

DATE: January 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10499

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

L. Helen Bennett, Esq.

Administrative Judge Wilford H. Ross issued a decision dated September 30, 2002 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge adequately considered various mitigating factors in accordance with the Directive when deciding the case; and (2) Whether the Administrative Judge's findings and conclusions are supported by substantial evidence. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated January 24, 2002. The SOR was based on Guideline F (Financial Considerations). A hearing was held April 24, 2002.

The Administrative Judge issued a written decision dated September 30, 2002, 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 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 also* 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 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 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 adequately considered various mitigating factors in accordance with the Directive when deciding the case. Applicant claims on appeal that the Judge failed to properly consider certain Financial Considerations Guideline mitigating conditions when he evaluated Applicant's history of outstanding, overdue indebtedness. The Board disagrees.

A review of the Administrative Judge's findings of fact indicates he was aware of and considered: (i) the fact that Applicant's financial situation was secure before he decided to start his own business in 1994; (ii) the fact that Applicant's delinquent debts were incurred during the period that he was attempting to establish his business; (iii) Applicant stopped paying on the indebtedness in 1996 during a time when he was experiencing periods of underemployment and unemployment; and (iv) Applicant indicated in a sworn statement to the DSS in 1999 that he would resolve his indebtedness as soon as possible, but subsequent to making the statement he was unable to do so because of family problems. In the "Conclusions" section of his decision, the Judge does not mention specific mitigating conditions, but he does comment on these factual findings by stating, "His [Applicant's] arguments about why he has not been able to resolve these [debt] problems have been noted, but they do not rise to the level of mitigating the security concerns of his longstanding indebtedness." The Judge's ultimate conclusion that these factors did not mitigate Applicant's failure to resolve debts that were many years old is not arbitrary or capricious given the record evidence in this case.

Applicant argues that the Judge erred by failing to consider mitigating conditions that speak to the lack of recency of the indebtedness,⁽¹⁾ the isolated nature of the indebtedness,⁽²⁾ whether the conditions causing Applicant's financial difficulties were largely beyond his control,⁽³⁾ whether Applicant was receiving assistance for his debt problem and there was evidence that the problem is under control,⁽⁴⁾ and whether Applicant initiated good-faith efforts to repay or resolve debts.⁽⁵⁾ As indicated above, the Judge makes no specific mention of these mitigating conditions in his decision. However, given the record, which includes evidence that Applicant owed over \$25,000 on approximately nine overdue accounts, that the debt delinquencies stretched over a period of years, and that Applicant had filed for bankruptcy but had not yet received a discharge at the time of the hearing, the Administrative Judge was not required as a matter of law to apply these mitigating conditions to Applicant's case. Applicant has failed to establish that the Judge erred. Even if the Board were to conclude, solely for the purpose of deciding this appeal, that the Judge's failure to cite Financial Considerations Mitigating Condition E2.A6.1.3.3 and explicitly state that he applied it constitute error, such error would be rendered harmless by Applicant's failure to resolve his indebtedness in the years since his business failure (1994-1995).

Applicant also argues: (i) there was no evidence to support a contention that he was chronically in debt; (ii) the premise in the Administrative Judge's decision that Applicant could show a commitment to resolving his debts only through filing for bankruptcy is unsupported; and (iii) the factual finding that Applicant failed to take action to resolve his financial situation is unsupported. These arguments are unpersuasive. The Administrative Judge does not use the phrase "chronically in debt" in his decision. He does conclude that Applicant had been in debt for several years. That conclusion is supported by the record. Applicant's argument that the debts should be viewed as isolated and remote in time is undercut by evidence of the number of debts and the fact that the debts remained unresolved over an extended period. The Administrative Judge does express concern that Applicant waited until the SOR issued in the case before filing for bankruptcy and his adverse decision is significantly based on that concern. A reading of the Judge's decision as a whole, however, reveals that he did not consider the initiation of bankruptcy proceedings to be dispositive of the issue

of Applicant's commitment (or lack thereof) to debt resolution. The Judge's decision also reflects his view that Applicant had the ability to pay off his debts during the five-year period preceding the hearing but did not do so. That conclusion is reasonably supported by the record evidence. The Administrative Judge did not make a factual finding that Applicant failed to take action to resolve his financial situation. The Judge found that Applicant had been paying on his debts but stopped making payments in 1996. The Judge did conclude that Applicant had ultimately failed to resolve his debts and could have done more toward debt retirement than he did. This conclusion is also supported by the record.

Applicant argues the record shows that he incurred the indebtedness during an isolated time, for a legitimate purpose and wanted and intended to resolve it responsibly, but was prevented from doing so by temporary conditions. These arguments refer to evidence that the Judge was required to consider. Applicant has not overcome the rebuttable presumption that the Administrative Judge considered all the evidence. The Judge was responsible for weighing the evidence, both favorable and unfavorable, before making an ultimate decision regarding Applicant's security clearance. Applicant's ability to argue for an alternate interpretation of the record evidence fails to demonstrate error on the part of the Administrative Judge.

2. Whether the Administrative Judge's findings and conclusions are supported by substantial evidence. Under this heading in his brief, Applicant states that the Administrative Judge erred in failing adequately to consider the mitigating factors to the fact of indebtedness. This assertion of error lacks merit, as has already been discussed in preceding paragraphs. Additionally, Applicant argues: (i) inferences and conclusions drawn by the Administrative Judge have no reasonable or logical basis in the evidence of record; and (ii) there is no rational connection or nexus between Applicant's financial situation and the revocation of his security clearance. These contentions also lack merit.

As stated in preceding paragraphs, the conclusions reached by the Administrative Judge after a consideration of all the evidence, both favorable and unfavorable, are reasonably supported by the record evidence. As such, they are not based on impermissible speculation or conjecture. The record contains substantial evidence that Applicant has longstanding debts that remain unresolved. Security clearance decisions are not an exact science, but rather involve predictive judgments about an applicant's security eligibility based on evaluation of an applicant's past and present conduct and circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Furthermore, the federal government is not required to wait until an applicant engages in a security violation or otherwise fails to safeguard or properly classified information before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). A history of financial difficulties raises security concerns that can warrant an adverse security clearance decision. *See, e.g.*, ISCR Case No. 96-0454 (February 7, 1997) at pp. 2-3 (discussing security significance of history of excessive indebtedness or recurring of financial difficulties). Thus, there is an adequate nexus between Applicant's financial situation, as established by the facts, and the Administrative Judge's unfavorable security clearance determination.

Applicant also submits that Department Counsel has failed to show that allowing him to retain his security clearance is not clearly consistent with the interest of national security. This assertion erroneously assumes that the burden is on the government to establish why Applicant's security clearance should be denied. Once Department Counsel establishes the fact of Applicant's long-term indebtedness, Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. *See*, Directive, Additional Procedural Guidance, Item E3.1.15.

Conclusion

Because Applicant has failed to demonstrate error below, 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. Covered by Financial Considerations Mitigating Condition E2.A6.1.3.1.
2. Covered by Financial Considerations Mitigating Condition E2.A6.1.3.2.
3. Covered by Financial Considerations Mitigating Condition E2.A6.1.3.3.
4. Covered by Financial Considerations Mitigating Condition E2.A6.1.3.4.
5. Covered by Financial Considerations Mitigating Condition E2.A6.1.3.6.