

KEYWORD: Guideline F

DIGEST: Given the Judge’s sustainable findings that, on their face, appear to raise certain Guideline F mitigating conditions, the decision does not contain an adequate explanation for the Judge’s conclusion that Applicant had failed to meet her burden of persuasion. Adverse decision remanded.

CASE NO: 09-08533.a1

DATE: 10/06/2010

DATE: October 6, 2010

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In Re:)	
-----)	ISCR Case No. 09-08533
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq. and Krystal M. Limon, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 9, 2010, DOHA 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 elected to have the case resolved on the written record. On July 30, 2010, after the considering the record, Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge properly applied the Guideline F mitigating conditions to the facts of the case. For the reasons that follow, the Board remands the Judge's adverse security clearance decision.

The Judge made the following findings of fact: Applicant is a 40-year-old employee of a defense contractor. She is divorced, and has two children from her marriage. Applicant held a security clearance from 1991 through 1998. Applicant explained that her financial problems began in May 2008 when her husband suffered a "mental breakdown." He abandoned the family and he quit his job. Applicant was not working at the time. She relocated to her family home in another state and sought full-time employment. She was unemployed for about ten months. The SOR alleged eleven delinquent debts for unpaid credit card accounts totaling \$41,871. In addition, Applicant reported a defaulted home mortgage loan that was past due in the amount of \$162,000. Applicant admitted the allegations. Applicant incurred additional expenses to pay for her divorce, which she obtained in January 2010. She is now in the process of filing bankruptcy. Her financial problems are directly related to her ex-husband. Applicant receives sporadic, limited financial support from her former spouse. She claims that bankruptcy is her only option because she has been unsuccessful in selling her home. Applicant hopes that a short sale will occur soon. She fully intends to pay her delinquent debts. Applicant has paid the filing fee for her bankruptcy and her attorney fee. She completed the financial counseling required by the bankruptcy process in April 2010. In May 2010, she completed a personal financial management course via the internet. Applicant expects to receive child support in the amount of \$1,500 a month, although she is not sure that she will actually receive it. Applicant's current net monthly income is \$3,394. After expenses she has a negative net remainder of approximately \$200.

The Judge reached the following conclusions in the case: Applicant has approximately \$41,000 in delinquent credit card debt and she has defaulted on a home loan and is past-due in the amount of \$162,000. She filed a petition in bankruptcy. Consequently, Financial Considerations Mitigating Condition ¶ 20(a)¹ does not apply. Financial Considerations Mitigating Condition ¶ 20(b)² applies in part. Applicant's sudden separation and divorce impacted her family finances. She received limited financial support from her husband. She supported her children. Applicant was unemployed for ten months. She did not pay any of her delinquent debts due to her lack of income. However, she filed for bankruptcy in July 2010, but the debts have not been discharged. While filing bankruptcy is a legal remedy that released Applicant from the requirement to pay the majority of her debt, insufficient time has passed for her to demonstrate the necessary qualities of sound judgment, reliability and trustworthiness. While a discharge in bankruptcy is intended to provide a person with a fresh start financially, it does not immunize an applicant's history of financial

¹Directive, Enclosure 2 ¶ 20(a), "[T]he behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

²Directive, Enclosure 2 ¶ 20(b), "[T]he 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[.]"

problems from being considered. Financial Considerations Mitigating Condition 20(d)³ applies in part. Applicant received the required financial counseling as part of her bankruptcy petition. There is no indication the financial problems will not recur. Financial Considerations Mitigating Condition 20(c)⁴ partially applies. It is too soon to show a demonstrated track record or that her financial problems are resolved or under control.

Applicant argues that the Judge erred in her application of the various Guideline F mitigating conditions and in her application of the whole-person analysis. Applicant also argues that the Judge failed to weigh all available relevant evidence because she did not give Applicant a fair opportunity to provide such evidence. These arguments have mixed merit.

Applicant persuasively argues that the Judge did not properly apply the Guideline F mitigating conditions. This issue is best resolved by initially pointing out that the Judge made an unequivocal finding that Applicant's financial problems were directly related to her ex-husband, and that she incurred additional expenses to divorce him. The Judge concluded that Applicant's sudden separation and divorce had an impact on her family finances, and, under the whole-person analysis, stated that Applicant suffered financial difficulty when her husband abandoned the family in 2008. Additionally and importantly, the Judge's decision contains no finding or conclusion, either express or by inference, that (1) Applicant was in any way at fault for the circumstances that gave rise to the delinquent indebtedness, (2) she behaved irresponsibly toward her finances either prior to or subsequent to the rise of the delinquent indebtedness, or (3) she has not demonstrated due diligence in dealing with her troubled financial situation since separating from her husband. To the contrary, the Judge mentions the facts that Applicant had to incur additional expenses pursuant to her divorce action, that she supported her children despite receiving limited support from her ex-husband, that she was unemployed after the separation and couldn't pay the debts because of lack of income, that she fully intends to pay her delinquent debts, and that she obtained the requisite financial counseling required by her bankruptcy action. The Judge then describes the legitimacy of Applicant's bankruptcy action as a legal means for resolving debts. These facts, stated by the Judge without qualification, coupled with the absence of any finding or conclusion assigning culpability to Applicant for her financial state, lay out a significant case for mitigation on this record.

The Judge's analysis under Mitigating Condition ¶ 20(a) is flawed. The Judge concluded that the mitigating condition did not apply after merely citing the facts that Applicant had \$41,000 in credit card debt, a defaulted past due home loan in the amount of \$162,000, and had filed a petition for bankruptcy. The Judge offered no other explanation as to why the mitigating factor did not apply. The facts cited by the Judge do not render the mitigating condition inapplicable given other evidence in this record. While the Judge could properly conclude based on the evidence and her own findings that Applicant's indebtedness did not happen long ago and was not "infrequent," there is record evidence and there are other findings of the Judge that make other components of the mitigating condition clearly applicable (debt occurred under such circumstances that it is unlikely

³Directive, Enclosure 2 ¶ 20(d), "[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

⁴Directive, Enclosure 2 ¶ 20(c), "[T]he 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[.]"

to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment). It was error for the Judge to fail to address these other factors. The Judge also should have either explained why these factors were not mitigating, or, in the alternative, she should have applied them in light of her finding that Applicant's financial troubles were directly related to her ex-husband, and the lack of any finding or conclusion by the Judge that Applicant had acted irresponsibly or demonstrated poor judgment either in accumulating the debt delinquencies or in dealing with the debts subsequently.

The Judge's analysis concerning Mitigating Condition ¶ 20(b) is also problematic. Again, the Judge cited some of the salient facts of the case regarding the nature of Applicant's indebtedness, and then discussed Applicant's bankruptcy and the fact that the debts contained therein have yet to be discharged. The Judge continued her discussion of ¶ 20(b) by stating that, although bankruptcy is a legal remedy, insufficient time had passed for Applicant to demonstrate the necessary qualities of sound judgment, reliability, and trustworthiness. Given the fact that nowhere in her decision does the Judge conclude that Applicant exhibited poor judgment, unreliability, or lack of trustworthiness, there is no basis for the Judge to conclude that Applicant needs more time to display positive characteristics. Significant unchallenged evidence exists in this case which tends to establish that Applicant's financial difficulties were largely beyond her control. A principal finding of the Judge was based squarely upon this evidence. There is a lack of substantial evidence that Applicant behaved irresponsibly, and the Judge made no such finding. Given this, the Judge's conclusion that Mitigating Condition ¶ 20(b) only partially applies, without an explanation more firmly rooted in the underlying record, constitutes error.

Since Applicant's debts remain outstanding, the Judge's conclusion that Mitigating Conditions ¶ 20(c) and ¶ 20(d) only partially apply is sustainable. However, the Judge's analysis of these mitigating conditions includes the statement, "There is no indication the financial problems will not recur."⁵ Given the Judge's findings that Applicant's financial problems were directly related to her husband, that Applicant is now divorced, that she incurred extraordinary expenses of a divorce and a bankruptcy filing, and she has gotten through a period of unemployment and is now employed, there is significant record evidence that undercuts the Judge's statement. There is no other evidence in the record indicating that Applicant's current indebtedness is anything more than a unique, one-time occurrence. To the extent that the statement affected the Judge's application of Mitigating Conditions ¶ 20(c), and ¶ 20(d), their application needs to be reevaluated.

The Judge's decision notes that Applicant has not received a discharge in bankruptcy and therefore her debts remain outstanding. The fact that significant debts are yet to be resolved is, of course, a matter that the Judge properly considered. However, the Judge has not explained what she believes Applicant could or should have done under the circumstances that she has not already done to rectify her poor financial condition, or why the steps taken by Applicant were not "responsible" in light of her difficult circumstances and limited resources. *See, e.g.,* ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). Therefore, the Judge has not articulated a satisfactory explanation for

⁵Decision at p. 5. Given the manner in which the Decision is written, it is not clear whether the Judge's statement about the likelihood of recurrence of the problem relates to Mitigating Condition ¶ 20(c), Mitigating Condition ¶ 20(d), or both.

her conclusions. On remand, the Judge should issue a new decision, after addressing the errors discussed herein.

Applicant asserts the Judge erred by not inquiring or requesting additional information from Applicant concerning her debts in order to alleviate concerns raised about her track record or her remaining SOR debts. Applicant states that she was at a disadvantage as a *pro se* litigant and did not realize what documents or evidence would be relevant to the Judge's decision in a financial case. Applicant further states that, rather than holding her lack of knowledge against her in the decision, the Judge should have requested further information from her. Applicant's arguments do not establish error.

In ISCR proceedings, the applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. Directive, ¶ E3.1.15. The Judge was under no obligation to make inquiries of Applicant that would have had the effect of further developing the record, nor was the Judge obligated to assist Applicant with the presentation of her case in any other way, especially since Applicant made no such request.

DOHA sent Applicant a letter dated April 15, 2010 advising her of her right to submit any information she wished the Judge to consider and of her right to be represented or assisted by an attorney and the significance of the consequences of a possible adverse decision. Applicants are free to present their cases without the assistance of counsel or a personal representative. Having made that choice, however, they cannot reasonably complain about their lack of knowledge or skill after the fact. Moreover, contrary to Applicant's assertions, the Board finds no evidence that the Judge "held against" Applicant the manner in which the case was presented. There is a rebuttable presumption that ISCR Judge's are unbiased, and any party seeking to overcome that presumption has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008); ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). Applicant has not met that burden.

Order

The Judge's adverse security clearance decision is REMANDED.

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

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

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I agree with my colleagues in their identification of errors contained in the Judge's decision. I also agree with their analysis of Applicant's contention that the Judge should have sought more evidence in this case. However, I disagree with my colleagues as to the appropriate remedy for the Judge's errors. For reasons sets forth below, I would reverse the Judge's adverse security clearance decision.

Department Counsel himself characterized as "well founded" Applicant's claim that her problems were caused by circumstances outside her control—abandonment by her husband followed by a period of unemployment. Furthermore, Department Counsel acknowledged that "it appears she acted responsibly by pursuing a short-sale of her now-devalued home and in securing full-time employment to support herself and her children. Within her limited means and resources, it appears that Applicant has established Financial Considerations Mitigating Condition 20(b)."⁶ Department Counsel Memorandum, File of Relevant Material, April 15, 2010. The Judge's findings, and the record, including evidence that Applicant is seeking bankruptcy protection, support Department Counsel's conclusions. Therefore, I believe that Applicant's situation is similar to that described in ISCR Case No. 06-25584 (App. Bd. Apr. 4, 2008). In that earlier decision, the Judge's unchallenged findings also established that the applicant's problems had arisen from circumstances beyond his control and that he had acted responsibly in regard to them. We stated that the mere fact that it might have taken the applicant a long time to resolve his debts was, in and of itself, no reason to deny him a security clearance. *Id.* at 3. The same reasoning should apply to Applicant in the case before us now.

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

⁶See Note 2, *supra*.