

DATE: May 3, 2001

In Re:

SSN: -----

Applicant for ADP Position

ADP Case No. 00-0131

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey Anderson issued a decision in which she concluded it is not clearly consistent with the national interest to grant or continue a designation of trustworthiness, suitability, and eligibility for Applicant to hold a sensitive information systems position. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The Composite Health Care System Program Office, the Directorate for Industrial Security Clearance Review (now Defense Office of Hearings and Appeals), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence entered into a memorandum of agreement (MOA), effective April 9, 1993, under which the Defense Office of Hearings and Appeals (DOHA) is authorized to adjudicate trustworthiness cases involving contractor personnel working on unclassified automated systems in ADP-I and ADP-II sensitivity positions as defined in DoD Regulation 5200.2-R. This Board has jurisdiction on appeal by virtue of the MOA, Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended).

Applicant's appeal raises the following issues: (1) whether the Administrative Judge's findings of fact are supported by substantial record evidence; and (2) whether Applicant is entitled to a remand of his case so he can present additional information on his behalf.

Procedural History

The Defense Office of Hearings and Appeals issued an undated Statement of Reasons (SOR) to Applicant. The SOR was based on Guideline F (Financial Considerations).

A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who was given an opportunity to respond to the FORM and submit information for consideration in his case. Applicant did not submit a response to the FORM.

The case was assigned to the Administrative Judge, who issued a written decision on February 9, 2001. [\(1\)](#) The Judge concluded it is not clearly consistent with the national interest to make or continue a determination of trustworthiness,

suitability, and eligibility for Applicant to hold a sensitive information systems position. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues⁽²⁾

1. Whether the Administrative Judge's findings of fact are supported by substantial record evidence. The Administrative Judge made findings of fact concerning Applicant's history of financial difficulties, which included Applicant filing for a Chapter 13 bankruptcy in August 1995 and the bankruptcy being dismissed in February 1998 because Applicant failed to make scheduled payments. On appeal, Applicant challenges: (a) the Judge's finding about Applicant's age, and (b) the Judge's findings about various specific debts alleged in the SOR.⁽³⁾

(a) The Administrative Judge clearly erred by finding that Applicant is 30 years old. The record evidence shows that Applicant is 40 years old. However, this error is harmless because there is no indication in the decision below that the Judge's decision turned on whether Applicant is 30 years old or 40 years old. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 3 (error is harmless when there is not a significant chance that it fatally affects an otherwise sustainable decision).

(b) In challenging the Administrative Judge's findings about various debts covered by the SOR allegations, Applicant: (i) makes various assertions that go beyond the record evidence below; and (ii) makes assertions about his financial actions since the record closed. On appeal, the sufficiency of a Judge's findings of fact is determined based on a review of the record evidence that was available to the Judge during the proceedings below. An appealing party cannot fairly challenge a Judge's findings based on information that was not presented during the proceedings below for the Judge's consideration. Furthermore, a Judge's findings cannot be challenged based on claims about events that occur after the close of the record below or after the Judge's decision was issued. *See, e.g.*, ISCR Case No. 99-0124 (October 13, 1999) at p. 3; ISCR Case No. 98-0620 (June 22, 1999) at p. 3. Finally, the Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the Board cannot consider Applicant's arguments that are based on assertions that go beyond the record evidence, or assertions concerning events that occurred after the close of the record below or after the Judge's decision was issued.

The Administrative Judge acted reasonably in making her findings of fact based on the record evidence available to her. Applicant cannot fairly challenge the Judge's findings based on claims that rely on information that was not presented to the Judge for her consideration. Considering the record evidence as a whole, the Judge's findings about Applicant's history of financial difficulties reflect a reasonable interpretation of the record evidence that was available to her.

2. Whether Applicant is entitled to a remand of his case so he can present additional information on his behalf. Applicant asks the Board to remand his case for further consideration, including reopening the record to allow him an opportunity to present new evidence on his behalf.

In the absence of a showing of harmful error that prejudiced the appealing party's right to present evidence, the appealing party is not entitled to a remand solely to give him or her another chance to present evidence for the consideration of the Judge. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3. Applicant has identified no error that prejudiced his right to present evidence during the proceedings below. To the contrary, Applicant had the opportunity to present information about his financial situation in response to the FORM. Applicant did not submit a response to the FORM. Having had the opportunity to present evidence for consideration by the Administrative Judge, Applicant waived his right to present such evidence when he failed to submit any response to the FORM. *See, e.g.*, ISCR Case No. 98-0188 (April 29, 1999) at p. 3; ISCR Case No. 98-0257 (January 22, 1999) at p. 2 n.1. *Cf.* ISCR Case No. 99-0304 (February 9, 2000) at pp. 2-3 (where applicant did not submit his response to FORM before deadline expired, the Administrative Judge did not err by rejecting the late response). In view of the foregoing, Applicant asks for relief to which he is not entitled.

Conclusion

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's February 9, 2001 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The decision in the case file is dated February 9, 2000. However, a review of the case file shows the year "2000" in the decision below is a typographical error.

2. This case involves an adjudication (under DoD Regulation 5200.2-R) of Applicant's eligibility to occupy a sensitive position, not an adjudication (under DoD Directive 5220.6) of Applicant's eligibility for a security clearance. However, the Board will cite to some of its decisions in security clearance cases in support of legal propositions and principles that are pertinent to both security clearance cases and sensitive position cases. *See* ADP Case No. 30-1130 (January 4, 2001) at p. 2 n.1.

3. The Administrative Judge entered favorable formal findings with respect to the debts covered by SOR paragraphs 1.b., 1.e., and 1.g. Those favorable formal findings are not at issue on appeal.