

DATE: April 19, 2001

In Re:

SSN: -----

Applicant for ADP Position

ADP Case No. 00-0353

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision, dated December 5, 2000, in which he 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, dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended). Under the MOA, the procedural provisions of the DoD Directive 5220.6 are applied by DOHA in processing trustworthiness cases. See ADP Case No. 30-1130 (January 4, 2001) at p. 2.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 1, 2000 to Applicant. The SOR was based on Guideline F (Financial Considerations). A hearing was held on October 19, 2000.

The Administrative Judge issued a written decision, dated December 5, 2000. The Judge found that Applicant had overdue debts totaling \$7,966.00 with twelve creditors that were many years old. He concluded that Applicant recognized her continuing responsibility for these debts but he also concluded that circumstances indicated that she would be unable to satisfy the debts any time soon and she would thus continue to be under financial stress for the foreseeable future. The Judge then concluded that it is not clearly consistent with the national interest to make or continue a trustworthiness determination for Applicant, or to make a determination that Applicant is eligible to occupy a

sensitive position. Applicant appealed the Administrative Judge's adverse decision.

Appeal Issue⁽¹⁾

Applicant contends on appeal that (1) there is no other evidence of wrongdoing on her part and she is fully committed to making amends for the financial mistakes she made; (2) a witness testified favorably on her behalf and she has always performed well on the job and has always been discreet; (3) the Administrative Judge was prejudiced against her because of her national origin; (4) the Administrative Judge erred by concluding that Applicant would be unable to satisfy her outstanding debts in the foreseeable future since she will be able to do so within 36 months; and (5) the fact that she is unable to pay her debts is not a reason to revoke her eligibility for a sensitive position and revocation is unnecessary, harsh and inappropriate. The Board construes Applicant's various arguments as raising the issue of whether the Judge's decision was arbitrary, capricious or contrary to law.

Concerning Applicant's statements that she has engaged in no other wrongdoing and is fully committed to making amends for her overdue debts, neither of these assertions demonstrate that the Administrative Judge erred when he concluded that Applicant is ineligible for a sensitive position. Even if applicants have not engaged in other conduct that may have serious negative implications for their eligibility for a sensitive position, it does not follow that a Judge cannot conclude their admitted or proven conduct makes them ineligible for a sensitive position. *See* ISCR Case No. 99-0254 (February 16, 2000) at p. 3; ISCR Case No. 98-0476 (December 14, 1999) at p. 4. Additionally, Applicant's statements about proposed future conduct to eliminate her debts, while relevant to her motivation and intentions, are not as probative as demonstrated actions to resolve the problem. *See, e.g.,* ISCR Case No. 99-0447 (July 25, 2000) at p. 3 ("A promise to take remedial steps in the future is not evidence of reform or rehabilitation.").

On appeal, Applicant makes reference to her job performance and positive witness testimony. Under the whole person concept, job performance and the favorable assessments of those familiar with an applicant are relevant considerations. In this case, however, the evidence cited by Applicant fails to demonstrate that the Administrative Judge erred when he concluded that Applicant had failed to mitigate the government's concerns about her trustworthiness based on her history of unresolved financial difficulties. The Judge performed his task of weighing both the favorable and the unfavorable evidence in a manner that is supported by the record.

By complaining that the Administrative Judge was prejudiced against her because of her national origin, Applicant has raised the issue of bias. There is a rebuttable presumption that quasi-judicial officers are impartial and unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The appealing party has a heavy burden when seeking to overcome or rebut that presumption. *See, e.g.,* ISCR Case No. 99-0007 (November 28, 2000) at p. 3; ISCR Case No. 97-0783 (August 7, 1998) at p. 2. The issue is not whether the appealing party personally believes that the Administrative Judge was biased. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or impartiality of the Judge. *See, e.g.,* ISCR Case No. 99-0710 (March 19, 2001) at p. 5. Applicant fails to identify anything in the record below or in the Judge's decision that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case. Furthermore, our reading of the record below and the Judge's decision does not reveal anything that indicates or suggests bias by the Judge.

Applicant asserts on appeal that she will be able to clear up her debts within 36 months and challenges the Administrative Judge's conclusion that she will be unable to satisfy her debts for the foreseeable future. Applicant testified at the hearing that she entered into an agreement with a debt consolidation organization and had planned to satisfy the consolidated debts within three and a half years from the hearing date of October 19, 2000. However, Applicant presented no documentary evidence to corroborate her assertion that she had committed to making regular, steady payments of a specified amount. Given the record evidence, it was not arbitrary, capricious or contrary to law for the Judge to conclude that there was no realistic expectation that Applicant would significantly improve her financial situation within the foreseeable future. *See, e.g.,* ISCR Case No. 99-0012 (December 1, 1999) at p. 3 ("Failure to present documentation about financial matters is a factor to be considered by a Judge in evaluating such claims.").

Applicant asserts the revocation of her eligibility for a sensitive position is unnecessary, harsh and inappropriate, even though she cannot currently pay her outstanding debts. Applicant's assertion is without merit. The federal government

must be able to repose a high degree of trust and confidence in persons placed in sensitive positions. Persons with access to government computers containing important, sensitive information must be held to high standards of conduct. *See* ADP Case No. 30-1130 (January 4, 2001) at p. 3. Under Guideline F, it is sufficient that the evidence shows an applicant has a history of unresolved financial difficulties that places the applicant in a situation where he or she is more vulnerable or susceptible to bribery or financial pressures. In areas not involving national security concerns, the government has a legitimate interest in protecting against bribery attempts aimed at its officers, employees, or agents. *See Marshall v. District of Columbia Government*, 559 F.2d 726, 729-730 (D.C. Cir. 1977); *Waide v. United States*, 229 Ct. Cl. 833, 835 (1982). Just as there is a legitimate governmental interest in avoiding or reducing the risk that law enforcement officers may be vulnerable to bribery or other financial misconduct due to personal financial difficulties, the federal government has a similar interest in avoiding or reducing the risk that persons in sensitive positions might mishandle or fail to properly safeguard sensitive information systems because their unresolved financial difficulties make them vulnerable or susceptible to bribery or other undue financial pressures. Accordingly, Applicant's history of unresolved financial problems provides a rational basis for the Judge's adverse decision.

Conclusion

Applicant has failed to meet her burden of demonstrating error below. Accordingly, the Board affirms the Judge's adverse sensitive position determination in this case.

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. 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. Nevertheless, 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.