

DATE: October 16, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03695

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated April 18, 2002, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses 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.

Department Counsel's appeal presents the issue of whether the Administrative Judge's favorable 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 October 15, 2001. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on February 26, 2002. The Administrative Judge issued a written decision, dated April 18, 2002, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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 Issue

Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious and contrary to law because: (a) various findings of fact by the Judge are not supported by substantial record evidence; (b) the Judge misapplied various provisions of the Adjudicative Guidelines; and (c) the Judge's errors preclude affirmance of her favorable security clearance decision. Discussion of the appeal issues will be facilitated by reviewing them in terms of the different guidelines alleged in the SOR.

Administrative Judge's application of Financial Considerations Mitigating Conditions. The SOR alleged Applicant owed the Internal Revenue Service (IRS) back taxes, penalties, and interest as a result of federal tax liens filed against him for tax years 1990, 1993, and 1994. The Administrative Judge found that Applicant owed on the tax liens even though he had made some payments on them between 1995 and 1998. The Judge found Applicant had been consistently attempting to resolve the matter with the IRS but that he had been unable to resolve it until March 2002, on a date after the hearing. The Judge found that at that time the Applicant reached an agreement with the IRS wherein Applicant agreed to make payment in full on the smaller 1993 and 1994 tax lien obligations and agreed to pay \$200.00 per month on the larger tax lien (approximately \$6,000.00) through an automatic withdrawal instituted with his employer. ⁽¹⁾ The Judge concluded Applicant had rebutted security concerns about his financial problems. While she characterized Applicant's delay in reaching an agreement with the IRS as "troublesome," she concluded he had sufficiently met several of the mitigating conditions under Guideline F. Specifically, the Judge applied Financial Considerations Mitigating Condition 1 ⁽²⁾ because the tax debts occurred initially in the early 1990's. The Judge also specifically cited Financial Considerations Mitigating Condition 6 ⁽³⁾ and concluded that Applicant has initiated a good-faith effort to repay his tax debts. Stating that Applicant was in a financial position to completely resolve the IRS debt and had committed to repay it, the Administrative Judge ruled in favor of Applicant under the Financial Considerations Guideline.

On appeal, Department Counsel contends that the Administrative Judge's application of Financial Considerations Mitigating Conditions 1, 4 ⁽⁴⁾, and 6 is not supported by the evidence and is arbitrary, capricious, and contrary to law. Department Counsel's assertions have merit.

The Administrative Judge's characterization of Applicant's three federal tax debts with the IRS as "not recent" was error since it focused only upon the initial incurring of the debts. Just as significant from a security standpoint is the question of whether or not the debts have been resolved and, if so, in what manner have they been resolved. Applicant continued to be liable for the debts for a ten-year period up to, including, and continuing after the date of the hearing. His failure to discharge his tax debts was a continuing course of conduct that precluded the application of Financial Considerations Mitigating Condition 1 in his favor.

The Administrative Judge's reliance on Financial Considerations Mitigating Condition 4 was error. Mitigating Condition 4 requires that an applicant received or is receiving counseling for financial problems in addition to requiring clear indications that the problem is being resolved or is under control. The Judge made no finding that Applicant received or is receiving counseling for financial problems and the record evidence specifically indicates that Applicant did not receive counseling for his tax lien problems. ⁽⁵⁾ The Judge's partial enumeration of the mitigating factor in the "Policies" section of her decision indicated her desire to apply the second half of the mitigating factor independently of the first half. As the two sections of the mitigating factor are conjunctive rather than disjunctive, the Judge's application of the second portion without some reference to the first was error.

Regarding the second Mitigating Condition 4 issue of whether there are clear indications that the problem is being resolved or is under control, the Judge concluded only that Applicant was financially in a position to resolve the IRS debt. The record evidence of Applicant's agreement with the IRS establishes only the potential for eventual debt resolution as opposed to actual ongoing debt resolution. Thus, the record evidence and the Judge's own conclusion do not support application of the second half of Mitigating Condition 4 in Applicant's favor.

Department Counsel persuasively argues the record evidence does not support the Administrative Judge's application of Financial Considerations Mitigating Condition 6 in favor of Applicant. The record evidence shows that (a) Applicant has had interaction with the IRS for many years regarding the outstanding tax liens but his longstanding dealings with the IRS never resulted in resolution or satisfaction of his outstanding debt; (b) Applicant was making payments to the IRS at one time but ceased to make payments when he became unemployed in 1998 and did not resume payments once he found another job; (c) Applicant did not enter into an agreement with the IRS to retire the debt until after the hearing date; and (d) the only evidence that Applicant had reached an agreement with the IRS is his uncorroborated post-hearing written statement. Given Applicant's long history of failing to reach an understanding with the IRS that resulted in payment and significant reduction of the debt, it was arbitrary and capricious for the Judge to accept Applicant's uncorroborated claim that he had reached an agreement that would likely resolve the debt. *See, e.g.,*

ISCR Case No. 00-0620 (October 19, 2001) at p. 4 ("In making findings of fact, a Judge must make a reasonable, common sense evaluation about the significance of the presence or absence of corroborating evidence."); 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."). The Judge's finding that Applicant initiated a "good-faith" effort to resolve the IRS debt does not reflect a reasonable interpretation of the evidence as a whole. Although Applicant testified that he made several attempts over time to settle his debts with the IRS, the record does not contain enough detail about Applicant's efforts to support the conclusion that those efforts were made in good faith. Regarding evidence of the most recent attempt at settlement, as stated above, an uncorroborated statement by Applicant that he has reached an agreement with the IRS after his security clearance hearing does not support the conclusion that he has made a good-faith effort to resolve the debt. Given the record evidence in this case, there was no rational basis for the Judge to apply Financial Considerations Mitigating Condition 6.

Administrative Judge's findings about falsification allegations. The SOR (as amended at the hearing) alleged Applicant falsified a security questionnaire in September 1999 by failing to disclose a 1994 arrest for battery and domestic violence and by failing to disclose he had been terminated from his employment in April 1998 for unsatisfactory performance. The Administrative Judge found Applicant did not falsify the security questionnaire. She concluded that because Applicant listed other substantial adverse information on his security form, namely his difficulties with the IRS and two other arrests, he was credible when he stated that he forgot the 1994 arrest. She also accepted Applicant's explanation that he did not think he should report he was fired from a job on his security application since (1) he prevailed in a dispute with his employer and was awarded unemployment compensation, and (2) he believed he was terminated because the company was on the verge of bankruptcy.

Department Counsel challenges the Administrative Judge's finding that Applicant did not falsify the security questionnaire regarding his employment termination. Specifically, Department Counsel argues that the Judge erred by accepting Applicant's explanations concerning the employment termination omission as credible. Department Counsel's argument is persuasive.

There is no dispute that Applicant's 1998 job termination is not listed on the security questionnaire. An application for unemployment compensation benefits prepared for Applicant (Government Exhibit 7) indicates that Applicant was terminated for "inability to work/unsatisfactory work performance." Applicant testified that at one point he was told he had been fired.⁽⁶⁾ Given these facts, a reasonable person would know or should know that Applicant's 1998 termination fell under one or more of the five categories listed in question 20 of the questionnaire.⁽⁷⁾ Since Applicant's 1998 termination should have been listed on the questionnaire but was not, the issue before the Administrative Judge was whether Applicant falsified the security questionnaire. A review of the decision below shows the Judge's findings on this issue turn on her conclusion that Applicant's explanation was credible.

Although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive,

Additional Procedural Guidance, Item E3.1.32.1), that deference does not immunize credibility determinations from review. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4. As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985):

"[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."

Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the applicant's demeanor when applicant testifies. Thus, the Board must consider whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at p. 3.

Department Counsel correctly points out that Applicant testified that he was on notice that, in the context of an unemployment compensation claim, the position of his former employer was that he had been fired. Applicant apparently disagreed with the contention that he had been fired but his testimony on why he did not feel he had been fired is vague and difficult to follow.⁽⁸⁾ His responses to questions on this point included oblique and disjointed references to his receipt of unemployment compensation, layoffs, a salary dispute, the company filing for bankruptcy and disagreements that included job performance. Applicant provided no coherent explanation for his belief that his receipt of unemployment compensation benefits meant that he had not been fired. Department Counsel has met its burden on appeal of demonstrating that the Administrative Judge's credibility determination was unreasonable even considering the deference owed to such a determination. In light of the other record evidence, including evidence that establishes that he had been fired and knew it, Applicant's explanations do not provide evidence of a reasonable belief that he had not been fired sufficient to sustain the Judge's finding that Applicant did not falsify the security questionnaire.

Administrative Judge's application of Personal Conduct Mitigating Conditions. The Administrative Judge listed Personal Conduct Mitigating Conditions 2⁽⁹⁾ and 3⁽¹⁰⁾ as being applicable to Applicant's case (Decision at p.6). The Judge then explained why she concluded Personal Conduct Mitigating Condition 3 was applicable to Applicant's failure to list his 1994 arrest for battery and domestic violence. She made a finding that during an April 2000 interview with an agent of the Defense Security Service (DSS), Applicant declared that he simply forgot to list the 1994 arrest on his security form and "there is no information that the agent confronted him in order to elicit this information." Consequently, in her conclusions the Judge stated that she found it believable that Applicant did not remember the 1994 charge when completing the security questionnaire but that he remembered and revealed the 1994 arrest in his DSS interview promptly and without any noted confrontation. Department Counsel argues: (a) the Judge impermissibly made an inference that Applicant had not been confronted by the DSS agent based on a lack of record evidence and erroneously concluded that Applicant had met his burden of showing he was not confronted by the DSS agent regarding his 1994 arrest; (b) the Judge's inference that no confrontation took place improperly shifted the burden of proof to the Government when it was the Applicant's burden to present evidence in support of mitigating his case; (c) the Judge ignored judicial admissions in Applicant's closing statement where he admits he did not discuss the 1994 arrest until after being confronted about arrests by the DSS agent; and (d) Applicant's disclosure was not "prompt" within the meaning of Mitigating Condition 3.

A review of the record convinces the Board that, contrary to the finding of the Administrative Judge, there is evidence of confrontation by the DSS agent and that evidence is sufficient to preclude application of Mitigating Condition 3. Department Counsel correctly points out that Applicant made an admission in his closing statement that, although not completely clear, indicates that Applicant mentioned the 1994 arrest after the investigator brought the question up.⁽¹¹⁾ Inasmuch as DOHA hearings are not governed by strict adherence to formal rules of evidence and Applicant's statement was an admission, it was appropriate for consideration by the Judge even though it occurred in closing statement. Additionally, the Board's review of the hearing transcript reveals another statement made by Applicant during the course of his testimony which indicates confrontation before he revealed the 1994 arrest.⁽¹²⁾ Taken together, these statements

by Applicant constitute evidence that undercuts the Judge's conclusion that the record contained no evidence of confrontation. Department Counsel also persuasively argues that disclosure of the 1994 arrest six months after Applicant omitted the arrest on his security questionnaire was not "prompt." Given the fact that evidence of confrontation exists in the record, Department Counsel's first two arguments on this point need not be addressed. The Administrative Judge erred by applying Personal Conduct Mitigating Condition 3 in favor of Applicant.

Department Counsel asserts that the Judge's application of Personal Conduct Mitigating Condition 2 was error. Personal Conduct Mitigating Condition 2 is not applicable to the facts and circumstances of Applicant's case. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (explaining difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). There is no mention of Personal Conduct Mitigating Condition 2 in the Judge's decision other than its listing in the "Policies" section. To the extent that the Judge relied on Mitigating Condition 2 in her analysis of the case under the Personal Conduct Guideline such reliance was in error.

Administrative Judge's application of Criminal Conduct Mitigating Conditions. The SOR alleged Applicant had a history or pattern of criminal activity as evidenced by the following: (1) a September 1989 arrest and subsequent conviction for bringing a weapon to jail; (2) a June 1992 arrest for battery/domestic violence; (3) an August 1994 arrest for battery/domestic violence; (4) a July 1998 arrest for retail theft which resulted in a nolo contendere plea to petit theft; and (5) acts of falsification in omitting the 1994 arrest and his 1998 termination from employment from his 1999 security questionnaire in violation of 18 U.S.C. §1001. The Administrative Judge acknowledged the arrests but concluded that Applicant had refuted the 1999 falsification allegations. The Judge concluded that except for the 1989 criminal involvement, which she characterized as "dated," the criminal matters seemed to grow out of family pressures which no longer existed. She concluded that Applicant's criminal conduct was mitigated under Criminal Conduct Mitigating Conditions 1, [\(13\)](#) 4, [\(14\)](#) and 6. [\(15\)](#)

Department Counsel argues that the Administrative Judge's finding that the Applicant mitigated the allegations of criminal conduct is not supported by the record evidence and is arbitrary, capricious and contrary to law. Specifically, Department Counsel asserts: (a) the 1998 arrest for retail theft and the acts of falsification are recent; (b) since 1989 Applicant has been arrested four times on a wide range of criminal offenses and the Judge failed to articulate a satisfactory explanation for her conclusion that the factors leading to the violation are not likely to recur; (c) there is no information described in the Administrative Judge's decision that supports a finding that there is clear evidence of rehabilitation; and (d) the Judge failed to consider Applicant's varied criminal record and his lack of candor when completing his security questionnaire and describing the circumstances of his 1998 shoplifting arrest at the hearing.

Department Counsel's arguments concerning Criminal Conduct Mitigating Condition 1 fail to articulate any persuasive reason as to why the Administrative Judge erred by finding that Applicant's criminal conduct is not recent.

Department Counsel persuasively argues that the Judge erred in applying Criminal Conduct Mitigating Condition 4. Given the totality of the record evidence of Applicant's history of criminal conduct, the Administrative Judge failed to articulate a rational explanation for why she concluded Applicant was not likely to repeat his criminal conduct. Because not all of Applicant's criminal conduct was related to his family problems, the end of Applicant's marriage does not provide a sufficient basis for the Judge's application of Criminal Conduct Mitigating Condition 4.

Department Counsel persuasively argues that the Judge erred in applying Criminal Conduct Mitigating Condition 6 in Applicant's favor. The Judge offers no reasons for her conclusions that Applicant is rehabilitated other than her observations that the 1998 shoplifting arrest was "out of character" for him and the fact that Applicant has a successful work record and has received very favorable performance evaluations. The Judge does not provide any independent analysis as to why the 1998 shoplifting arrest was out of character for Applicant. Instead she merely accepted Applicant's own characterization that his behavior was "out of character." [\(16\)](#) Therefore, this factor provides little weight in support of the Judge's conclusion that Applicant has been successfully rehabilitated. While a favorable work record arguably provides some evidence of successful rehabilitation, Criminal Conduct Mitigating Condition 6 requires more than just some evidence of rehabilitation. There must be "clear evidence of successful rehabilitation" considering the record as a whole, taking into account any record evidence that fairly detracts from that favorable evidence. *See, e.g.*, ISCR Case No. 99-0122 (April 7, 2000) at pp. 3-4. In Applicant's case, any evidence of successful rehabilitation must be evaluated in the context of considerable record evidence that detracts from such favorable evidence, namely (a)

Applicant's varied criminal record; (b) the extent of that record; (c) Applicant's less than credible explanation of his 1998 shoplifting arrest where he stated that he was addicted to shopping at a particular store and switched the price tags on merchandise in a deliberate attempt to get barred from the store; and (d) the falsification of Applicant's security questionnaire.

Department Counsel correctly points out that Applicant's evidence of reform was limited in comparison to his history of criminal conduct and his lack of candor regarding that conduct. The Administrative Judge gave undue weight to the evidence of reform in light of Applicant's overall negative history. It was arbitrary and capricious for the Judge to conclude that Mitigating Condition 6 could be applied in Applicant's favor.

Whether the Administrative Judge's decision should be reversed. Department Counsel contends the totality of the Administrative Judge's errors warrants reversal of the Judge's favorable security clearance decision. Considering the record as a whole, the Board concludes Department Counsel's contention is correct.

Conclusion

Department Counsel has met its burden of demonstrating harmful error below. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable 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. At the hearing, the Administrative Judge agreed to hold the record open in the case until March 5, 2002 to allow Applicant the opportunity to submit additional documents in support of his case. Applicant made timely submissions. The evidence of Applicant's post-hearing agreement with the IRS consists solely of a letter by Applicant, dated March 5, 2002, wherein he describes an agreement that was reached on an unspecified date. No corroborating documentation was submitted by Applicant.

2. "The behavior was not recent."

3. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

4. "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." While the Judge did not specifically mention this mitigating condition in the body of the "Conclusions" portion of her decision, she did list it as a mitigating factor in the "Policies" section of her decision.

Also, her comments in the "Conclusions" section included a general reference to all six Financial Considerations mitigating conditions. Application of Mitigating Condition 4 relates to the Judge's basic conclusion that Applicant will resolve his debt problems with the IRS. For these reasons, the Board construes the Administrative Judge's decision as relying, in part, upon application of Financial Considerations Mitigating Condition 4.

5. Transcript of hearing at pp. 81, 84.

6. Hearing transcript at p. 74.

7. The conduct of applicants must be evaluated in light of the reasonable person standard. See, e.g., ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 98-0355 (March 12, 1999) at p. 4.

8. Hearing transcript at pp. 36-37.

9. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

10. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

11. Hearing transcript at p. 96.

12. Hearing Transcript at p. 77. In response to a question by Department Counsel asking whether or not he remembered the 1994 arrest, Applicant stated "I do, I mean, as soon as the officer or the investigator came in and said that, I was like, yes, that's-."

13. "The criminal behavior was not recent."

14. ". . . the factors leading to the violation are not likely to recur."

15. "There is clear evidence of successful rehabilitation."

16. Decision at p. 4.