

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge exceeded the scope of the remand order by reopening the record and taking in new evidence, although the order directed only a new decision. Judge erred in concluding that Applicant had met his burden of persuasion as to mitigation regarding his delinquent debts. Favorable decision reversed.

CASENO: 08-06058.a2

DATE: 08/26/2010

DATE: August 26, 2010

In Re:)	
)	
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)	ISCR Case No. 08-06058
)	
Applicant for Security Clearance)	

APPEAL BOARD REMAND DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 5, 2008, 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 May 29, 2009, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. On September 21, 2009, we remanded the case to the Judge. On May 13, 2010, the Judge issued a Decision on

Remand, again granting 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 by exceeding the scope of the remand order and whether the Judge's favorable decision is arbitrary, capricious, or contrary to law.

The Judge found that Applicant has a history of delinquent debt, although he had paid off several of the debts and credibly denied owing others. She noted that Applicant had experienced family illnesses, loss of employment, and a separation from his wife. We summarized the Judge's findings of fact thoroughly in our prior decision, ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009).

A. Whether the Judge Exceeded the Scope of the Remand Order

In her original decision, the Judge concluded that the record was not sufficient to enable Applicant to identify two of the creditors alleged in the SOR. Having found evidence in the record sufficient to identify them, we remanded the case to the Judge for the purpose of obtaining from Applicant an admission or a denial regarding the debts alleged to be owed these two creditors.

Department Counsel argues that the Judge did not comply with the requirements of the remand order, insofar as the Judge reopened the record and solicited new evidence. We find Department Counsel's argument persuasive.

The Appeal Board has authority to remand a case to a Judge for the correction of errors. "If the case is remanded, the Appeal Board shall specify the action to be taken on remand[.]" Directive ¶ E3.1.33.2. The case will then be assigned to a Judge "for correction of errors(s) in accordance with the Appeal Board's clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board." *Id.* at ¶ E3.1.35. In this case, the Judge exceeded the scope of the remand order by receiving new evidence. This new evidence concerned an additional debt other than the two which the Judge had found to be unidentifiable. It appears to have been generated after the close of the record. Furthermore, Applicant made no reply at all concerning one of the two debts at issue in our decision. The Judge's admission of new evidence was error, as was her failure to secure an admission or denial concerning one of the two debts, as the remand order required.

B. Whether the Judge's Decision is Arbitrary, Capricious, or Contrary to Law

Once a concern arises regarding an Applicant's security clearance eligibility, 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 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).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The record demonstrates that Applicant had paid off certain of his debts. However, the record also contains gaps and ambiguities that undercut Applicant's case for mitigation and the Judge's favorable decision. For example, the Judge gave Applicant credit for attempting to resolve a \$4,810 judgement owed to a former landlord. She stated that "the judgment, is not resolved or being resolved because the creditor is uncooperative, not for lack of effort on Applicant's part." Decision at 12. The record demonstrates that Applicant had encountered financial problems and sought a reduction in the rent he owed the landlord. The landlord did not agree to accept a reduced rent and eventually had Applicant evicted. The landlord received a judgment against Applicant for unpaid rent. Applicant did not appear at the court hearing. Applicant stated that he had contacted the landlord's attorney, who acted "kind of indignant" toward him. Tr. at 28. There is no evidence to corroborate any efforts Applicant has made to satisfy this judgment or otherwise attempt to address it in good faith. Neither is there anything in the record to support the Judge's opinion that the landlord behaved unreasonably in seeking monies owed under the lease. The record does not support a conclusion that Applicant has demonstrated mitigation regarding this debt.

The Judge found that another debt, in the amount of \$4,660 for a credit card, had been paid. However, Applicant's claim that he had satisfied this debt through a repayment plan is not supported by Applicant Exhibit (AE) A, which lists payments to various creditors pursuant to the plan. This debt does not appear in AE A, which is not consistent with Applicant's contention that he had paid the debt off during the course of the repayment plan. Furthermore, the Judge herself acknowledged that the record evidence is inconsistent concerning this debt.¹ The record is not sufficient to demonstrate that Applicant has met his burden of persuasion as to mitigation under the *Egan* standard regarding this debt. The SOR also alleged a debt of \$5,699 owed to a jeweler. While the record contains a settlement offer to Applicant by the creditor, it does not demonstrate that Applicant actually paid the amount contained in the offer. Exhibit H. The Judge's conclusion that Applicant had paid off this debt through settlement is not supported by the record evidence.

Of particular note is the \$1,377 debt which formed part of the basis for the remand order. In the original decision the Judge concluded that the evidence did not identify either this creditor, SOR ¶ 1(c), or another alleged in SOR ¶ 1(i) and that, as a consequence, the Government had failed to meet its burden of production. However, as we stated in our earlier decision, the record did indeed identify both creditors with sufficient specificity to enable Applicant to address the debts. Furthermore, AE L, provided by Applicant in response to the remand order, specifically identified

¹*See* Decision at Note 7: "Applicant believed this account had been paid in his payment plan developed in 1998, but the account number is different . . . The credit reports show conflicting information on the status of this debt . . . , including paid, a zero balance and transferred or sold."

the creditor alleged in 1(c) and provided some information concerning the debt. Nevertheless, in her Decision on Remand, the Judge continued to assert that the identities of both creditors were unknown, although she concluded that Applicant had demonstrated that 1(c) had been resolved. The Judge's conclusion that these creditors could not be identified is error, as is her conclusion that the evidence is sufficient to mitigate the security concerns arising from them, in light of the *Egan* standard.

We also note the Judge's finding that Applicant had three debts which he denied but which he subsequently paid after the hearing. "His change in position is not explained." Decision at 6-7. This lack of explanation undercuts her subsequent analysis that Applicant had demonstrated a good-faith effort to resolve these debts. The Judge does not address why Applicant could not reasonably have ascertained the validity of the debts prior to the hearing or, indeed, prior to his receipt of the SOR. Moreover, the fact that Applicant's largest debt, the \$24,701 tax lien, was paid off through garnishment rather than a voluntary effort diminishes its mitigating force.² All in all, considering the record as a whole, we conclude that Applicant's evidence is not sufficient to mitigate the security concerns arising from his financial problems. We conclude that the Judge's favorable decision is not sustainable.

Order

The Judge's adverse security clearance decision is REVERSED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

²AE E consists of two pay stubs from a previous employer, one showing a "Garnishment-Tax Levy" in the amount of \$5,036.95 and the other showing \$7,717.60. AE F is an employee earnings report from a different employer, covering the period of time between May 2003 and November 2004. This document shows a total of \$44,008.46 paid by garnishment to an unspecified creditor. Government Exhibit 2, Response to Interrogatories, contains a credit report, dated August 12, 2008, which lists the federal tax lien. It does not report a "released date" for the lien. The record does not contain a document from the IRS to Applicant stating that the tax debt had been satisfied.

Appeals after remand where harmful error is at issue can put the Board in a quandary. At some point the case needs to reach closure. On the other hand, sometimes preservation of the process and its integrity is paramount. The proper resolution of this case is remand to another Judge. In order to demonstrate why that is appropriate, it is necessary to discuss how the Judge implemented the Board's instructions from the first Appeal Board case:

In the case at issue now, the Judge received specific instructions from the Board. Indeed, there were, effectively, nine instructions. The Judge carried out four of them. The Judge re-opened the record. The Judge gave Department Counsel an opportunity to respond. The Judge issued a new decision. The Judge gave Applicant no credit under Directive Enclosure 2 ¶ 20(d) for the IRS garnishment nor any debt which he disputed, denied or had not paid.

The Judge partly carried out two instructions. The Judge did have a discussion of the timing of certain payments but it was not sensible—the Judge concluded that payment of two debts after the hearing was indicative of good faith. The Judge did remove her expansive inappropriate discussion of the Appeal Board's authority but she added in new, and factually incorrect, arguments with the Board regarding the two debts which were a substantial basis for the remand.

The Judge failed entirely to implement three instructions. The record was only to be opened for the "limited purpose of obtaining from Applicant an admission or denial regarding the two creditors referred to in SOR allegation 1.c and 1.i . . ." The Judge directed Applicant to take various actions with multiple third parties and then to submit new evidence to her. Those directions exceeded the scope of the remand order. The Judge did not explain what authority she had for such directions. Next, the Judge was supposed to evaluate Applicant's admissions or denials on two debts which she had mistakenly believed were not identified in the record. After remand, Applicant discussed the status of his relationship with the creditor in 1.c, a national retailer, through two accounts. The Judge failed to discuss or evaluate Applicant's explicit acknowledgment of the identity of the creditor. The Judge also failed to note the Board's identification of the pages in the record where the creditor's name and contact information were identified. Instead of evaluating Applicant's acknowledgment, the Judge wrote, "Applicant also disputed the debt in allegation 1.c after the hearing. He continually denied any knowledge of the creditor. The credit report failed to identify the original creditor, and did not list an address or telephone number for this creditor. Thus, Applicant had no way to contact the creditor or pay the debt if it was his. Given that the Appeal Board considered the debt proven, Applicant properly disputed after remand under these facts." (Decision p. 10.) Finally, any discussion in the new decision of Directive, Enclosure 2 ¶ 20 (b) or 20 (e) was supposed to have a complete discussion as to how each prong of the guideline applies for each debt under discussion. The Judge failed to do that.

In light of the Judge's failures and her continued argumentation it is not plausible to believe she could render a fair and reasoned decision in this case. There is case law both within DOHA³ and

³ISCR Case No. 98-0066 (App. Bd. Feb. 9, 1999).

outside of DOHA⁴ for the proposition that when a Judge is unwilling to carry out the law in a given case that the proper resolution is to remand the case to another Judge even absent a showing of bias.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairperson, Appeal Board

⁴See e.g., *United States v. Robin* 553 F.2d 8 (2nd cir.), *United States v. Torkington* 874 F.2d 1441(11th Cir.), *Chudasma v. Mazda* 123 F.3rd 1353 (11th Cir.).