

DATE: November 15, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0525

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Roy C. Dickson, Esq.

Administrative Judge Barry M. Sax issued a decision dated June 1, 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.

The 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) Did the Administrative Judge err in applying the Adjudicative Guidelines to Applicant's case? and (2) Was the Administrative Judge's decision arbitrary, capricious and contrary to law?

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 29, 2000. The SOR was based on Guideline F (Financial Considerations). A hearing was held on April 12, 2001.

The Administrative Judge issued a written decision, dated June 1, 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 Judge's unfavorable 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 Issues⁽¹⁾

1. Did the Administrative Judge err in applying the Adjudicative Guidelines in Applicant's case? Applicant contends that the Administrative Judge did not properly apply the Adjudicative Guidelines pertaining to Guideline F (Financial Considerations). In support of that contention, Applicant cites Title 32 of the Code of Federal Regulations, Part 154, Appendix F. The provisions quoted by Applicant are not the current version of the Adjudicative Guidelines. The current version of the Adjudicative Guidelines is contained both in the copy of the Directive provided to all applicants when they are sent an SOR and in Title 32 of the Code of Federal Regulations, Part 147. At the hearing, Appellant acknowledged that she had received a copy of the Directive with the SOR sent to her. *See* Hearing Transcript at p. 3.⁽²⁾

In the decision below, the Administrative Judge cited and applied the current version of the Financial Considerations Adjudicative Guidelines. Considering the record as a whole, the Judge: had a rational basis for: (a) applying Financial Considerations Disqualifying Guidelines 1⁽³⁾ and 3⁽⁴⁾; and (b) concluding that none of the Financial Considerations mitigating conditions applied.

2. Was the Administrative Judge's decision arbitrary, capricious and contrary to law? Applicant argues that she was an innocent spouse, that holding her responsible for her ex-husband's taxes is inequitable, and that her conduct does not constitute a history of living beyond her means. The Board construes these points as an argument that the decision below is arbitrary, capricious and contrary to law.

Much of Applicant's appeal relies heavily on new evidence, which the Board is prohibited from considering on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider Applicant's arguments only to the extent they are based on record evidence that was before the Administrative Judge.

A review of the record evidence shows that the Administrative Judge's decision represents a fair reading of the record. Applicant owes in excess of \$150,000 for several years taxes (Federal and State). As a result of these tax debts there are four notices of liens filed against Applicant. Applicant blames her ex-husband for the situation but offered little evidence to show a reasonable effort on her part to repair the situation over the six years she was aware of it. To the extent that there is record evidence that can be considered mitigating in nature it does not demonstrate error below. The mere presence of favorable or mitigating evidence does not compel an Administrative 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 or *vice versa*. Applicant's ability to argue for a more favorable weighing of the evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law. (See, ISCR case No 00-0250, July 11, 2001, at p. 9). The Judge's findings and conclusions in this case reflect a reasonable interpretation of the record evidence and are consistent with pertinent provisions of the Directive.

Conclusion

Applicant failed to meet her burden on appeal of demonstrating error below. The Administrative Judge's decision is affirmed.

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 for Applicant on the matter covered by SOR paragraph 1.a. That finding is not raised on appeal. The Administrative Judge made no formal finding on SOR paragraph 1.f., however, a reading of the Judge's decision leads the Board to conclude that the Judge implicitly found against Applicant on SOR paragraph 1.f.

2. A current version of the Adjudicative Guidelines can be found online at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1>.

3. "A history of not meeting financial obligations."

4. "Inability or unwillingness to satisfy debts."