

DATE: July 11, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0250

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision, dated February 16, 2001, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's findings are supported by substantial record evidence; (2) whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines; (3) whether the Administrative Judge erred by entering a formal finding against Applicant with respect to Guideline J (Criminal Conduct); and (4) whether a criminal matter that was resolved in Applicant's favor can be removed from the written record.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 28, 2000 to Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Applicant submitted an answer to the SOR.

Applicant did not ask for a hearing in her case. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to the FORM. The Administrative Judge issued a written decision, dated December 8, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant appealed the Administrative Judge's December 8, 2000 decision. On February 13, 2001, the Board issued an Appeal Board Decision and Remand Order (hereinafter "Remand Order"). In the Remand Order, the Board concluded: (a) the Judge had failed to consider Applicant's response to the FORM; (b) the Judge's error warranted remand of the case; (c) Applicant had waived her right to a hearing; and (d) Applicant was not entitled to have a hearing or the opportunity to submit additional evidence on remand. The Board remanded the case to the Judge with instructions to

issue a new decision after he considered "the case file (including Applicant's response to the FORM) that was compiled before the Judge was assigned the case."

The Administrative Judge issued a new decision, dated February 16, 2001 (hereinafter "Remand Decision"). The case is before the Board on Applicant's appeal from the Remand Decision.

Appeal Issues

Applicant's appeal submission contains various statements and assertions that go beyond the record evidence.⁽¹⁾ Such statements and assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant cannot fairly contend the Administrative Judge erred based on arguments that rely on information that was not provided by Applicant for consideration during the proceedings below. *See, e.g.*, ADP Case No. 00-0131 (May 3, 2001) at p. 3.

1. Whether the Administrative Judge's findings are supported by substantial record evidence. Applicant contends: (a) the record evidence does not support the Judge's finding that she knowingly and willfully falsified a security form by not disclosing all of her past due debts; and (b) the record evidence does not support various findings the Judge made concerning her history of financial difficulties. The Board will address Applicant's contentions in turn.

(a) Falsification. The Administrative Judge found "Applicant knowingly and wilfully failed to disclose any of her past due indebtedness, except for her student loan of \$472.00, listed in subparagraph 1.t. of the SOR." Applicant argues the Judge's finding of falsification is erroneous because: (i) the FORM prepared by Department Counsel incorrectly refers to an "admission in the Applicant's answer" with respect to the falsification allegation in this case; (ii) Department Counsel failed to prove that many of her debts were more than 180 days past due; (iii) Department Counsel failed to prove she deliberately omitted her past due debts; (iv) the Judge improperly relied on a negative credibility determination as a substitute for record evidence; (v) she disclosed two student loans, not just one, in response to question 38 on the security form; and (vi) Applicant voluntarily disclosed information about her past due debts in response to Financial Interrogatories propounded by DOHA. For the reasons that follow, the Board concludes most of Applicant's arguments lack merit, and to the extent one of her arguments has some merit it fails to demonstrate harmful error.

(a)(i) On appeal, the Board reviews an Administrative Judge's decision to determine whether the appealing party has demonstrated the Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. Even if Department Counsel erred by referring to an "admission in the Applicant's answer" in support of its FORM argument that Applicant engaged in a knowing and willful falsification, such an error is irrelevant to determining whether the Judge's findings and conclusions about the falsification allegation are supported by substantial record evidence.

(a)(ii) The SOR alleged that Applicant engaged in falsification when she did not list many of her past due debts in response to question 38 on a security form she completed on February 11, 1999. Question 38 reads: "**Your Financial Delinquencies - 180 Days** In the last 7 years, have you been over 180 days delinquent on any debt(s)?"(emphasis in original) Applicant is correct in arguing that the wording of question 38 is important. *See* ISCR Case No. 97-0595 (February 19, 1999) at pp. 2-3 (when an applicant is alleged to have falsified a security form, the Administrative Judge must consider the plain language of the question the applicant is alleged to have falsely answered).⁽²⁾ Given the particular wording of question 38, Applicant was obligated to list only those debts of hers that had been more than 180 days past due at any time within seven years of the date she completed the security form.⁽³⁾

Department Counsel has the burden of proving controverted allegations. *See* Directive, Additional Procedural Guidance, Item E3.1.14. In this case, Applicant controverted the SOR allegation that she falsified a security form she completed in February 1999. The Administrative Judge could not find Applicant falsified the security form (as alleged by SOR paragraph 2.a.) unless there was record evidence that: (a) during the previous seven years, Applicant had former debts that had been past due for more than 180 days, regardless of whether they had been later satisfied, written off, discharged in bankruptcy, or were unenforceable because of the passage of a statute of limitations; (b) at the time Applicant completed the security form, she had current debts that were past due for more than 180 days; or (c)

Applicant had both kinds of past due debts.

Applicant persuasively argues that there is no record evidence that many of her past due debts not listed in response to question 38 on the security form were or had been more than 180 days delinquent. To the extent there is no such record evidence, the Administrative Judge had no factual or legal basis for finding Applicant falsified the security form by not listing such past due debts in response to question 38. However, on appeal, Applicant essentially concedes that the past due debts covered by SOR paragraphs 1.m., 1.n., 1.p., 1.q., 1.r., 1.w. and 1.x. should have been disclosed in response to question 38 (although she denies an intent to falsify).

(a)(iii) and (a)(iv) When trying to prove an applicant has engaged in knowing and willful falsification, Department Counsel may not have direct or objective evidence of an applicant's intent or state of mind when the applicant completed a security form. Furthermore, Department Counsel may not have the benefit of an applicant's admission that he or she engaged in a deliberate effort to deceive or mislead the government. Neither situation necessarily precludes Department Counsel from meeting its burden of proving a falsification allegation. An applicant's intent or state of mind can be proven through indirect or circumstantial evidence. *See, e.g.*, ISCR Case No. 00-0302 (April 23, 2001) at p. 3; ISCR Case No. 99-0205 (October 19, 2000) at p. 5. Furthermore, falsification can be proven despite an applicant's denial of any intent to make a false or misleading statement or omission. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3.

The record shows Applicant denied that she deliberately omitted her delinquent debts when she responded to question 38 of the security form, claiming: (1) she is not the type of person who would ever lie; (2) she is not so naive as to believe the government could not find information about her financial situation; (3) she gave the government permission to investigate her financial affairs; (4) she provided details about her delinquent debts in response to the Financial Interrogatories propounded by DOHA; (5) she forgot about her debts because they involved small amounts; (6) she

paid off many of her delinquent debts; and (7) not all of her debts were listed because some of them were not over 180 days past due. *See* Applicant's Answer to SOR; Applicant's Response to FORM. Claims 3, 4, and 6 are irrelevant to a determination as to whether Applicant falsified the security form. As discussed earlier in this decision, claim 7 is irrelevant to a determination as to whether Applicant falsified the security form by failing to list those debts that were more than 180 days past due. As to claims 1, 2 and 5, the Administrative Judge was not compelled, as a matter of law, to accept Applicant's statements. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3. Considering the record as a whole, the Judge's finding of falsification is sustainable. [\(4\)](#)

(a)(v) Applicant correctly notes that, in response to question 38 on the security form, she disclosed two student loans, not just one. However, the SOR did not allege that Applicant falsified the security form by failing to list her student loans in response to question 38. Furthermore, the Administrative Judge did not find that Applicant falsified the security form by listing only one student loan. Accordingly, the Judge's erroneous reference to one student loan in his Remand Decision is harmless error.

(a)(vi) Applicant correctly notes that she made disclosures to the government about her delinquent debts when she submitted her responses to the Financial Interrogatories sent to her by DOHA. However, Applicant's disclosures about her delinquent debts in response to the Financial Interrogatories did not preclude the Administrative Judge from finding she falsified the security form by failing to disclose those delinquent debts in response to question 38 (to the extent that those delinquent debts were more than 180 days past due, as discussed earlier in this decision).

(b) Financial difficulties. Applicant contends the Administrative Judge's findings about her financial difficulties are not supported by substantial record evidence. In support of this contention, Applicant argues: (i) Department Counsel failed to prove that she is unwilling or unable to pay her debts; (ii) the record evidence does not show she is financially overextended; and (iii) the record evidence shows she was not aware of her delinquent debts when she completed the security form in February 1999 and she took care of her debts once she became aware of them.

The record evidence shows that Applicant had various delinquent debts for which she was responsible, and that Applicant had not satisfied many of those debts as of the time the SOR was issued. Given the record evidence of

Applicant's delinquent debts, it is untenable for Applicant to assert that she was not financially overextended. In addition, given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant failed to address most of her delinquent debts until after she received the SOR. Applicant gave a written statement to a Defense Security Service investigator in July 1999 (FORM, Item 8) in which she discussed her delinquent debts. The information provided in Applicant's written statement, Applicant's Answer to the SOR and Applicant's Response to the FORM supports the Judge's finding that Applicant did not take steps to address most of her delinquent debts until after the SOR was issued.

2. Whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines.

Applicant contends the Administrative Judge failed to properly apply various provisions of the Adjudicative Guidelines that are pertinent to her case. Specifically, Applicant argues: (a) the Judge failed to apply, or give an explanation for not applying certain Personal Conduct Mitigating Conditions; (b) the Judge failed to apply, or give an explanation for not applying certain Financial Considerations Mitigating Conditions; (c) the Judge did not properly apply the whole person concept in her case; and (d) the Judge failed to consider the factors set forth in Section E2.2.5. The Board will address Applicant's arguments in turn.

(a) Personal Conduct Mitigating Conditions. Applicant argues the Administrative Judge failed to apply, or give an explanation for not applying, Personal Conduct Mitigating Conditions 1, 2, 3 and 5. For the reasons that follow, the Board concludes Applicant's argument about Mitigating Condition 1 fails to demonstrate the Judge committed harmful error, and her arguments about Mitigating Conditions 2, 3, and 5 lack merit.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 1 ⁽⁵⁾ because there is no evidence proving her debts were over 180 days past due or that she deliberately omitted those debts when she completed the security form. As discussed earlier in this decision, the Judge's finding of falsification is sustainable with respect to Applicant's omission of those debts that she has conceded were more than 180 days past due when she completed the security form. As to Applicant's omission of those debts, the Judge was not required to apply Personal Conduct Mitigating Condition 1. Application of Personal Conduct Mitigating Condition 1 to Applicant's omission of other debts not proven to be more than 180 days past due would not negate or diminish the negative security significance of her omission of delinquent debts that were more than 180 days past due. Accordingly, Judge's failure to distinguish between the two categories of Applicant's debts was harmless error. *See, e.g.,* ISCR Case No. 00-0104 (March 21, 2001) at p. 3 (error is harmless when, upon consideration of record as a whole, there is not a significant chance that, but for the error, the Judge would have reached a different result); ISCR Case No. 00-0244 (January 29, 2001) at p. 6 (error is harmless when there is not a significant chance that it fatally affects an otherwise sustainable decision).

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 2 ⁽⁶⁾ because "[a]t no time did Applicant provide false or misleading statements to Defense Investigative Service personnel or Department (sic) Office of Hearings and Appeals personnel regarding her case." Applicant's argument lacks merit. Implicit in Applicant's argument is the premise that her disclosures about her financial situation to an investigator and DOHA personnel mitigated her omission of various delinquent debts when she completed the security form in February 1999. Correction of a falsification is covered by Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2. *See* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (explaining difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). Applicant's argument does not demonstrate the Judge should have applied Personal Conduct Mitigating Condition 2.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 3 ⁽⁷⁾ because she voluntarily provided answers to the Financial Interrogatories before the SOR was issued. Applicant's argument is not persuasive. Applicant was confronted with the fact that she had failed to disclose all her delinquent debts before the SOR was issued.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 5 ⁽⁸⁾ because she provided information about her finances in response to the Financial Interrogatories and her disclosures significantly reduce or eliminate any vulnerability to coercion, exploitation or duress. The Judge did not need to consider whether to

apply Personal Condition Mitigating Condition 5 because the Judge did not (i) find that Applicant's falsification made her vulnerable to coercion, exploitation, or duress, or (ii) apply Personal Conduct Disqualifying Condition 4.⁽⁹⁾ *See, e.g.,* ISCR Case No. 99-0417 (February 24, 2000) at p. 4.

(b) Financial Considerations Mitigating Conditions. Applicant argues the Administrative Judge failed to apply, or failed to give an explanation for not applying, Financial Considerations Mitigating Conditions 1, 2 and 3.

Applicant argues the Administrative Judge should have applied Financial Considerations Mitigating Condition 1⁽¹⁰⁾ because she began to address her delinquent debts before the SOR was issued. Applicant's argument lacks merit. The issuance of an SOR is not the sole time against which an applicant's conduct is measured to determine whether it is recent or not recent. Besides, the record evidence in this case shows that as of the date the SOR was issued Applicant still had delinquent debts that were not resolved, and as of the date Applicant submitted her response to the FORM she had some debts that were still not resolved. The evidence that Applicant still had unresolved delinquent debts militated against application of Financial Considerations Mitigating Condition 1.

Applicant argues the Administrative Judge should have applied Financial Considerations Mitigating Condition 2⁽¹¹⁾ because "[t]he majority of the debt was incurred during the marriage to her estranged husband" and she has since either paid her over due debts or made arrangements to pay them. Even if the majority of Applicant's delinquent debts were incurred during the marriage to her estranged husband, such a fact would not show that those debts were "an isolated incident." Furthermore, Applicant's efforts at resolving her delinquent debts are irrelevant to a determination whether those debts were "an isolated incident." Given the record evidence in this case, it is untenable for Applicant to argue that the Judge should have viewed her history of delinquent debts as merely "an isolated incident."

Applicant argues the Administrative Judge should have applied Financial Considerations Mitigating Condition 3⁽¹²⁾ because on the security form Appellant listed that she was separated from her husband. This argument lacks merit. Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate the evidence concerning her delinquent debts. Directive, Additional Procedural Guidance, Item E3.1.15. When Applicant submitted her answer to the SOR and her response to the FORM, she did not provide any information or otherwise indicate that her delinquent debts were connected, directly or indirectly, to her separation from her husband. Furthermore, Applicant's written statement to a Defense Security Service investigator (FORM, Item 8) and her responses to the Financial Interrogatories (FORM, Item 9) do not indicate that her delinquent debts were caused, or contributed to, by the separation from her husband. Accordingly, Applicant was not entitled to have the Judge apply Financial Considerations Mitigating Condition 3 in this case. *See, e.g.,* ISCR Case No. 99-0519 (February 23, 2001) at p. 12 (applicant has burden of presenting evidence to demonstrate applicability of mitigating condition).

(c) Whole person concept. Applicant contends the Administrative Judge did not properly apply the whole person concept, as required by Directive, Section E2.2.1. In support of this contention, Applicant argues the Judge failed to consider her case in light of the various factors enumerated under Section E2.2.1. Applicant's arguments fail to demonstrate the Judge erred.

Some of Applicant's arguments in support of this appeal issue are based on statements and assertions that go beyond the record evidence. Such statements and assertions constitute new evidence. As discussed earlier in this decision, the Board cannot consider new evidence, and the Board will not conclude the Administrative Judge erred based on evidence that was not submitted for the Judge's consideration.

Other arguments Applicant makes in support of this appeal issue overlap or repeat arguments she makes in connection with the Personal Conduct Mitigating Conditions and the Financial Considerations Mitigating Conditions. The Board will not repeat its discussion of those mitigating conditions.

What remains of Applicant's arguments about the whole person concept is her interpretation of the record evidence. The ability of an appealing party to set forth an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's findings and conclusions are erroneous. *See, e.g.,* ISCR Case No. 99-0435 (September 22, 2000) at p. 4. In this case, except for the harmless error discussed earlier in this decision, the Judge's findings and conclusions about Applicant's falsification of the security form and her delinquent debts reflect a reasonable interpretation of the record

evidence that is consistent with the requirement that the Judge evaluate Applicant's security eligibility in light of the whole person concept.

(d) Directive, Section E2.2.5. Applicant contends the Administrative Judge did not properly apply the Adjudicative Procedures. In support of this contention, Applicant argues the Judge did not consider the factors enumerated under Directive, Section E2.2.5.

Some of Applicant's arguments in support of this appeal issue are based on statements and assertions that go beyond the record evidence. Such statements and assertions constitute new evidence. As discussed earlier in this decision, the Board cannot consider new evidence, and the Board will not conclude the Administrative Judge erred based on evidence that was not submitted for the Judge's consideration.

Other arguments Applicant makes in support of this appeal issue overlap or repeat arguments she makes in connection with the Personal Conduct Mitigating Conditions and the Financial Considerations Mitigating Conditions, as well as arguments she makes in connection with the whole person concept. The Board will not repeat its discussion and resolution of those arguments.

To the extent that Applicant's arguments about the Section E2.2.5 factors show that there is some record evidence that could be considered mitigating in nature, they do not demonstrate the Administrative Judge erred. The mere presence of favorable evidence does not compel a Judge to issue a favorable security clearance decision. Rather, a Judge must consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. See, e.g., ISCR Case No. 99-0710 (March 19, 2001) at p. 5. Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 00-0104 (March 21, 2001) at p. 6. Considering the record as a whole, the Board concludes the Judge's weighing of the record evidence was not arbitrary, capricious, or contrary to law. Consideration of the Section E2.2.5 factors did not compel the Judge, as a matter of law, to render a favorable security clearance decision in this case.

3. Whether the Administrative Judge erred by entering a formal finding against Applicant with respect to Guideline J (Criminal Conduct). Applicant contends the Administrative Judge should have entered a formal finding in her favor with respect to Guideline J (Criminal Conduct) because: (a) the Administrative Judge found in her favor with respect to the matter alleged in SOR paragraph 3.b.; and (b) the Administrative Judge erred by finding that she engaged in falsification of the security form she completed in February 1999.

The Administrative Judge's favorable formal finding with respect to SOR paragraph 3.b. is not at issue on appeal. The only basis upon which the Judge could enter a formal finding against Applicant under Guideline J was his finding that she falsified the security form she completed in February 1999 and his conclusion that the falsification constituted a violation of 18 U.S.C. 1001. As discussed earlier in this decision, Applicant has failed to demonstrate the Judge erred by finding that she falsified the security form. Given that sustainable finding of falsification, the Judge had a rational basis for concluding Applicant's falsification was a violation of 18 U.S.C. 1001, and entering a formal finding against her under Guideline J with respect to SOR paragraph 3.a.

4. Whether a criminal matter that was resolved in Applicant's favor can be removed from the written record. Applicant notes that the Administrative Judge entered a formal finding in her favor with respect to the matter covered by SOR paragraph 3.b. and asks that the criminal matter covered by SOR paragraph 3.b. be removed from the written record to preclude it from arising in the future. Applicant asks for relief which cannot be granted in these proceedings. Nothing in Executive Order 10865 or the Directive gives an Administrative Judge or the Board authority to expunge or remove matters from an applicant's record.

Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Accordingly, the Board affirmed the Administrative Judge's adverse security clearance 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. On appeal, Applicant offers explanations and background information about various documents contained in the record before the Administrative Judge. Such explanations and background information are being offered to supplement the evidence that was before the Judge. As such, those explanations and background information constitute new evidence. *See, e.g.*, ISCR Case No. 97-0193 (March 5, 1998) at pp. 2-3.

2. SOR allegations need not meet the stringent requirements of a criminal indictment. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, the fact that administrative pleadings such as an SOR are not held to stringent standards does not relieve an Administrative Judge of the need to consider the plain language of a question that an applicant is alleged to have falsely answered.

3. The SOR did not allege that Applicant falsified the security questionnaire in connection with her response to question 39 of the security form. Furthermore, the SOR was not amended pursuant to Directive, Additional Procedural Guidance, Item E3.1.17. Accordingly, the Board's discussion is limited to Applicant's answer to question 38 of the security form.

4. Applicant correctly notes the Board has held that, absent record evidence supporting a controverted SOR allegation, mere disbelief in an applicant's statements is an insufficient basis for an Administrative Judge to find the applicant engaged in the conduct alleged. However, the Judge did not commit such an error in this case.

5. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."

6. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

7. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

8. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

9. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress"

10. "The behavior was not recent."

11. "It was an isolated incident."

12. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."