

DATE: August 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07657

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated February 26, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed.

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 following issues: (1) whether the Administrative Judge erred in applying certain Financial Considerations mitigating conditions; and (2) whether the Judge's conclusions in favor of Applicant are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 6, 2001. The SOR was based on Guideline F (Financial Considerations). A hearing was held on January 15, 2002. The Administrative Judge issued a written decision, dated February 26, 2002, in which he 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 Administrative 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 Issues

1. Whether the Administrative Judge erred in applying certain Financial Considerations mitigating conditions. Department Counsel contends the Administrative Judge erred by applying Financial Considerations Mitigating Conditions 3-(1) and 6-(2). Department Counsel argues that the Judge's application of Financial Considerations Mitigating Condition 3 is unwarranted because: (a) Applicant has had financial difficulties since 1988 that cannot be attributed to two brief periods of unemployment he suffered between October 1997 and March 1998; and (b) the Judge's application of Financial Considerations Mitigating Condition 3 is based on a piecemeal analysis of the record evidence. Department Counsel argues the Judge's application of Financial Considerations Mitigating Condition 6 is unwarranted because: (a) Applicant has a history of failing to resolve his financial difficulties despite promising to do so; (b) Applicant has failed to demonstrate that he has acted in a reasonable, prudent manner to deal with his financial difficulties; and (c) the record evidence does not support the Judge's finding that Applicant has shown "good prospects" for his current Chapter 13 bankruptcy plan to succeed.

Financial Considerations Mitigating Condition 3. The Administrative Judge found that Applicant had financial difficulties associated with his divorce in 1989, but that he slowly stabilized his finances and maintained a good payment history until after he was laid off in September 1997. The Judge applied Financial Considerations Mitigating Condition 3 based on Applicant's periods of unemployment in 1997 and 1998.

In support of its claim that the Administrative Judge erred by applying Financial Considerations Mitigating Condition 3, Department Counsel points to record evidence that shows: (a) Applicant had financial difficulties before his divorce in 1989; (b) Applicant continued to have financial difficulties in March 1991; and (c) Applicant failed to resolve his financial difficulties after he told investigators in July 1989 and March 1991 that he would deal with them. Department Counsel's arguments rely on matters not alleged in the SOR issued to Applicant.

The SOR issued to Applicant did not allege that he had financial difficulties in the late 1980s and early 1990s, and at the hearing Department Counsel did not move to amend the SOR to allege that Applicant had financial difficulties in the late 1980s and early 1990s. An applicant is entitled to receive reasonable notice of the allegations being made against him or her so that the applicant can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, an SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5. Furthermore, as long as there is fair notice to an applicant about the matters that are at issue in his or her case, and the applicant has a reasonable opportunity to respond, a security clearance case should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. Finally, conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; or (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9.

In this case, Applicant was placed on reasonable notice that his overall history of financial difficulties was being considered in assessing his security eligibility under Guideline F. Furthermore, Applicant had a reasonable opportunity to present evidence about his history of financial difficulties in response to the evidence submitted by Department Counsel at the hearing. Under the particular circumstances presented by this case, Department Counsel is not precluded

from relying on record evidence of Applicant's past financial difficulties to claim the Judge erred by applying Financial Considerations Mitigating Condition 3 in connection with the SOR allegations in this case.

Considering the record evidence as a whole, the Administrative Judge failed to articulate a sustainable basis for applying Financial Considerations Mitigating Condition 3 to Applicant's overall history of recurring financial difficulties. By focusing on Applicant's financial difficulties that arose in connection with his period of unemployment during 1997 and 1998, the Judge failed to explain why Financial Considerations Mitigating Condition 3 should apply despite the presence of record evidence indicating Applicant had a history of earlier financial difficulties to which that mitigating condition does not consistently apply. The Administrative Judge has failed to do a whole person analysis. The Judge's misapplication of Financial Considerations Mitigating Condition 3 was based on his piecemeal analysis of the record evidence.

Financial Considerations Mitigating Condition 6. The Administrative Judge concluded that Applicant's efforts to pay his creditors warranted application of Financial Considerations Mitigating Condition 6 because: (a) "Applicant is to be encouraged in his ongoing efforts to pay off his old debts through a court-approved Chapter 13 repayment plan"; (b) Applicant's current Chapter 13 bankruptcy plan "offers good prospects for succeeding"; and (c) "Safe predictions can be made that [Applicant] can remain in control of his finances by either completing his latest Chapter 13 plan, or utilizing other resolution measures available to him to discharge his old debts."

Department Counsel contends the Administrative Judge erred by applying Financial Considerations Mitigating Condition 6 because the record evidence does not support its application. In support of this contention, Department Counsel argues: (i) Applicant failed to resolve his financial difficulties despite telling an investigator in 1989 that he intended to do so; (ii) Applicant has not demonstrated "that he acted in a reasonable, prudent, and straightforward manner given all of the facts surrounding his subsequent actions to remedy his financial problems"; (iii) Applicant failed to successfully complete earlier Chapter 13 bankruptcy plans; and (iv) the record evidence does not support the Judge's conclusion that Applicant's current Chapter 13 bankruptcy plan "offers good prospects for succeeding."

Department Counsel's contention is persuasive. The Administrative Judge's favorable conclusions do not reflect a reasonable interpretation of the record evidence as a whole, which includes significant evidence that runs contrary to the Judge's favorable conclusions. Indeed, the Judge's favorable conclusions do not rationally follow from some of the Judge's own findings of fact concerning Applicant's overall history of financial difficulties. The record evidence shows Applicant has a history of recurring financial difficulties, that he failed to complete Chapter 13 bankruptcy plans twice in the past, and that he intends to give up on his current Chapter 13 plan and file for Chapter 7 bankruptcy in the near future. The Judge himself noted that Applicant "is looking to convert his Chapter 13 petition into a Chapter 7 bankruptcy with the next few months." Given the record evidence in this case, it was arbitrary and capricious for the Judge to apply Financial Considerations Mitigating Condition 6.

2. Whether the Judge's conclusions in favor of Applicant are arbitrary, capricious, or contrary to law. Department Counsel argues the Administrative Judge's conclusions in favor of Applicant are arbitrary, capricious, or contrary to law because: (a) the Judge's application of Financial Considerations Mitigating Conditions 3 and 6 lacks support in the record evidence; (b) the Judge's conclusions fail to take into account Applicant's overall history of financial problems; and (c) the Judge's conclusions fail to take into account the evidence that shows Applicant is not currently able to manage his finances.

Department Counsel's arguments are persuasive. As discussed earlier in this decision, the Administrative Judge erred by applying Financial Considerations Mitigating Conditions 3 and 6. Furthermore, the Judge's favorable conclusions under Guideline F fail to take into account significant record evidence that runs contrary to his favorable conclusions. Considering the record as a whole, the Judge's favorable conclusions under Guideline F are not sustainable.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board hereby 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. "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)."
2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."