

DATE: December 12, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0345

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision, dated July 25, 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 11, 2000. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

Applicant submitted an answer to the answer and elected to have a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared and a copy provided to Applicant. No response to the FORM was received from Applicant. The case was then assigned to an Administrative Judge for determination.

The Administrative Judge issued a written decision, dated July 25, 2001. In that decision, the Judge entered formal findings in favor of Applicant with respect to Guideline E and Guideline J, but entered formal findings against Applicant with respect to Guideline F and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse security clearance decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing

party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issue

The Administrative Judge's favorable findings and conclusions with respect to Guideline E and Guideline J are not at issue on appeal.

Applicant makes several arguments: (1) he is an honest debtor who used the bankruptcy law in 1979 and 1987 to obtain relief "from the weight of oppressive indebtedness" and get "a fresh start"; (2) the Judge failed to mention that he reaffirmed all his debts except one after the 1987 bankruptcy and satisfied those reaffirmed debts; (3) he sought to use a Chapter 13 bankruptcy in 1993 to help pay all his debts, his failure to successfully comply with its terms was due to his wife losing her job, and he paid off his debts eventually; (4) the Judge's findings about his debt to a cable provider are wrong because of a "gross miscommunication of the facts"; and (5) his job record and his record of holding a security clearance weigh in his favor and show he would not let financial problems lead him to harm his employer, his security clearance, or his standing with his family. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant's brief contains various factual assertions that go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant cannot fairly challenge the Administrative Judge's findings and conclusions based on evidence that was not presented for the Judge's consideration. ⁽¹⁾ Accordingly, to the extent that Applicant's arguments rely on new evidence to challenge the Judge's findings and conclusions, the Board will not consider them.

The fact that Applicant is legally free to seek relief from his debts in bankruptcy or does not demonstrate the Administrative Judge erred. The legality of Applicant's exercise of his rights under bankruptcy law does not preclude the government from considering the negative security implications of his history of recurring financial difficulties. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4 (discussing why discharge in bankruptcy does not preclude consideration of security implications of applicant's financial problems that led to the bankruptcy). Given the record evidence that Applicant has a long history of financial difficulties that resulted in his seeking relief through bankruptcy proceedings in 1979, 1987, and 1993, it was not arbitrary or capricious for the Judge to conclude Applicant's history of financial difficulties raises security concerns under Guideline F. Furthermore, it was proper for the Judge to consider the fact that Applicant had financial difficulties even after he received bankruptcy relief in 1979 and 1987.

The record evidence concerning Applicant's job record and his holding a security clearance constitutes favorable evidence. However, the mere presence of favorable record evidence is not dispositive. An Administrative Judge must consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Furthermore, the government need not wait until an applicant mishandles or fails to properly safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Indeed, there are many types of conduct and circumstances other than security violations that can provide a rational basis for an adverse security clearance decision. In this case, Applicant's history of recurring financial difficulties provides a rational basis for the Judge's adverse

conclusions about his security eligibility. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at pp. 2-3 (discussing security significance of history of excessive indebtedness or recurring financial difficulties).

The Administrative Judge's findings of fact are sustainable on the basis of the record evidence below and his conclusions rationally follow his findings of fact. Furthermore, the Judge's findings and conclusions provide a rational basis for his adverse conclusions about Applicant's security eligibility. Applicant's arguments to the contrary are not persuasive.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms 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. In this regard, the Board notes Applicant was given the opportunity to submit a response to the FORM. No response to the FORM was received from Applicant. By failing to respond to the FORM, Applicant waived his right to have additional information considered in his case.