

DATE: January 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0621

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey Anderson issued a decision, dated August 13, 2001, in which she 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 failed to consider the record evidence as a whole; (2) whether the Administrative Judge made erroneous findings of fact; and (3) 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 April 24, 2001. The SOR was based on Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). A hearing was held on July 6, 2001. The Administrative Judge issued a written decision, dated August 13, 2001, in which she 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 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 found that Applicant did not falsify a security clearance application as alleged in SOR paragraph 3.a and made a favorable formal finding with respect to Guideline E (Personal Conduct) based on that finding. The Judge's favorable finding and conclusion with respect to Guideline E are not at issue on appeal.

1. Whether the Administrative Judge failed to consider the record evidence as a whole. Appellant asserts: (a) the Judge drew adverse conclusions about Appellant "without firmly checking into my background amongst my family, friends, and co-workers"; (b) the Judge did not consider various pieces of evidence submitted by Applicant; and (c) "I find it astounding and unbelievable that my whole life in my favor can be summed up in as little as 11 sentences. However; my brush with the Law can be expounded upon and criticized for on 11 pages, many of which are incorrect." (underlining in original). The Board construes these assertions as raising the issue of whether the Judge failed to consider the record evidence as a whole.

The Administrative Judge had no obligation to check into Applicant's background. Indeed, because the Judge is responsible for acting in a fair and impartial manner, it would have been improper for the Judge to conduct any inquiries amongst Applicant's family, friends, and co-workers outside the context of Applicant's hearing. ⁽¹⁾ Applicant had the affirmative duty to present evidence on his behalf. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). Applicant was informed of his obligation to present evidence on his behalf by: (a) the provisions of the Directive; (b) the "Prehearing Guidance for DOHA hearings"; and (c) the opening remarks of the Judge at the hearing. There is no reasonable basis for Applicant to expect that the Judge would conduct any inquiries into his background outside the hearing process.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Furthermore, a Judge is not required to specifically mention or discuss every piece of record evidence when making a decision. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 6. An appealing party's unhappiness with the length of a Judge's discussion about certain evidence does not rebut the presumption that the Judge considered all the record evidence. Furthermore, the fact that a Judge gives less weight to certain evidence than the appealing party would have preferred does not rebut the presumption that the Judge considered all the record evidence. Applicant's dissatisfaction with the Judge's choice to give less weight to certain evidence than Applicant believes it was entitled to falls short of overcoming the presumption that the Judge considered all the record evidence. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 00-0417 (May 1, 2001) at p. 3. The Judge acted properly by weighing the record evidence as a whole and deciding whether the favorable evidence outweighed the unfavorable evidence or *vice versa*, and Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate the Judge erred in her weighing of the evidence in this case. *See, e.g.*, ISCR Case No. 00-0525 (November 15, 2001) at p. 3.

Administrative Judges have broad latitude and discretion in how to write their decisions, provided they issue decisions that (a) comply with pertinent provisions of the Directive, and (b) set forth their findings and conclusions with sufficient specificity and clarity that allow the parties and the Board to discern what the Judge is finding and concluding. *See* ISCR Case No. 98-0809 (August 19, 1999) at p. 2. If the Judge satisfies those requirements, then it does not matter whether the Judge's decision is long or short, or whether particular passages or sections are brief or lengthy. In this case, a reading of the decision below persuades the Board that the Judge: (i) fulfilled her duty to consider the evidence as a

whole, and (ii) issued a decision that is consistent with the requirements of pertinent provisions of the Directive and allows the parties and the Board to discern what the Judge found and concluded. Applicant's dissatisfaction with the Judge's choice to not write more extensively about evidence that he feels is favorable to him is insufficient to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge made erroneous findings of fact. Applicant also argues: (a) the Administrative Judge made erroneous findings about Applicant's arrest and conviction in 1997; and (b) the Judge made erroneous findings about Applicant's financial situation. For the reasons that follow, the Board concludes Applicant's arguments have mixed merit, but that the errors identified by Applicant are harmless ones.

(a) July 1997 incident. In connection with this incident, the Administrative Judge erred by finding (Decision at p. 3) that: (i) Applicant was charged with a felony and that he was charged with anything beyond driving under the influence of alcohol (a misdemeanor), and (ii) Applicant was sentenced to 8 months community service.⁽²⁾ But, the Judge did not err by finding (Decision at pp. 3, 8) that Applicant's probation (arising from his conviction for an October 1996 incident) was revoked as a result of the July 1997 incident. The record evidence shows Applicant's probation was revoked and then later restored as "an informal grant of probation." Later in the decision (at p. 8), the Judge correctly noted that Applicant's 1997 offence involved misdemeanor driving under the influence.

An Administrative Judge's decision is not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 3. Furthermore, any errors identified on appeal must be considered in the context of the Judge's decision as a whole to determine whether they are harmful or harmless. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6. The Judge's errors concerning the July 1997 incident are harmless under the particular facts of this case.

(b) Applicant's financial situation. Applicant (i) complains that the SOR allegation that he is financially overextended and at risk to engage in illegal acts to generate funds is "absolutely false"; and (ii) states the Judge took out of context a passage from Applicant's hearing testimony. Neither claim demonstrates the Judge erred in connection with her factual findings about Applicant's financial history.

(i) Applicant's disagreement with the wording of the SOR allegation is misplaced. The Administrative Judge properly summarized the SOR allegation that pertains to Guideline F (Financial Considerations). Absent a showing that an SOR is legally deficient, neither a Hearing Office Judge nor the Board need address an applicant's disagreement with the wording of an SOR allegation. Furthermore, in support of this argument, Applicant offers information about his current income and expenditures in his appeal brief. As noted earlier in this decision, the Board cannot consider new evidence on appeal.

(ii) Considering the decision below as a whole, the Administrative Judge's citation of a passage from Applicant's hearing testimony does not demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge's findings of fact about Applicant's financial history do not reflect a reasonable interpretation of the record evidence.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also contends: (a) the Judge's erroneous findings have "assassinated my character in order to label me 'Unworthy!"; (b) the Judge misapplied Criminal Conduct Disqualifying Condition 1; (c) the Judge misapplied the Financial Considerations Disqualifying Conditions 1 and 3 and failed to apply any Financial Considerations Mitigating Conditions; (d) the Judge misapplied three of the general factors cited on pages 6-7 of the decision below; and (e) he, his supervisor, friends, and coworkers do not believe the government has met its burden of proof against him. The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) The Board has already discussed Applicant's specific claims that the Administrative Judge failed to consider the record evidence as a whole and made erroneous findings of fact. We need not repeat our discussion and resolution of those claims.

Most of the Administrative Judge's findings of fact have not been challenged on appeal. Furthermore, the few factual

errors identified by Applicant on appeal are harmless and do not detract significantly from the Judge's conclusions about Applicant's criminal record and his history of financial difficulties. The Judge's conclusions about Applicant's criminal record and his history of financial difficulties reflect a reasonable interpretation of the record evidence and follow rationally from the Judge's sustainable findings of fact.

(b) Given Applicant's felony conviction (for the October 1996 incident) and his misdemeanor conviction for the July 1997 incident, the Administrative Judge had a rational basis for applying Criminal Conduct Disqualifying Condition 1.

(3) The Judge's harmless errors concerning Applicant's conviction for the July 1997 incident (discussed earlier in this decision) do not render her application of Criminal Conduct Disqualifying Condition 1 arbitrary, capricious, or contrary to law.

(c) Applicant: (i) notes he provided the Administrative Judge with an explanation for why he did not pay the two delinquent debts covered by SOR paragraphs 2.b and 2.c; (ii) suggests the Judge gave undue weight to the fact that he spent \$3,000 on moving his mobile home closer to work; (iii) indicates he filed for bankruptcy in 1995 only after a bitter divorce and "a collection agency attack[ed] my credit report over a disputed bill"; (iv) asks why the government is taking action against him when he knows of other people with security clearances who have had their paychecks garnished by the Internal Revenue Service; (v) states he has never been dishonest with the government with respect to filing for bankruptcy; and (vi) and refers to the Administrative Judge's citation of pertinent Adjudicative Guidelines pertaining to Guideline F (Financial Considerations). The Board construes Applicant's statements as challenging the Judge's application of Financial Considerations Disqualifying Conditions 1 (4) and 3 (5) and the Judge's conclusion that none of the Financial Considerations Mitigating Conditions were applicable.

Applicant's candor with the government about his history of financial difficulties did not preclude the Judge from considering the security implications of the overall facts and circumstances of Applicant's history of financial difficulties. The security implications of an applicant's conduct and circumstances are not reduced or diminished by the fact that the applicant candidly admits his or her conduct and circumstances to the government.

The legality of Applicant's actions in filing for bankruptcy in 1995 did not bar the Administrative Judge from considering the security implications of Applicant's overall history of financial difficulties, including the two debts that were still delinquent as of the date of the hearing. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 3 ("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 financial difficulties.").

Applicant's reference to other persons with security clearances fails to demonstrate the Judge erred for two reasons. First, Applicant's reference is based on an assertion that goes beyond the record evidence and, as such, relies on new evidence. As discussed earlier in this decision, the Board may not consider new evidence. Second, even if Applicant does know persons with security clearances who have had their paychecks garnished by the Internal Revenue Service, there is no record evidence whether such persons have had their cases brought to the attention of appropriate DoD personnel for investigation, or whether such persons have had the facts and circumstances of their particular cases adjudicated by DoD personnel to determine their security eligibility. And in any event, the Judge's adverse decision in this case is not based solely on Applicant's history of financial difficulties, but rather includes the Judge's consideration of Applicant's convictions for the October 1996 felony incident and the July 1997 misdemeanor incident.

Applicant's statements, whether viewed individually or taken together, do not show the Administrative Judge erred with respect to her application of the Adjudicative Guidelines pertaining to Guideline F (Financial Considerations). Given the record evidence in this case, the Judge had a rational basis for applying of Financial Considerations Disqualifying Conditions 1 and 3 and concluding that none of the Financial Considerations itigating Conditions were applicable.

(d) On pages 6 and 7 of the decision below, the Administrative Judge listed the general factors to be considered in all industrial security clearance case, as set forth in the Directive, Items E2.2.1.1 through E2.2.1.9. Applicant takes exception to the Judge's citation of Items E2.2.1.6 ("The presence or absence of rehabilitation and other pertinent behavioral changes"), E2.2.1.8 ("The potential for pressure, coercion, exploitation, or duress") and E2.2.1.9 ("The likelihood of continuation or recurrence"). Applicant's argument fails to demonstrate the Judge erred. First, a Judge need not specifically list the general factors in a security clearance decision, but it is permissible for a Judge to list them.

Second, nothing in the decision below indicates or suggests that the Judge reached any conclusions remotely like the specific ones Applicant is concerned about in his arguments about Items E2.2.1.6, E2.2.1.8 and E2.2.1.9.

(e) The opinions of Applicant, his supervisor, friends, and coworkers that the government has not met its burden of proof against Applicant are not sufficient to demonstrate the Administrative Judge erred. A Judge must adjudicate an applicant's security eligibility based on an evaluation of the security significance of the overall facts and circumstances of the applicant's case, including application of pertinent provisions of the Directive. A Judge is not bound by the opinions of an applicant or other persons as to the security significance of the facts and circumstances of an applicant's case. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12 ("Moreover, an applicant's opinion as to the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve a Judge of his or her responsibility to evaluate the applicant's security eligibility."); ISCR Case No. 99-9020 (June 4, 2001) at p. 7 ("The opinions of an applicant's employer or supervisor about an applicant's suitability for a security clearance are not binding or conclusive on an Administrative Judge.").

Applicant's 1996 and 1997 alcohol-related criminal incidents and his history of financial difficulties provide a rational basis for the Administrative Judge's adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. 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. Of course, at a hearing the Administrative Judge has the right to ask reasonable questions of an applicant and any other person who testifies.

2. The Board notes that as a result of Applicant's conviction in March 1997 (for an alcohol-related incident that occurred in October 1996), Applicant was sentenced to 400 hours of community service.

3. "Allegations or admission of criminal conduct, regardless of whether the person was formally charged."

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

5. "Inability or unwillingness to satisfy debts."