

DATE: November 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0377

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Robert S. Gardner, Esq.

Administrative Judge Roger C. Wesley issued a decision, dated May 23, 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 erred by concluding that Applicant's financial situation poses a security risk; and (2) whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 3, 2000. The SOR was based on Guideline F (Financial Considerations), Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on March 28, 2001. The Administrative Judge issued a written decision, dated May 23, 2001, in which he 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 Administrative Judge's adverse 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 Issues

The Administrative Judge entered formal findings for Applicant under Guideline H (Drug Involvement) and Guideline J (Criminal Conduct) with respect to Applicant's past history of prescription drug misuse. Those favorable formal findings are not at issue on appeal.

1. Whether the Administrative Judge erred by concluding that Applicant's financial situation poses a security risk. Applicant does not challenge the Administrative Judge's findings of fact concerning his history of financial difficulties. However, Applicant does contend the Judge erred by concluding Applicant's financial situation poses a security risk. In support of this contention, Applicant argues: (a) Applicant's 1985 bankruptcy is mitigated because it occurred more than 15 years ago; (b) Applicant's most recent bankruptcy was extenuated by his military discharge and ensuing medical problems; (c) Applicant's March 2001 bankruptcy discharge has eliminated his vulnerability to coercion, pressure or influence due to financial need; and (d) Applicant's current financial situation poses no security risk under Guideline F.

(a) Applicant's argument about the significance of his 1985 bankruptcy lacks merit. After Applicant received a discharge of his debts in bankruptcy in 1985, he again experienced recurring financial difficulties that eventually resulted in unpaid debts in excess of \$200,000. Given the record evidence in this case, the facts and circumstance of Applicant's 1985 bankruptcy (including the financial difficulties that led to that bankruptcy) cannot be considered as separate or apart from his overall history of recurring financial difficulties that continued up to early 2001. Applicant's argument is based on an artificial, strained interpretation of the record evidence that runs contrary to the whole person concept. Accordingly, the Administrative Judge did not err by considering the 1985 bankruptcy in light of Applicant's recurring financial difficulties after that bankruptcy.

(b) Applicant's argument about the extenuating circumstances surrounding his most recent bankruptcy does not demonstrate the Administrative Judge erred. The Judge noted the extenuating circumstances surrounding Applicant's debts that led to his most recent bankruptcy. However, the Judge also concluded that Applicant failed to demonstrate due diligence in dealing with those debts before he filed for bankruptcy again. The Judge's reasoning on this point reflects a reasonable interpretation of the record evidence and does not demonstrate arbitrary or capricious action by him. *See, e.g.*, ISCR Case No. 00-0378 (August 15, 2001) at p. 4 (Judge must consider the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*).

(c) Applicant correctly notes that the Administrative Judge concluded that Applicant's recent discharge in bankruptcy eliminated any current exposure he might have to coercion, pressure or influence due to unresolved debts. However, that conclusion did not end the Judge's analysis. Indeed, the Judge considered Applicant's overall history of financial difficulties (including Applicant's financial difficulties after the 1985 bankruptcy) and decided that Applicant had not demonstrated a sufficient track record of financial reform to warrant a conclusion that Applicant had put his financial troubles behind him so that they would not be likely to recur. The Judge's reasoning reflects a reasonable interpretation of the record evidence and is consistent with his obligation to consider any evidence of rehabilitation and assess the likelihood of recurrence. *See* Directive, Section 6.3.5, Section 6.3.6, E2.2.1.6, and E2.2.1.9. Given the Judge's sustainable conclusion that Applicant might have a recurrence of financial difficulties in the future, it was not arbitrary or capricious for the Judge to conclude that Applicant's overall history of recurring financial difficulties raised security concerns even though he had eliminated any current exposure he might have to coercion, pressure or influence due to unresolved debts.

(d) For all the reasons given concerning Applicant's first three arguments, the Board concludes the Administrative Judge

had a rational basis for deciding that Applicant's current financial situation did not demonstrate a sufficient track record of financial reform and rehabilitation

that overcame the negative security implications of his long history of recurring financial difficulties, including his getting into financial difficulties again after the 1985 bankruptcy.

2. Whether the Administrative Judge's adverse conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant knowingly and willfully falsified a security questionnaire executed in January 1999 by failing to disclose material facts about his medical history (SOR 3.a), some unpaid judgments (SOR 3.d), and some of his delinquent debts (SOR 3.e).⁽¹⁾ The Judge concluded that Applicant's knowing and willful falsifications warranted adverse formal findings under Guideline E, but that "they were accompanied by enough extenuating and mitigating circumstances to escape violation of 10 U.S.C. Sec. 1001" and entered a formal finding in favor of Applicant under Guideline J (Criminal Conduct) with respect to his falsifications.

On appeal, Applicant contends the Administrative Judge's adverse conclusions under Guideline E are arbitrary, capricious, or contrary to law because: (a) the Judge's finding of knowing and willful falsifications is "effectively contradict[ed]" by the Judge's finding that Applicant did not violate 18 U.S.C. Section 1001; (b) "[b]ased on a clear reading of [18 U.S.C. Section 1001] , a willful and deliberate falsification on the SF 86 constitutes a violation regardless of any mitigation or extenuation"; (c) the Judge's finding that Applicant did not violate 18 U.S.C. Section 1001 "can only [lead to the conclusion] that the Administrative Judge actually is convinced that [Applicant] did not possess the culpable state of mind to make out a knowing and deliberate falsification or concealment"; and (d) if the Judge found that there are extenuating and mitigating circumstances which warrant a conclusion that Applicant did not violate 18 U.S.C. Section 1001, then such a conclusion must be based on a finding that the extenuating and mitigating circumstances "negate the presence of knowing and willful intent," and, therefore, the Judge should have also concluded that those extenuating and mitigating circumstances negate the knowing and willful intent necessary for entering adverse conclusions under Guideline E.

Applicant persuasively argues that the Administrative Judge's conclusions about Applicant's falsifications under Guideline E and Guideline J are inconsistent and cannot be reconciled.⁽²⁾ However, Applicant's argument seeks relief that is not warranted. If Applicant engaged in knowing and willful falsification of the security questionnaire, then it follows that Applicant's falsifications were a violation of 18 U.S.C. Section 1001. In this case, the Judge specifically explained why he found that Applicant engaged in a knowing and willful falsification of the security questionnaire as alleged in SOR 3.a, 3.d, and 3.e. The Judge's explanation reflects a reasonable interpretation of the record evidence and is sustainable. However, the Judge failed to articulate any rational basis for his conclusion that Applicant's falsifications did not violate 18 U.S.C. Section 1001.

If the Board were to accept Applicant proposed resolution of the inconsistency, it would have to reject the Administrative Judge's articulated explanation for finding Applicant engaged in knowing and willful falsifications as alleged in SOR 3.a, 3.d, and 3.e and accept the Judge's unexplained conclusion that Applicant's falsifications did not violate 18 U.S.C. Section 1001. The Board declines to do so. When faced with an articulated finding of knowing and willful falsification that is sustainable on the record evidence and a contradictory unexplained legal conclusion that does not follow rationally from the Judge's factual findings, the Board will sustain the articulated finding and decline to accept the unexplained legal conclusion.

Department Counsel notes that if the Administrative Judge erred on this point, such an error would have harmed the government, not Applicant. The Board rejects Department Counsel's argument that the Judge did not err, but agrees with Department Counsel's alternative argument that if the Judge erred the error harmed the government, not Applicant. Because Applicant was not harmed by the Judge's error, it would be unwarranted to grant Applicant relief from that error.

Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Therefore, 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. The Administrative Judge found that Applicant did not falsify the security questionnaire with respect to question 27 (SOR 3.b) or question 34 (SOR 3.c). Those favorable findings are not at issue on appeal.

2. Department Counsel contends "Applicant's argument attempts to manufacture an inconsistency in the Judge's decision where none exists." That contention is not persuasive.