an attorney advising that his firm represents Applicant "with regard to a Chapter 7 Bankruptcy filing."

discuss the significance of the timing of Applicant's motion toward filing bankruptcy. (Nor did the Judge discuss the significance of the timing of her credit counseling or payment of debts).

It is well settled that an administrative judge has broad discretion in writing a security clearance decision. However, the Judge's decision must be written in a manner that allows the parties and the Board to discern the findings the Judge is making and what conclusions the Judge is reaching. *See, e.g.*, ISCR Case No. 02-05665 at 4 (App. Bd. May 7, 2003). In the case before us we cannot say with confidence how the Judge reached his ultimate favorable decision.

### **Order**

The Judge's favorable security clearance decision is REMANDED to the Judge for issuance of a new decision consistent with discussion above.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

### **DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY**

I respectfully disagree with my colleagues as to the proper disposition of this case. I acknowledge that mere reliance upon a legal remedy like bankruptcy is usually inadequate to satisfy one or more of the mitigating conditions *per se*. However, Applicant's proposed bankruptcy filing is part of a larger effort to address her financial condition. This effort includes actual resolution of some debts, including a relatively large one, and the use of a credit counseling service for others. Applicant entered into her relationship with the credit counseling service before the issuance of the SOR, which indicates that she was aware of her financial problems before her eligibility for a clearance became threatened and was taking steps to address those problems. I am satisfied that this record, viewed in its totality, supports a favorable whole-person analysis for Applicant. *See* ISCR Case No. 02-05110 at n. 7 (App. Bd. Mar. 22, 2004); ISCR Case No. 99-0542 at 7 (App. Bd. Mar. 21, 2003) for the proposition that a Judge can clear an Applicant under a whole-person analysis even if no specific mitigating factor can be found to apply. This is not to suggest that I would necessarily have decided the case in the same way the Judge did but, rather, that I do not conclude that the Judge's decision is arbitrary, capricious, or contrary to law.

Signed: James E. Moody \_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board