

DATE: September 17, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0683

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated May 22, 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 certain findings of fact by the Administrative Judge are erroneous; (2) whether the Administrative Judge drew conclusions that are arbitrary, capricious, or not supported by the record evidence; 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 a Statement of Reasons (SOR) dated January 24, 2001 to Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on April 3, 2001. The Administrative Judge issued a written decision, dated May 22, 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.

Appeal Issues ⁽¹⁾

1. Whether certain findings of fact by the Administrative Judge are erroneous. The Administrative Judge made extensive findings of fact concerning the matters covered by the SOR. On appeal, Applicant does not challenge most of the Judge's findings. However, Applicant does argue: (a) the Administrative Judge erred by finding that around June 2000 Applicant settled one delinquent debt for less than the full amount; (b) the Administrative Judge erred by finding Applicant did not complete an extension course with a local university; (c) the Administrative Judge erred by finding that he intentionally used a false address in order to gain a lower tuition rate at a technical school; and (d) the Administrative Judge erred by finding that Applicant sought to downplay the seriousness of his conduct under SOR

paragraph 2.c.

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.* Accordingly, the Board need not review the factual findings by the Judge that Applicant has not challenged on appeal.

As to the factual findings challenged by Applicant, 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 the same record. 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 presence of conflicting record evidence does not diminish a Judge's fact-finding responsibility. When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. Accordingly, 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.*

(a) SOR paragraph 1.c. The record contains conflicting information concerning the debt covered by SOR 1.c. In responding to SOR paragraph 1.c, Applicant stated "Admit - resolved." Government Exhibit 4, which was admitted without objection from Applicant, is a compilation of three credit reports. The first credit report lists the debt as a credit card debt with the notation "Settlement accepted on this account." The second credit report lists the debt with the notation "Settled - Less than full bal." The third credit report lists the debt with the notation "Paid Chargoff." At the hearing, Applicant testified that he paid off the debt through monthly payments of \$200. When pressed for documentation about the payment schedule for this debt, Applicant said he had documentation but left it at home.

The record evidence shows, and Applicant admitted, the debt covered by SOR paragraph 1.c. had become delinquent. The burden rested with Applicant to present persuasive evidence that he had dealt with this debt. *See Directive, Additional Procedural Guidance, Item E3.1.15.* Applicant's statement at the hearing that he had documentation concerning satisfaction of this debt but left it at home: (a) did not satisfy his obligation to present relevant documentation at the hearing, and (b) did not preclude the Judge from making findings of fact based on the record evidence that was before her. Furthermore, the Judge was not required to accept Applicant's uncorroborated claim that he paid the debt in full. *See, e.g., ISCR Case No. 99-0012 (December 1, 1999) at p. 3 ("Failure to present documentation in support of an applicant's claims about financial matters is a factor to be considered by a Judge in evaluating such claims.").*

Considering the record as a whole (including Applicant's failure to present documentation to corroborate his claims about the debt), there is sufficient record evidence for the Board to sustain the Administrative Judge's finding that Applicant settled the debt covered by SOR paragraph 1.c for less than the full amount. However, there is insufficient record evidence for the Board to sustain the Judge's finding that Applicant settled the debt by paying only \$200. However, that error is harmless under the particular facts of this case.

(b) Extension course. Applicant discusses at some length the facts and circumstances surrounding the extension course that he took and argues: (i) he "withdrew" from the extension course, (ii) the Administrative Judge was wrong to find he "dropped out of the program," and (iii) there is an "important" difference between the Judge's finding and Applicant's characterization of the matter.

As a preliminary matter, the Board notes much of Applicant's argument is based on statements and factual assertions that go beyond the record evidence. As such, many of his statements constitute new evidence, which the Board cannot consider. *Directive, Additional Procedural Guidance, Item E3.1.29.* What remains of Applicant's argument is little more than a dispute over details that are essentially irrelevant to the issues in this case. The Board need not concern itself with disputes over minor details, regardless of how strongly an appealing party may feel about those details. *See Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the material issues raised by the*

parties to determine whether harmful error occurred."). Whether Applicant "withdrew" or "dropped out" from the extension course is essentially irrelevant to the security issues in this case.

(c) Applicant's address. Applicant contends the Administrative Judge erred by finding he intentionally used a false address in order to gain a lower tuition rate at a technical school. Applicant's arguments fail to demonstrate the Judge erred.

The record below shows Applicant made statements about his intentions and state of mind when he listed the address of a friend's aunt as his address for purposes of signing up for a local technical school program. Applicant's statements are relevant evidence. However, Applicant's explanations were not binding on the Administrative Judge. Rather, the Judge had the obligation to consider Applicant's explanations in light of the record as a whole. *See, e.g.*, ISCR Case No. 00-0044 (December 22, 2000) at p. 3; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge found Applicant's explanations to be unpersuasive and concluded that Applicant deliberately used a false address in order to gain a lower tuition rate at a technical school. Applicant's appeal arguments do not demonstrate the Judge's finding is arbitrary, capricious, or contrary to law. Considering the record evidence in this case, the Judge's findings on this aspect of the case are sustainable.

(d) Seriousness of Applicant's conduct. The Administrative Judge indicated that "concerns for [Applicant's] judgment and reliability persist because of his efforts at the hearing to downplay the seriousness of the conduct [pertaining to SOR paragraph 2.c]." Applicant contends the Judge erred because: (i) the Judge's conclusion is "an arbitrary assessment" of Applicant's explanations; and (ii) the Judge failed to consider Applicant's honesty with the Defense Security Service investigator. Applicant's arguments fail to demonstrate the Judge erred. (2)

The Administrative Judge had the opportunity to observe Applicant when he testified and to assess his demeanor and credibility. Based on an assessment of the record evidence in light of Applicant's demeanor and credibility, the Judge could form impressions and reach conclusions about Applicant's explanations for his conduct. Considering the record as a whole, the Board concludes it was within the bounds of the Judge's discretion as the finder of fact to decide that Applicant's explanations for his conduct reflected an effort by Applicant to downplay the seriousness of his conduct. Furthermore, Applicant's disclosures to the Defense Security Service investigator are irrelevant to the Judge's assessment of Applicant's explanations for his conduct. Applicant's appeal arguments on this point lack merit.

2. Whether the Administrative Judge drew conclusions that are arbitrary, capricious, or not supported by the record evidence. Applicant also argues: (a) the Administrative Judge's findings take or portray Applicant's conduct and circumstances out of context; (b) the Judge drew conclusions about Applicant that fail to fairly take into account the facts and circumstances of Applicant's case; (c) the Judge erred by concluding Applicant had a history of financial difficulties throughout the last decade; and (d) the Judge erred by concluding Applicant has demonstrated he places his personal interests ahead of satisfying his debts to creditors.

On appeal, the Board reviews an Administrative Judge's conclusions to determine whether they are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3. Even if a Judge's findings of fact are supported by the record evidence or are unchallenged on appeal, the Board may still need to determine whether the inferences and conclusions the Judge drew from those findings are reasonable if those inferences and conclusions are challenged on appeal. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 3. "An Administrative Judge's responsibility to weigh the record evidence does not mean that the Judge is at liberty to draw whatever inferences or conclusions the Judge wants to. Rather, a Judge must: (a) draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence; (b) evaluate the facts and circumstances of an applicant's case in a manner consistent with the 'whole person' analysis required by the Directive; and (c) consider the totality of an applicant's conduct and circumstances under the 'clearly consistent with the national interest' standard." ISCR Case No. 99-0511 (December 19, 2000) at pp. 13-14 (citations and footnotes omitted). *Accord* ISCR Case No. 00-0593 (May 14, 2001) at p. 2.

Considering the record evidence in this case, the Administrative Judge did not take or portray Applicant's conduct and circumstances out of context. To the contrary, the Judge's detailed findings and conclusions show the Judge conscientiously sought to consider Applicant's conduct and circumstances in light of the totality of the record evidence.

Furthermore, our reading of the decision below persuades us the Judge fairly considered the particular facts and circumstances of Applicant's case, as required by the Directive. Applicant's vigorous disagreement with the Judge's conclusions fail to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law.

Given the record evidence in this case, the Administrative Judge had a rational basis for concluding Applicant had a history of financial difficulties throughout the last decade, and concluding that Applicant has demonstrated he places his personal interests ahead of satisfying his debts to creditors. The Judge's adverse conclusions reflect a reasonable interpretation of the record evidence. Applicant's arguments to the contrary fail to demonstrate the Judge erred.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge erred by not applying Financial Considerations Mitigating Conditions 1, 2, 3, and 4 to his case. Applicant also makes some arguments that the Board construes as questioning whether there is a rational basis for the Administrative Judge's adverse security clearance decision. The Board construes these contentions as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

(a) Financial Considerations Mitigating Conditions. Applicant contends the Administrative Judge should have applied Financial Considerations Mitigating Condition 1, ⁽³⁾ Financial Considerations Mitigating Condition 2, ⁽⁴⁾ Financial Considerations Mitigating Condition 3, ⁽⁵⁾ and Financial Considerations Mitigating Condition 4 ⁽⁶⁾ to his case. Applicant's contention lacks merit.

The Administrative Judge specifically gave reasons why she concluded that Financial Considerations Mitigating Conditions 1, 2, 3, and 4 were not applicable to Applicant's case. The Judge's discussion of these mitigating conditions is rational and is supported by the record evidence in this case. Applicant's argument about these mitigating conditions lacks any support in the record evidence and totally fails to show any error by the Judge.

(b) Rationale for Administrative Judge's decision. Applicant makes several arguments which, viewed collectively, can be construed as raising the issue of whether there is a rational basis for the Administrative Judge's adverse security clearance decision. For the reasons that follow, the Board concludes the Judge had a rational basis for her adverse security clearance decision.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The federal government need not wait until an applicant mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information.

In this case, Applicant's history of financial difficulties and his use of a false address in order to gain a lower tuition rate at a technical school provide a rational basis for the Administrative Judge's adverse conclusions about Applicant's security eligibility. The Judge's decision reflects a fair and impartial consideration of the record evidence as a whole, application of pertinent provisions of the Adjudicative Guidelines, and an evaluation of Applicant's case consistent with the "whole person" concept.

Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's May 22, 2001 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 made findings of fact and reached favorable conclusions about the matters covered by SOR paragraphs 1.c, 2.a, 2.b, and 3.a. Those findings and conclusions are not at issue on appeal.

2. On appeal, Applicant refers to SOR paragraph 2.c and states "[a] re-reading of the original investigative report reveals mistakes in the details. The errors are not huge but I should like to correct them." No investigative report was admitted as evidence at the hearing. If Applicant is referring to an investigative report that was not admitted as evidence, then it is irrelevant whether that report has any errors because it was not before the Administrative Judge and not considered by her in making her decision. If Applicant is referring to his December 20, 1999 written statement [Government Exhibit 2], which contains statements pertinent to the matter cover by SOR paragraph 2.c, his effort to "correct" any errors in it now is far too late. If Applicant believed that his written statement contained any factual errors, he should have raised the matter at the hearing and brought it to the Judge's attention for her consideration.

3. "The behavior was not recent."

4. "It was an isolated incident."

5. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."

6. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."